82

Language Law and Legal Challenges in Medium-Sized Language Communities. A Comparative Perspective

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CONTENTS

Part 3. Sectors

INTRODUCTION

The aim of the book

The studies published in this book share two fundamental characteristics: first, they have a common focus, the issue of language rights; second, they centre exclusively on medium-sized language communities (MSLCs).

Looking at the second of these characteristics first, we should start by explaining what we understand by MSLCs and why we have decided to restrict our analysis to these communities. We define MSLCs as communities that speak languages which are not international languages, nor languages with a large number of speakers, nor (at the other extreme) minority languages or languages that are not widely spoken. In demographic terms, MSLs are conventionally defined as languages spoken by between one and 25 million people. I say conventionally because the numerical criterion is neither definitive nor necessarily inflexible, and, for the purpose of this study, it is not the only criterion we will apply. A second point to bear in mind regarding the definition of the MSLCs we will study here is the requirement that the communities should belong to socioeconomically developed societies. This bestows on them homogeneity, both in terms of the problems and challenges they face and in terms of the legal instruments they require in order to deal with them: these questions, as I say later, constitute the crux of our reflections in this volume. Finally, the third defining element of these communities is the fact that their languages enjoy healthy intergenerational transmission and a high degree of vitality, as witnessed by their use at all levels of contemporary society in both the public and the private domain: in government, administration, the legal system, health, and at all levels of education, including higher education; in daily interpersonal communication, obviously; in the written and audiovisual media, cinema, theatre, music, the book industry and popular culture; on the Internet, and in the economic and commercial spheres.

The aim of this definition is not to create a new category or to establish a new classification of languages. A task of this kind would not correspond to legal experts. Our more modest aim is to group together a set of linguis-

tic communities whose viability and survival in today's globalized world appear to face common problems and challenges which are often quite different (in terms of either their nature or their intensity), from those facing other languages and which, therefore, require the adoption of specific legal instruments. We contend that the dichotomy between majority and minority languages is insufficient for detecting and explaining some of the phenomena that are common to MSLCs.

Our reason for focusing our study on MSLCs lies, then, in the feeling that the challenges which are in general common to all languages — for example, competition with one or more international languages (in particular, English), which obliges them to share certain areas of use, or the need to defend themselves from other languages which are also used in the same state – present some specific features in the case of these communities.

The studies collected together here are contributions from a group of legal specialists to a broader interdisciplinary research project entitled *The Sustainability of Medium-Sized Language Communities (MSLC) in the age of globalization: new trends, new solutions?*, run by the University Centre for Sociolinguistics and Communication at the University of Barcelona (CUSC-UB)[1] and the Department of General Linguistics, and sponsored by Linguamón – House of Languages and the Spanish Ministry of Science and Innovation (currently Ministry of Education, Culture and Sport).[2] This project has also given rise to another publication, which analyses MSLCs from a sociolinguistic perspective. So readers who are interested in the framework of the studies we present here, or who would like a fuller account of the criteria used to define MSLCs, should consult the project's website,[3] and the introduction and the conclusions of the book *Survival & Development of Language Communities: Prospects and Challenges*, which is currently in press.[4] This also excuses me from having to give a more complete analysis of these questions, which do not really correspond to the world of the law; and it is from the perspective of the world of the law, or more precisely from that of the area of language rights, that the studies

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1 <http://www.ub.edu/cusc/>

2 The reference of Ministry's project is the follow: *Globalización, intercomunicación y lenguas propias en las comunidades lingüísticas medianas (MLC Medium-sized Language Communities)* FFI2009-10424 (1-1-2010 to 31-12-2012).

3 <http://www.ub.edu/cusc/llenguesmitjanes>

4 F X Vila (ed.). In press: *Survival & Development of Language Communities: Prospects and Challenges* (Clevedon, UK: Multilingual Matters).

gathered here have been written. This is, as I said at the beginning, the other feature that the studies in this volume share.

So far we have talked about the homogeneous elements of the nine studies we present here. However, there is a heterogeneous element that merits comment. This is the fact that not all the studies adopt the same focus. Some of them study the linguistic regime of particular MSLs: for instance, the cases of Ukrainian in Ukraine, of Estonian in Estonia, of French in Quebec and of Czech in the Czech Republic. Others analyse the position of the MSLs in supranational organizations (specifically, the European Union) and in international law on human rights, and in the rules relating to international trade and economic integration; finally, two studies explore the legal challenges facing MSLCs in specific sectors. Among the many sectors that we could have analysed, we chose Higher Education and the audiovisual media services. The choice of these two sectors is not arbitrary: as the conclusions of the book mentioned above stressed, these are precisely the domains in which all MSLs are vulnerable, above all due to the penetration of English, and so it is in these sectors where the principal challenge facing them, that of linguistic assimilation, is manifested most starkly.

So the wide variety of the perspectives applied in the studies in this volume reflects our aim of presenting a comprehensive analysis of the legal instruments adopted to face these new challenges. In today's globalized context a study focusing only on specific communities would not do justice to the range of problems and challenges; and to achieve a fuller vision, studies of key sectors and a keen awareness of the international dimension are mandatory.

Perhaps our choice of French in the province of Quebec as an MSL may seem surprising, given the fact that French is a majority language with an undisputed international status. Nonetheless, given the number of speakers (approximately six million out of the seven and a half million inhabitants of the province), and given the context in which it finds itself (strongly influenced by English and the English-speaking culture), we contend that the French-speaking community in Quebec clearly qualifies as an MSLC. Indeed, the province of Quebec has been obliged to adopt far-reaching legal measures to face the genuine risk of assimilation into the English-speaking world. The case of French in Quebec presents clear similarities to that of other MSLs and has an important bearing on the discussion.

We should also perhaps explain the inclusion of the analysis of the Ukrainian community in Ukraine, given that the number of speakers of Ukrainian, some 33 million, comfortably exceeds our nominal upper limit for an MSLC of 25 million speakers. As we noted above, the demographic criterion is not definitive; two of the studies also mention Basque, a language with some 670,000 speakers. The situation of the Ukrainian-speaking community and its relation with the Russian language – so different in nature from that of the Baltic countries – and the limited bibliography available make it a particularly interesting case study.

As we said above, the research presented here is part of a larger project. This means that the articles compiled are not just studies commissioned for a collective volume, but texts that the authors presented at the workshops organized in 2010 and 2011 by CUSC-UB and Linguamón-House of Languages, under the title *The challenges for medium-sized language communities in the global era. A juridical perspective*, at the University of Barcelona. The nine guest speakers have all worked in the field of language rights and eight of them are doctors in law. I stress this because it is quite unusual for a volume on language rights to have such a high proportion of contributors from the discipline. Perhaps surprisingly, the authors of articles on language rights in international monographs tend to be linguists or sociolinguists, and so in this regard the book offers an original perspective.

The chapters of the book

The book is structured in three parts. The first part contains the four studies which analyse the linguistic regime in specific MSLCs. Chapter 1 focuses on the Ukrainian-speaking community and bears the title *The Ukrainian language: What does the future hold? (A legal perspective)*. The author, Iryna Ulasiuk, stresses that the Ukrainian language has had a very controversial history, nourished and rejected in turn by the Ukrainians themselves: for many years marginalized, neglected and practically prohibited, and finally actively promoted and elevated to the status of the sole state language. The author's main aim in the article is to investigate the place that the Ukrainian legislation reserves for Ukrainian and to see how the changing role of the language in the society has affected the position of other languages, especially Russian, which continues to be an important (and in some areas predominant) means of communication for

ethnic Russians, ethnic Ukrainians, and for members of smaller ethnic groups. The Constitution declares that Ukrainian is the sole state language, but the principal challenge today is to maintain it as the main language of the government, political life, and public affairs, and to ensure that the language requirements adopted to this end are compatible with democratic principles.

In Chapter 2, entitled *The case of Estonian in Estonia. Threats and challenges of English and the Russophone community*, Mart Rannut studies the Estonian community in Estonia. The author traces the events after the end of the Soviet occupation, when Estonian had to reassign functions and change positions in order to become the country's national and official language. This process was implemented gradually, with the adoption of three language acts, in 1989, in 1995 and in 2011. Though Estonian was proclaimed the national (official) language in 1989, a policy of bilingual service for private persons was introduced due to widespread Russian monolingualism among immigrants. In the 1995 Language Act, this system of bilingualism was terminated, and Russian was downgraded to the position of a recognized minority language, albeit with substantial privileges for its speakers. The 2011 Language Act follows the spirit of the previous Act with minor changes in the content. Other legislation on language regulation in education, name policy, and so on, have helped to create the current language environment in Estonia. The establishment of language requirements is the object of heated debate, which means that language policy in Estonia is constantly monitored by both domestic and international organizations and institutions. The segregation between communities and the low level of language skills in Estonian that non-Estonian students acquire are the two most important challenges facing Estonian society today.

In Chapter 3, André Braën deals with the case of the French community of Quebec. In his study *French in Quebec: internal threats and challenges* the author analyses the legal measures taken by the province of Quebec in order to preserve and to promote the French language inside its territory, and also explores the main constitutional limitations restricting this action. One of these limitations is the federal nature of the Canadian state, while others arise from specific provisions of the *Canadian Charter of Rights and Freedoms* and of the *Constitutional Act, 1867*. The desire of a significant number of members of this MSLC that their children should acquire proficiency in English is a direct challenge to the legislation on the

language to be used at school in the province of Quebec, a question which has recently been the object of two important decisions by the Canadian Supreme Court. This novel phenomenon of French-speaking members of the community fighting for access to English-language schools calls for further reflection on the point of the legitimate balance between the freedom of language and compulsory linguistic measures designed to preserve and promote a language community. The challenge is enormous, since Quebec wishes to integrate newcomers into its culture, language, and society, and inside this process the workplace and the school are obviously two vitally important sectors.

In Chapter 4, under the title *Sustainability of Medium-Sized Language Communities in the age of globalization: The Czech language*, Mahulena Hofmannová examines the case of the Czech linguistic community. The author reminds us that in the Czech Republic there is no constitutional provision or any specific legislation guaranteeing the protection of the Czech language. Three bills aimed at introducing specific protective legislation of this kind were rejected, either by the government or by Parliament. On the other hand several statutory acts have been passed that require the use of Czech in specific proceedings and some international agreements have been signed protecting Czech abroad. In addition, the inclusion of Czech into the family of official languages of the European Union has had further positive consequences for its perception at home. Inside the Czech Republic, the Czech language develops in relation to the languages of national minorities (especially Slovak) which are protected by a series of constitutional and statutory norms, as well as through international agreements. This language contact does not pose a threat for Czech. The challenges facing the Czech language lie elsewhere: the increasing competition from international languages, mainly English, a competition which is beginning to be a problem, especially in the sphere of the media.

The second part of the book brings together the three studies that analyse the position of MSLs in the international arena, from the perspective of the supranational organizations (specifically, the status they enjoy inside the European Union) and from the perspective of International Law.

Medium-Sized Language Communities and the EU legal framework: exploring the challenges and strategies for change is the title of Chapter 5, by Niamh Nic Shuibhne. Two research questions underpin this article: first, whether or not MSLCs face *particular* challenges within the EU

legal space; second, if they do, are these challenges more difficult for MSLCs to address? Following an outline of post-Lisbon EU language governance and policy initiatives on multilingualism, two fundamental domains in which EU law impacts on languages and language communities are discussed: *procedural* and *substantive*. In terms of substantive EU law, the author suggests that themes and trends within the protection of linguistic diversity focus less on the formal status of the language(s) in question but nonetheless raise difficult questions – shared across language communities – about the balance between national regulatory diversity and internal market effectiveness. The key finding of the analysis undertaken suggests that MSLCs are affected *more acutely* (i.e. relative to other language communities) by EU law in the *procedural* sense. Some strategies for the future are proposed, so that the problematic gap between EU language law/policy and MSLC language practice might be narrowed if not closed. It is also argued that EU governance of language arrangements strongly resonates with two keywords. First, it is fraught with *complexity*. The starkness of the binary (official-working/all-other) approach to the status of languages within the EU masks a much more complex reality. Second, it is simply a fact that while the vastness of the 27-State EU brings many good things, it also generates practical, financial and efficiency costs. According to the author, then, the need arises to agree on and achieve *compromise*.

Chapter 6, by Antoni Milian-Massana, is entitled *The impact of European Union law on Medium-Sized Language Communities*. Although the EU proclaims the equality of its 23 official and working languages, the truth is that only a few of them are used as working languages. In the agencies, since they are not institutions of the EU, the distinction between languages is even greater. Of the 23 languages, 14 are spoken by MSLCs. However, the favourable treatment given to the languages with more speakers does not seem to be a threat to the MSLs; in fact, the linguistic communities that are doing most to fight inequality between the working and official languages are not the MSLCs but the communities with the most speakers. The author places special emphasis on the linguistic provisions contained in the EU secondary law, which are rules that restrict the language requirements laid down in internal legislations. He proposes that these restrictions might be less severe for MSLs, if the language requirements are justified in order to counter possible threats of linguistic assimilation. This position is supported by the doctrine of the Court of Justice.

Two languages spoken by MSLCs do not enjoy legal status in the EU's institutions. If we add that the dynamic of the EU freedoms favours *de facto* their assimilation, and that the EU secondary legislation often ignores them, the result is that these two languages are the ones that suffer most from EU integration. The study formulates proposals for correcting this serious shortcoming.

José Woehrling's contribution, *Globalization and languages: new challenges for Québec's language policy*, in Chapter 7, explains that it should not surprise us that as the effect of economic and cultural globalization on the position of the French language in Quebec increases, we should be witnessing a growing number of demands directed at the Quebec government for the adoption of new, more stringent, measures for the protection of French. These measures (already analysed in Chapter 3) inevitably restrict linguistic freedom by imposing new requirements for the use of French and by limiting the use of English and can be challenged as running contrary to the rights and freedoms guaranteed by the Canadian Constitution as well as by the international conventions on human rights and the rights of minorities. The contribution examines the constraints on the language policy of Quebec (or any similar language policy) imposed by international law on human rights, applicable (in this case) in Canada. The *special* minority guarantees regarding the *official use* of languages contained in the international legal provisions applicable to Canada are currently quite limited. Conversely, the "linguistic freedom" implicitly deriving from fundamental freedoms and from the right to equality seems to be the subject of an evolving and widening interpretation. The study also examines the constraints imposed on the linguistic policy of Quebec by the legislation relating to international trade and the economic integration of North America, and suggests possible measures in order to protect the position of French in the continent.

The third and last part of the book comprises two sectorial studies. Chapter 8, by Xabier Arzoz, bears the title *The transformation of Higher Education and Medium-Sized Language Communities*, and examines the implications of the transformation of higher education for MSLCs. As the author notes, this process does not specifically concern the use and the status of MSLs; however, it is clear that some of the main trends – for instance, internationalization, economization and increased competition – will have an impact on their international and domestic status. The paper explores the changing legal framework of higher education in inter-

national and European law and notes some of the indirect effects it may have on language use in this sector. The author discusses the impact on MSLCs of the emergence of English as a medium of instruction in higher education, and does so by exploring the reactions at government and institutional level, and in society as a whole, in specific national contexts. Finally, he analyses the effects on MSLs of the dominance of English as a language of science. In addition to educational and linguistic questions, the study underlines the importance of social, cultural and economic elements. The author concludes that the challenge is to find a reasonable equilibrium between the legitimate interest in the State's international competitiveness and the employability of its citizens and the need to maintain and develop the full capacity of expression of mother tongues in as many linguistic domains as possible.

In the last chapter of the book, chapter 9, entitled *The European legal framework for protecting the Medium-Sized Language Communities in the media: A comparative legal analysis*, Iñigo Urrutia Libarona analyses the general European context in which domestic legislation on the use of languages in audiovisual media services has to operate, and then presents a comparative analysis of the instruments and legal means designed to guarantee the presence of MSLs in the audiovisual media market. Linguistic obligations in broadcasting and distribution, language quotas, requirements to produce programmes in national languages and compulsory investment obligations for audiovisual works in national languages are measures that are commonly used by European states to defend and guarantee the presence of MSLs in the media. In this comparative study, the author highlights some of the common features of the regimes for protecting MSLs and highlights the future challenges facing these languages and their linguistic communities in the audiovisual sector. The pressure today to globalize and deregulate the audiovisual market, supported by the free movement of the audiovisual media services, creates an atmosphere favourable to language freedom that is opposed to the imposition of any language requirements by national or regional authorities. In this context, language requirements and quotas are regarded as factors that restrict the free movement of audiovisual services and make them less attractive for exporters. The author stresses that the dividing line between protectionist economic measures and measures intended to defend MSLs and cultural and linguistic diversity is not always clear.

Conclusions

The book does not have a concluding chapter; our aim, as we stated above, was to offer a preliminary appraisal of the current challenges facing MSLCs, the legal measures that these communities adopt to protect and safeguard their languages, and the legal limits to which these measures are subject in a plural, democratic society. We believe that this focus can highlight specific features relating to MSLCs which would otherwise pass unnoticed. Some chapters in fact present conclusions of their own, to which we refer the reader. To close this introduction, I think it is worth formulating a set of general conclusions to summarize some of the characteristics of MSLs that in my view confer on them a certain distinctive identity.

The features of MSLs that distinguish them from other languages lie in the type of legal recognition they enjoy and in the legal measures applied for their protection and to guarantee their use. Specifically, all the languages of MSLCs are recognized as official languages in their territories.[5] This differentiates them from minority languages, which do not normally have official status (and those that do often suffer restrictions – substantive restrictions (incomplete official status), sectoral restrictions (for example, that the language may only be used in certain public services or institutions), and geographical restrictions (for example, if the official status is only recognized in particular local enclaves). MSLs also differ from minority languages in terms of the legal measures adopted in order to protect them and to guarantee their use, such as the language requirements for officials, civil servants, and professional services, language quotas on radio and TV, language requirements for labelling, or language requirements for immigrants – measures that are practically unheard of in the case of minority languages. Minority languages often lack the means to put measures of this kind into practice and, given their relative lack of vitality, the implementation of those requirements would, in a large number of cases, be disproportionate and therefore illegal.

In contrast, the legal recognition of the languages of MSLCs and the legal measures used for their protection are largely the same as those corresponding to majority languages. However, there are still differences. These differences are not normally to do with the *nature* of the measures,

5 This territory normally coincides with that of a state, but sometimes — as in the case of Catalan, Galician (and Basque), it covers only a part of the whole territory of a state.

as is the case of minority languages, but to do with their *degree* or *intensity*, and their *objective*. With respect to legal recognition or status, there are clear differences of *degree*. The prime example is the area of supranational organizations, where MSLs suffer marginalization compared with majority languages; in fact in supranational organizations, the difference in *degree* becomes a difference in *nature* for MSLs that do not enjoy official status in the state as a whole.

As regards the measures used, there may be differences in both the *objective* and the *degree*. While majority languages adopt language requirements to defend themselves from international languages (above all from English), the languages of MSLCs also adopt them, in some cases, to defend themselves from other international or colonial languages, and/or from minority languages spoken in their territory which at the same time are international languages. In fact the fragility of the MSLs may better justify the adoption of restrictive measures, and may mean that stronger measures may be proportionate and appropriate.

Obviously there is a major difference between the MSLs that enjoy full status as official languages of a State and those that are recognized as official languages in part of the territory but are not by the State's central institutions (that is, they are official languages *in* the State, but not *of* the State). While the preservation of fully official languages is not in general threatened, those whose official status is in territorial terms incomplete run the risk of assimilation. Their lack of recognition at supranational level (which we could term the "external threat") together with their subordination at internal level (the "internal threat") leaves them in a precarious situation, in far greater danger than other MSLs. Adopting language requirements is more difficult in the case of MSLs that are official in only a part of a State's territory, even though they are necessary to protect the language. In these situations, restrictive linguistic measures, which are actually more justified from the point of view of the need to safeguard the language than in other cases, can more easily be perceived as a barrier to the free movement of goods, workers, establishment and the provision of services. And in the case of an MSL that is official in only part of the territory, the State is unlikely to regard it as an important symbol that merits the adoption of specific compulsory linguistic measures.

The continuity of the MSLs that are official State languages is not normally threatened, but this does not mean that there is no risk of assimilation. When, as in the case of Estonian, Ukrainian and French in Quebec,

the MSL is in contact with linguistic minorities which have large numbers of speakers and which speak a major international language. The Slovene minority in the Czech Republic does not speak a major language and does not pose a threat for Czech but in the cases of Estonian, Ukrainian and French in Quebec, the international threat is compounded by the internal threat. However, these three cases face a less serious internal threat than MSLs which are only official in part of the State's territory. The explanation lies in the fact that the internal legal order benefits the State's official languages and that the ones that are official only in part of the territory are in a subordinate position. This situation explains the widespread use of language requirements in favour of the official languages of the States, which sometimes goes beyond legal limits. The examples of Estonian, Ukrainian and French in Quebec reveal another interesting aspect: the greater the concessions made by the internal legal order in favour of the language in contact with the MSL, the weaker the position of the MSL and the greater the risk of assimilation. The fact that English is an official language in Canada and is therefore official at least in the federal activities in Quebec probably places French in a more precarious situation than Estonian in Estonia, where Estonian is the only official language. For the same reason, the recognition of Russian in Ukraine as a State language alongside Ukrainian, if the project succeeds, may have particularly damaging consequences for the latter language.

One final observation is in order. Compulsory measures adopted to protect and promote the use of a language may be of two kinds: those that directly impose its study or its use in specific activities, and those on the other hand that restrict access to knowledge of the language posing the threat of assimilation, or limit its public use. Evidently, these restrictions will indirectly achieve the same result: an increase in the use of the language that is receiving protection. However, in the case of the measures that restrict the use of the majority or international language, an interesting new phenomenon has recently emerged. In Quebec, growing numbers of the MSLC are rejecting the measures that obstruct access to a good command of the international language that poses the threat. The novelty is that now it is not only the speakers of the international language that question the restrictions, but speakers of the MSL as well. The phenomenon bears witness to the increasing importance in today's globalized world of proficiency in particular international languages, above all, English. At the legal level, it highlights the need to continue reflecting on the scope of compul-

sory linguistic measures that limit the freedom of language, the arguments underpinning these measures, and the legal limits to which they should be subject.

Before ending I would like to thank Professor Albert Bastardas and Associate Professor F. Xavier Vila of the University of Barcelona, directors of the interdisciplinary research project into MSLCs, for having placed me in charge of the legal area of this research, and Assistant Professor Vanessa Bretxa, of the same university, for her support in the administrative and management tasks. And of course I would like to express my gratitude to all the authors of this volume for having agreed to participate in the project.

I would also like to thank Antoni Mir and Marta Xirinachs, director and head of programmes, respectively, at Linguamón-House of Languages, for their support for the project, Professor Carles Viver and Mercè Corretja Ph. D., director and head of the Area of Research, respectively, at the *Institut d'Estudis Autonòmics*, for their interest in publishing the book, and Michael Maudsley, for the linguistic supervision of the texts.

I hope very much that this volume will serve to deepen the reflection on the current challenges facing MSLCs and will help to define the legal measures that can and should be adopted in each context.

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PART 1

CASE STUDIES

1

THE UKRAINIAN LANGUAGE: WHAT DOES THE FUTURE HOLD? (A LEGAL PERSPECTIVE)

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SUMMARY: 1. Introduction. 2. The Ukrainian language: past practices. 3. The ethnic and linguistic composition of present-day Ukraine. 4. The Ukrainian language: present-day practices and law. 5. The Ukrainian language: most recent and future developments.

> *[...] History shows that when a people is deprived of all else, language remains as a symbol of solidarity — the ultimate Thule of ethnic aspirations.*[1]

1 · Introduction

Language is an instrument of communication. But as Dónall Ó Riagáin has stressed, it is much more than that:

> [Language] is a highly developed tool, refined by generations of users, which enables a people to express their most intimate thoughts and finest ideas, to record their experiences, lament their losses, celebrate their

1 J Ornstein, 'Soviet Language Theory and Practice', *The Slavic and East European Journal*, vol. 3:1 (1959), 17, at 1-24.

> triumphs, and above all record these in their literature (be it written or oral) for coming generations. Language is one of the few things that distinguish *Homo sapiens* from the animals. The vocabulary, morphology, even accentuation, of a people's speech all bear evidence of their development as a distinct group, their lifestyle, contacts with other peoples and their shared historical experience.[2]

Thus, language forms a central feature of human identity. Whereas many authors have argued that language is only one of many cultural markers of identity, and that its loss does not necessarily imply the loss of ethnic identity,[3] language is nevertheless probably the most distinctive and the most visible sign of a human and national identity.[4] When we hear a person speak, we inevitably find ourselves guessing about their age, gender, education, occupation, and place of origin. Beyond this individual matter, a language is nothing less than a symbol of national and ethnic identity.

However, language is not only a means for us to present our own notion of 'who we are', but a way for others to project onto us their own suppositions of the way 'we should be'. Tension can occur when the listener's understanding of the speaker's identity conflicts with the way the speaker wishes to be understood. The conflict becomes more complicated when the hearer is in a position of power and does not only misunderstand the wishes of the speaker but actively suppresses this expression, forcing upon the speaker an entirely different and perhaps undesired identity.[5]

Consequently, language has been a major element in the development of an ethnic community's political consciousness, on the one hand, and 'a tool of state-building', on the other. As a result, languages 'have often been manipulated, elevated, and transformed in the interests of the state'.[6] In some cases languages have been marginalised, neglected and even prohibited. The detrimental nature of such treatment is obvious:

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2 D Ó Riagáin, 'The Importance of Linguistic Rights for Speakers of Lesser Used Languages', *International Journal on Minority and Group Rights*, vol. 6:3 (1999), 290, at 289-298.

3 For an overview of the academic literature on the issue, see U Schmidt, 'Language Loss and the Ethnic Identity of Minorities', *ECMI Issue Brief* , nr 18 (2008), 4-6.

4 See also G Poggeschi, 'Language Rights and Duties in Domestic and European Courts', *Journal of European Integration*, vol. 25:3 (2003), 207, at 207-224.

5 B Spolsky, 'Second-Language Learning' in J. Fishman (ed.), *Handbook of Language and Ethnic Identity* (Oxford: Oxford University Press, 1999), 181, at 181-192.

6 W Safran, 'Language, Ideology, and State-Building: A Comparison of Policies in France, Israel, and the Soviet Union', *International Political Science Review*, vol. 13: 4, 397, at 397-414.

> To suppress or deliberately restrict the use of a people's language is to attack their dignity in a most profound manner and to infringe their human rights. To attack a people's language or culture can often be more hurtful, more damaging, than to displace them from their ancestral homelands or to marginalise them economically.[7]

The history of the Ukrainian language, which is the focus of today's presentation, is the history of a language which has experienced all of the above: the Ukrainian language has been nourished and rejected by the Ukrainians themselves, it has been marginalized, neglected and nearly prohibited by different governing regimes, and finally it has been actively promoted and elevated to the status of the only state language.

The key purposes of today's presentation are to investigate the place the Ukrainian legislation reserves for the Ukrainian language and to see how the changing role of that language in society affects the position of other languages. The other languages would include Russian, which continues to be an important means of communication and in some areas a dominant one, both for ethnic Russians and ethnic Ukrainians, and also for members of smaller ethnic groups.

I will begin with a brief overview of the history of the Ukrainian language in Ukraine and a short description of the ethnic and linguistic composition of present-day Ukraine. These will serve as necessary background information for the issues addressed in the rest of the presentation. The analysis of the legal aspects of the current language policy and law in Ukraine will follow. Beyond this, an attempt will be made to identify different scenarios of the future development of language legislation concerning the position of the Ukrainian language.

2 · The Ukrainian language: past practices

The history of Ukraine has been a dramatic struggle for the creation of national statehood marked by only two brief periods of independence in the modern era.[8] Its history of unstable statehood and the rule in the past by different empires and states of territories of what is now known as Ukraine

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7 Ó Riagáin note 1 *supra*, at 290.

8 See T Kuzio, *Ukraine. The Unfinished Revolution* (London: Alliance Publishers, 1992), 7.

have prevented the emergence of a cohesive national identity[9] and have resulted in a long history of uncertainty for the Ukrainian language. The period between the sixteenth century and the beginning of the seventeenth century, when Ukraine was part of the Polish-Lithuanian Commonwealth, was marked by the flourishing of the Ukrainian language and Ukrainian culture. The Khmelnytsky Uprising of 1648-1657 and the wars that followed it brought about a steady decline in questions of language and culture. The period before World War I was characterized by the revival of the Ukrainian language in the western part of Ukraine. Here, under the relatively liberal Austrian rule, Ukrainians were to some extent free to pursue their cultural aspirations and Ukrainian was commonly used in education and in official documents. On the other hand, this period was also characterized by the suppression of Ukrainian in the rest of the country, which belonged to the Russian Empire. The use of the Ukrainian language was prohibited in print. The import of Ukrainian language publications, public performances and lectures was also banned in 1876.[10] A period of relative tolerance towards the Ukrainian language after 1905 was followed by another strict ban on Ukrainian books in 1914. The dissolution of the Russian Empire as a result of the 1917 Bolshevik Revolution prompted different ethnic groups across the empire to renew their sense of national identity, and this included the Ukrainians. In the chaotic post-revolutionary years, Ukraine went through several short-lived periods as an independent or quasi-independent state and, for the first time in modern history, the Ukrainian language gained usage in most government affairs. Its role became more important in the first years of Bolshevik rule within the policy called *korenizatsiia* (indigenization), which was 'the policy of rooting communist ideals in the Republics through the agency of local elites and through the medium of the local language'.[11] As a result, the Ukrainian

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9 A Takach, 'In Search of Ukrainian National Identity: 1840-1921', *Ethnic and Racial Studies*, vol. 19:3 (1996), 657; O Subtelny, 'Russocentrism, Regionalism, and the Political Culture of Ukraine' in V Tismaneau (ed.), *Political Culture and Civil Society in Russia and the New States of Eurasia* (NY: Sharpe, 1995) 189; B Krawchenko, *Social Change and National Consciousness in Twentieth-Century Ukraine (*New York: St. Martin's, 1985), 21; R Solchanyk, 'Molding 'the Soviet People': The Role of Russia and Belorussia'*, Journal of Ukrainian Studies*, vol. 8:1(1983), 13.

10 The prohibition was explicit in two documents: Circulation of the Minister of the Interior Valuev of 8 July 1863 and secret decree issued in 1876 by Tsar Alexandr II (Ems Decree).

11 S Wright, 'Editorial' in Wright, S.(ed.) *Language Policy and Language Issues in the Successor States of the Former USSR*, Multilingual Matters, at 1.

language was actively promoted both in the government and among party personnel and it became more widely used as a language for teaching. Schools and classes were provided for Ukrainians and literature in Ukrainian and the cultural aspirations of the Ukrainian nation were supported.

The policy of *korenizatsiia* was replaced with 'a quasi-imperialistic' Stalinist nationalities policy,[12] the rejection of the principle of linguistic parity and the introduction of different overall priorities which 'foretold the doom of national languages'.[13] Ukrainians, like those of other nationalities in the former Soviet Union, were subjected to 'internationalist policies,' the ultimate goal of which was the merger (*slijanie*) of different ethnic groups into the new historical community of *'Soviet people'* united by one language, the Russian language. Officially,[14] the Soviet leadership remained committed to ethnic pluralism and national languages were not attacked directly. In practice, the position of national languages, including Ukrainian, was weakened as Russian reached into the schools, the media, the party and state bodies, the economy and all other spheres of public life.

The result of these policies was quite dramatic. At the beginning of the 1990s there was a real threat to the very existence of the language of the majority.[15] While on an individual level, Ukrainian was perceived as a natural 'native language' of ethnic Ukrainians and made evident as such in the censuses, on the eve of the country's independence more than half of the children in Ukrainian schools and kindergartens were taught in Russian. In most cities in the eastern and southern parts of the country, hardly any schools provided instruction in Ukrainian. The language of the titular nation was rarely spoken in the street, and almost never in the government or by public bodies. Many other ethno-cultural demands of the Ukrainian-speaking Ukrainians were not better met. With the exception of the western regions, very few institutions of higher education continued to teach in

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12 A Popov, I Kuznetsov, 'Ethnic Discrimination and the Discourse of 'Indigenization': The Regional Regime, 'Indigenous Majority' and Ethnic Minorities in Krasnodar Krai in Russia', *Nationalities Papers*, vol. 36:2, 226, at 223-252.

13 E R Goodman, 'The Soviet Design for a World Language'*, Russian Review*, vol. 15: 2 (1956), 85, at 85-99.

14 In Russian history, especially in the Soviet period, the strained relation between paper and reality was particularly acute.

15 I Prizel, 'The Influence of Ethnicity on Foreign Policy', in R Szporluk (ed.) *National identity and Ethnicity in Russia and the New States of Eurasia*, (New York: M. E. Sharpe, 1994), 107, at 103-128.

Ukrainian. Almost no films were shown in Ukrainian, not even those that were produced in Ukraine. That is why, since Ukraine gained its independence, it has engaged in a linguistically-oriented nation-building project and has consistently pursued a policy of promoting a new national identity based on the titular[16] language and culture.

3 · The ethnic and linguistic composition of present-day Ukraine

According to official statistics based on registered ethnic belonging,[17] Ukraine's population comprises a national majority of 37.5 million Ukrainians, which makes up 77.8% of the total population of the country, and 10.9 million (22.2%) members of other nationalities. Russians are the second most numerous ethnic group in Ukraine and also its largest minority. They number 8.3 million people or 17.3%. All other numerically important ethno-linguistic minorities, which together number fewer than 2.4 million persons (4.9% of the overall population), represent a variety of communities, each with a population of fewer than 300,000 persons (less than 1% of Ukraine's population): 275,800 Belarusians, 258,600 Moldavians, 248,200 Crimean Tatars, 204,600 Bulgarians, 156,600 Hungarians, 151,000 Romanians, 144,100 Poles, 103,600 Jews, 99,900 Armenians, 91,500 Greeks, 73,300 Tatars, 47,600 Roma, 45,200 Azerbaijani, 34,200 Georgians, 33,300 Germans and 31,900 Gagauz.

Ukraine's multiculturalism has several distinctive features. First, it is pronouncedly regional in nature.[18] While Central and North-Western Ukraine have historically been the basic regions of ethnic Ukrainian settlement and the least ethnically diluted, most ethnic Russians reside in the east as well as in the south of Ukraine. Moreover, ethnic Russians make up an absolute majority in the Crimea, which is the only region in Ukraine where the ethnically Russian population prevails, and Ukrainians are the largest minority. In some regions, there is a strong presence of certain mi-

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16 The term 'titular nation' was used in the USSR to denote a dominant ethnic group which gave rise to the title of an autonomous entity (republic, for example) within the Soviet Union. Ukrainians are a titular nation which gave rise to the title of the Ukrainian Soviet Socialist Republic.

17 Available in English at: www.ukrcensus.gov.ua/eng/

18 Riabchuk even introduced the concept of 'two Ukraines' to describe the regional differences in Ukraine. M. Riabchuk, 'Two Ukraines?, *East European Reporter,* vol. 5:4 (1992) and M Riabchuk, 'Ukraine: One State, Two Countries?' *Tr@nsit online*, nr 23 (2002).

norities (geographically most densely settled): 98.1% of Crimean Tatars live in the Autonomous Republic of Crimea; 96.8% of Hungarians in the region of Zakarpatya, 86.5% of Gagauz in the region of Odessa, 84.7% of Greeks in the region of Donetsk, 75.9% of Romanians in the region of Chernivtsi and 21.3% in the region of Zakarpatya, and 73.7% of Bulgarians in the region of Odessa.

Second, the linguistic composition and the role of language affiliation in Ukraine is indeed complex. Thus, the given number (or percentage) of Ukrainians and Russians does not represent the real number of the Ukrainian-speaking and Russian-speaking populations. According to the 2001 Ukrainian population census, 5.6 million (14.8%) of Ukrainians declared Russian as their mother tongue and 0.3 million Russians (3.9 %) declared Ukrainian as their mother tongue. A total of 67.5% of all inhabitants declared Ukrainian as their mother tongue, and 29.6% declared Russian as their mother tongue. Thus, the 2001 census results point to a comparatively unusual central feature of Ukraine: the fact that, as a consequence of history, Russian is the mother tongue or the language of common use for many people who identify themselves in ethnic terms as Ukrainians, together with some smaller ethnic groups such as Belarusians, Jews, Greeks, Tatars, Georgians, and Germans.

Third, another peculiarity of the linguistic situation in Ukraine is that while language use is currently split fairly evenly between Ukrainian and

Russian, the language differences have in fact two dimensions: a regional division between Western and Eastern Ukraine,[19] and a social division between the urban and rural population: Ukrainian and Russian are spoken in approximately equal amounts across Ukraine as a whole, with a greater concentration of Russian speakers (those who speak Russian in their daily life) in the east and south and in metropolitan areas, while there are more Ukrainian speakers in central and western areas and, in general, across most of Ukraine's rural areas.

4 · The Ukrainian language: present-day practices and law

The description above of the ethnic and linguistic composition of present-day Ukraine shows that *de facto* Ukrainian-Russian bilingualism is the main feature of this post-Soviet state; and none of the three major ethno-linguistic groups (Ukrainian speakers, Russian-speaking Ukrainians, Russians)[20] can be regarded as dominant. In the context of this sociolinguistic reality, where Ukrainian and Russian each try to occupy a niche of their own in different domains of social life, the problems of the 'minorities proper' are obviously in danger of being overshadowed. Hence, the three major challenges that newly-independent Ukraine has been facing in constructing its language policy and law. On the one hand, a Ukrainian national movement drew the attention of Ukrainian society to the pitiful condition of the Ukrainian language at the moment of the break-up of the Soviet Union and evidenced the need for measures to reverse the effects of age- old Ukrainian language oppression. On the other hand, by pursuing a policy that supports an ethnic Ukrainian state and promotes the Ukrainian language, Ukraine has been confronted with the dilemma of how to balance the strengthening of the position of the Ukrainian language but not ignore the language rights of a large Russian-

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19 A Wilson (1997), *Ukrainian Nationalism in the 1990s: A Minority Faith*. Cambridge: Cambridge University Press, at 23-4.

20 The lack of congruence between ethnicity, declared mother tongue and actual language use has prompted some researchers propose a three-fold division of the Ukrainian population: Ukrainophone Ukrainians (40%), Russophone Ukrainians (33-34%) and Russophone Russians (20-21%). See, for example, A Wilson, V Khmelko, 'Regionalism and Ethnic and Linguistic Cleavages in Ukraine', in T Kuzio (ed.) *Contemporary Ukraine: Dynamics of Post-Soviet Transformation* (M.E.Sharpe Inc., 1998), 75, at 60-81.

speaking population. As the OSCE stresses 'when the policy of a state is to enhance its character as a nation by promoting the use of the state language, it can encounter resistance from a powerful minority to any downgrading of that minority's language. Thus language can become an explosive issue'.[21]

Finally, the campaign for Ukrainian national revival has awakened the desire in other ethnic groups to revitalize and develop their native languages and cultures. Thus, the Ukrainian state has been constrained to finding an equilibrium between promoting the Ukrainian language and taking into account the interests of speakers of minority languages that are less numerous than Russian.

As the discussion below shows, these often politically-loaded challenges have proved to be extremely difficult and nothing if not controversial.

In October 1989, the Ukrainian parliament enacted the *Law on Languages*.[22] The law officially re-established the Ukrainian language as the sole state language and proclaimed the transition, in the public spheres of government, education, and commerce, from Russian to Ukrainian. The law provided for the extensive use of Ukrainian and became 'one of the first legal steps towards de-Sovietization and independence of the country in 1991'.[23] It also tried to reverse 'a long-established relationship between Ukrainian as a 'low, peasant' language, and Russian as the 'high, cultured' language'.[24] It is interesting to note that the drafting of the *Law on Languages* was in the focus of public attention from the very start. Before the final version was adopted, four different drafts were proposed. Three of them aimed at radical Ukrainization and one of them aimed at preserving the status quo. The draft received no less than 23,967 comments and observations in the public debates that addressed it![25] While the law did not give Russian the status of the second state language, its position as a 'language

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21 www.osce.org/hcnm/44691.

22 Law of Ukraine on *Languages in the Ukrainian SSR* of 28.10.1989 No. 8312-XI.

23 L Bilaniuk, 'Gender, Language Attitudes, and Language Status in Ukraine', *Language in Society*, vol. 32, 50.

24 Bilaniuk, L. (2003) 'Gender, Language Attitudes, and Language Status in Ukraine', *Language in Society*, vol. 32, 50, at 47-78.

25 See more on the drafting history of the law O.Yu. Sergeyeva, 'Constitutional and Legal Basis of Language Relations Regulation in Ukraine (1991-2006)', *Derzhavne Budivnitstvo*, nr 1 (2006) [Сергєєва О.Ю. Конституційно-правові засади регулювання мовних відносин в Україні (1991-2006 рр.)// Державне будівництво], available at: http://nbuv.gov.ua/e-journals/DeBu/2006-1/index.html

[of inter-national communication] of the peoples of the USSR' was confirmed. The special mention of Russian stirred much controversy and prompted some commentators to interpret the provisions of the law as actually granting Russian the status of the second state language.[26] Indeed, the law led to bilingualism in a number of situations, as well as the compulsory learning of the two languages and of their use as languages of instruction in all schools.[27] Interestingly, the 1992 *Law on National Minorities*[28] did not even mention Russians, but only the Ukrainian people and national minorities. Thus, the law implicitly stated that Russians belonged inevitably to the latter and that the official use of the Russian language was to be restricted to 'places' with an *ethnic* Russian majority, which effectively meant only Crimea.

Equally heated debate surrounded the language issue in the adoption of the Constitution of Ukraine in 1996.[29] Here again the determination to make Ukrainian the sole state language was confirmed in Article 10. The state was further obliged to ensure 'the comprehensive development and functioning of the Ukrainian language in *all* spheres of social life throughout the *entire* territory of Ukraine'.[30] With regard to other languages, Russian was separately referred to. Its development, use and protection, together with other languages of national minorities of Ukraine, were constitutionally guaranteed.

Tensions arose again in 1999 when two parliamentarians of Ukraine requested the Constitutional Court to officially interpret Article 10 on the grounds that the state language was not being sufficiently used in state educational institutions and by certain public authorities.[31] The central is-

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26 See more on the discussion in M Antonovich, 'The Legislation of Ukraine and Foreign Countries as for the Status of the State Language (Comparative Analysis)', *Pravo Ukrainy,* nr 6 (1999), 73 [Антонович М. Законодавство України та зарубіжних країн щодо статусу державної мови (порівняльний аспект) // Право України. - 1999. - № 6.]

27 For an analysis of the law see M Strikha, *Language Policy and Language Legislation of Ukraine* (Kyiv: Institute of Open Politics, 2000), 24-25, at 23-25 [Стріха М. Мовна політика і мовне законодавство України]; D Arel, 'Language Politics in Independent Ukraine: Towards One or Two State Languages?', *Nationalities Papers*, vol. 23: 3 (1995), 599-600, at 597-622.

28 *Law of Ukraine on National Minorities in Ukraine* of 25.06.1992 No. 2494-XII.

29 See more in K. Wolczuk, *The New Ukrainian Constitution: In Pursuit of a Compromise,* (Edinburgh: Centre for Economic Reform and Transformation, 1997).

30 Author's italics.

31 Decision of the Constitutional Court of Ukraine of 14 December 1999 № 10-рп/99 (case on the use of the Ukrainian language)[Рішення Конституційного Суду України № 10-рп/99 від 14.12.1999(справа про застосування української мови)].

sue was the extent to which Article 10 could be applied in an effort to protect the state language without undermining the role of other languages. The Court defined the Ukrainian language as an 'obligatory means of communication by the bodies of state power and local self-government (language of acts, work, correspondence, documentation, etc.), as well as in other public spheres of the society's life stipulated by the law on all territory of Ukraine'. Rather vaguely, the Court remarked that the Constitution itself and language laws had systematically taken account of minority languages and, in particular, implied that the provisions regarding the state language did not impede efforts to safeguard minority languages.[32] The Court's decision was fiercely criticized by the Constitutional Court judge O. Mironenko, who argued that according to the Constitution Ukrainian was the official and working language of the state but not necessarily of society or private persons and that, by extending the mandatory use of the Ukrainian language to the private sphere, the Constitutional Court was contravening international law.[33] Opinions were voiced that the decision was biased and politically motivated.[34]

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32 A similar logic was adopted by the court in its 2008 decision, Decision of the Constitutional Court of Ukraine No.8- рп /2008 of April 22, 2008 (case on the language of court proceedings) [Рішення Конституційного Суду України No.8-рп/2008 від 22 квітня 2008 р. (справа про мову судочинства)]. The authors of the appeal argued that the corresponding articles of the civil and administrative codes establishing Ukrainian as the language of court proceedings violated *inter alia* Article 10 of the Constitution, and in this way narrowed the existing constitutional rights and freedoms guaranteed to a person and citizen. The summary of the facts of the case and the Court's decision is available in English in *Bulletin of the Constitutional Court of Ukraine* nr 4/2008, 15-17 [Вісник Конституційного Суду України].

33 Special Opinion of the Judge of the Constitutional Court of Ukraine O.M. Mironenko [Окрема думка судді Конституційного Суду України Мироненка О.М. стосовно Рішення Конституційного Суду України у справі за конституційними поданнями 51 народного депутата України про офіційне тлумачення положень статті 10 Конституції України щодо застосування державної мови органами державної влади, органами місцевого самоврядування та використання її у навчальному процесі в навчальних закладах України (справа про застосування української мови)].

34 Control over the effective implementation of various guarantees of rights is exercised by the Constitutional Court of Ukraine and by courts of general jurisdiction. However, the country's judicial system is still not fully independent, and its control upon governmental agencies is insufficiently developed. The central government's influence over the Constitutional Court, particularly in the sphere of ethno-politics, has prompted minority activists to complain that the Court acts as a tool for the government's goal of Ukrainization. […] I find that the Constitutional Court's bias was also apparent in another recent ruling on the use of state language in government institutions and educational process in Ukraine.
V Stepanenko, 'A State to Build, a Nation to Form: Ethno-Policy in Ukraine' in A-M Biro, P Kovacs (eds.) Diversity in Action: Local Public Management of Multi-Ethnic Communities in

Despite its interpretative nature, the 1999 decision provoked 'a diplomatic war between Russia and Ukraine, each accusing the other of violating the linguistic rights of its Russian and Ukrainian minorities respectively'.[35] The peaceful resolution of the problem was facilitated by the intervention of international organizations and in particular, of the OSCE High Commissioner on National Minorities, Max van der Stoel. With regard to Ukraine, Van der Stoel pointed out that 'while it is perfectly legitimate for the government of Ukraine to strive for an expansion of the knowledge of the state language, the realization of this aim ought not to be sought through restrictive measures regarding minority languages in Ukraine'.[36] His arguments could be considered even more pertinent in view of the obligations the Ukrainian state has undertaken under the two Council of Europe's conventions: the Framework Convention for the Protection of National Minorities (FCNM)[37] and the European Charter for Regional or Minority Languages (ECRML). The ECRML had already been signed by Ukraine in May 1996 and the Ukrainian authorities were urged by the Council of Europe to ratify it within 12 months. In a parliamentary vote, the ratification law was adopted on 24 December 1999.[38] It stipulated that in areas where a minority accounted for 20% of the population, that minority's language should be given the status of a regional language and could be used in public affairs and in edu-

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Central and Eastern Europe (Budapest: LGI Managing Multiethnic Communities Project, 2001), 328-9, at 309-346.

Zhurzhenko also points to the political nature of this decision. See T Zhurzhenko, 'Language and Nation Building Dilemmas of Language Politics in Contemporary Ukraine', *Tr@nsit online*, nr 21 (2002).

35 See A Fournier, 'Mapping Identities: Russian Resistance to Linguistic Ukrainization in Central and Eastern Ukraine', *Europe-Asia Studies*, vol. 54:3 (2002), 422-423, at 415-433. See also R Woronowycz, 'Ruling on Pre-Eminence of Ukrainian Language Stirs Controversy', *The Ukrainian Weekly*, February 27, 2000, available at: www.scribd.com/doc/12843740/The-Ukrainian-Weekly-200009; A Krushelnycky, 'Russia, Ukraine Wage War of Words', *RFE/RL*, 21 March 2000; T Kuzio, 'Language and Nationalism in the Post-Soviet Space', *RFE/RL Newsline*, vol. 4: 148, Part II, 3 August 2000; V Kulyk, 'Revisiting a Success Story: Implementation of the Recommendations of the OSCE High Commissioner on National Minorities to Ukraine, 1994-2001', CORE Working Paper 6 (2000), 113-4.

36 *Letter by Max van der Stoel*, OSCE High Commissioner on National Minorities, to H. E. Mr. Anatoly M. Zlenko, Minister for Foreign Affairs, Ukraine, 12 January 2001; available at: www.osce.org/inst/hcnm/documents/recommendations/ukraine/2001/recom-06apr01.pdf

37 Ukraine signed the FCNM in September 1995 and ratified it in 1997. Law of Ukraine *on Ratification of the Council of Europe Framework Convention for the Protection of National Minorities* of 09.12.1997 No. 703/97-BP.

38 Law of Ukraine *on Ratification of European Charter for Regional or Minority Languages* of 24.12.1999 No. 1350-XIV.

cation.[39] In practical terms, the language of the Russian minority would gain regional status across basically half of the Ukrainian territory.[40] As summed up by Kulyk, the Russian language would be used in Crimea, in seven eastern and southern regions and in the city of Kyiv at all levels of education, from pre-school to university, in legal proceedings of all types, if one of the parties requested, and in the work of regional or local government, including administrative procedures with visitors and the answering of citizens' applications.[41] Here again, the situation became heated when the endorsement of the ECRML was repealed in the summer of 2000. The Constitutional Court of Ukraine ruled that the Charter contravened the Constitution and blocked the ratification process because of the Charter's procedural error.[42]

The Constitutional Court's repeal of ratification of the Language Charter set a dangerous legal precedent[43] and, as some authors propose, a political precedent that was 'designed to foster exclusionary language policies'.[44]

Despite a great deal of uncertainty on whether the Charter would be ratified after a number of members of parliament and prominent personalities had called for it not to ratified at all (arguing that it would hinder the further development of Ukrainian[45]), in October 2002 the ECRML was

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39 Point 2.1. Minority language use, although less extensive, was also stipulated for areas where minority groups comprise between 10% and 20 % of the population (point 2.2).

40 B Bowring, M Antonovych, 'Ukraine's Long and Winding Road to the European Charter for Regional or Minority Languages' in *The European Charter for Regional or Minority Languages: Legal Challenges and Opportunities*, Regional or Minority Languages, No. 5 (Council of Europe Publishing, 2008), 169-170.

41 Kulyk note 35 *supra*, at 112-113.

42 Decision of the Constitutional Court of Ukraine of 12.07.2000 No. 9-рп *On the Compliance of the Law of Ukraine on Ratification of European Charter for Regional or Minority Languages of 1992 with the Constitution of Ukraine* [Рішення Конституційного Суду України у справі за конституційним поданням 54 народних депутатів України щодо відповідності Конституції України (конституційності) Закону України 'Про ратифікацію Європейської хартії регіональних мов або мов меншин, 1992 р.' (справа про ратифікацію Хартії про мови, 1992 р.)]
The French constitutional court also declared that the ratification of the Charter would contravene the Constitution, but it did so for substantive reasons. See S M Määtta, 'The European Charter for Regional or Minority Languages, French Language Laws, and National Identity', *Language Policy*, nr 4 (2005), 176-80, at 167-186.

43 From the wording of the Decision it is clear that it was standard practice in the Verkhovna Duma to adopt the ratification laws on the basis of Article 7(1) of the Law *on International Treaties of Ukraine*. It seems that none of the laws adopted in this way had been annulled, however.

44 See, for example, Stepanenko note 34 *supra*, at 324.

45 T Kuzio, 'Parliament to Mull Ratification of Minority Language Charter', *RFE/RL Poland, Belarus and Ukraine Report*, vol. 4:46, 3 December 2002.

once again presented for ratification and was finally adopted in May 2003.[46] However, in contrast to the first ratification law of 1999, the state was now bound to minimal undertakings and set no numerical thresholds.[47] Under this document the Charter's provisions were applied to thirteen minority language groups (Belarusians, Bulgarians, Crimean Tatars, Gagausians, Germans, Greeks, Hungarians, Jews, Moldavians, Poles, Rumanians, Russians, and Slovaks) in seven main spheres of social life: education, legislation, administrative and public institutions, the mass media, culture, the economy, and trans-border cooperation. It should be noted that the Russians, having been intensely involved in the endeavour to ratify this law, became a minority that was recognized like any other. In their 2010 report, the ECRML's Committee of Experts drew the Ukrainian authorities' attention to the specific case of the Russian language and stated that this language was considered by many of those in national minorities and by some ethnic Ukrainians as their mother tongue. '[Russian] is therefore not in the same position as other regional or minority languages. However, in the instrument of ratification, Russian is placed at the same level as other languages, which does not correspond to the Charter's philosophy'.[48] The Committee of Experts, therefore, encouraged Ukraine to reconsider the level of protection it accorded to the Russian language.

Notwithstanding the above, 'the symbolic capacity of the charter'[49] has been periodically used by Russophones. For example, a few months after the ratification, a number of regional councils and municipalities in the eastern and southern parts of Ukraine approved regional language status for Russian and made it the working language in public administration.[50]

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46 *Law of Ukraine on Ratification of European Charter for Regional or Minority Languages* of 15.05.2003 No. 802-IV.

47 For a detailed analysis of the second ratification law see B Bowring, M Antonovych note 40 *supra,* at 172-7.

48 Report of the Committee of Experts on the ECRML 'Application of the Charter in Ukraine', ECRML (2010) 6, 7 July 2010, para. 61.

49 For a detailed analysis of the second ratification law see B Bowring, M Antonovych note 40 *supra,* at 158. See also O Hrytsenko, 'Imagining the Community: Perspectives on Ukraine's Ethno-Cultural Diversity', *Nationalities Papers*, vol. 36: 2 (2008), 214, at 197-222.

50 Decision of Kharkiv municipality of 6.03.2006 No.43/06; Decision of Luhansk regional council of 25.04.2006 No.2/13, Decision of Sevastopol municipality of 26.04.2006. These were followed by similar decisions adopted by the regional councils of Donetsk (18.05.2006), Odessa (24.05.2006), Mykolaiv (26.05.2006), Zaporizhia (22.06.2006) and Kherson (6.07.2006), and by the municipalities of Dnipropetrovsk (24.05.2006), Yalta (28.05.2006), Kryvyi Rih (21.06.2006) and Alushta (28.06.2006).

However, most of these decisions were found to contravene the legislation in force.[51] The reasoning adopted by both the courts to which these decisions were appealed and by the Ministry of Justice (which considered it necessary to issue a legal interpretation of the validity of the forenamed decisions,[52]) can be summarized as follows: the executive argued that the majority of the local population were ethnic Ukrainian;[53] local government had no jurisdiction over the legal status of languages used in the public domain and within their territories; and it was the central rather than regional bodies of power who had authority in language matters.[54]

With regard to other minority languages, the Committee of Experts encouraged the authorities to extend the list (three of the smaller languages included were Armenian, Czeck and Caraim) and so ensure that the level of protection given to other languages was not lower than the level envisaged in the 1989 Law on Languages.[55]

Data from the Public Report prepared by People's Deputy V Kolesnichenko 'On the Implementation of the European Charter for Regional or Minority Languages in Ukraine'(2007), 16 [Отчет о ситуации в Украине с правами языковых меньшинств, выполнением Европейской хартии региональных языков или языков меньшинств и проявлениями расизма и нетерпимости» подготовленный народным депутатом Вадимом Колесниченко], available in Russian at: http://odnarodyna.ru/topics/6/31.html

See also For a detailed analysis of the second ratification law see B Bowring, M Antonovych note 40 *supra,* at 158-9; O Hrytsenko note 49 *supra,* at 214.

51 Some of them, however, have been upheld. For a full overview of the outcome of these decisions, see the Public Report, Kolesnichenko, note 50 *supra,* 16 [Отчет о ситуации в Украине с правами языковых меньшинств, выполнением Европейской хартии региональных языков или языков меньшинств и проявлениями расизма и нетерпимости» подготовленный народным депутатом Вадимом Колесниченко], available in Russian at: http://odnarodyna.ru/topics/6/31.html

52 *Legal Interpretation of the Ministry of Justice of the decisions of the organs of local self-government (Kharkiv municipality, Sevastopol municipalità and Luhansk regional council) on the status and use of the Russian language in the cities of Kharkiv, Sevastopol and region of Luhansk)* [Юридичний Висновок Міністерства юстиції щодо рішень деяких органів місцевого самоврядування (Харківської міської ради, Севастопольської міської ради і Луганської обласної ради) стосовно статусу та порядку застосування російської мови в межах міста Харкова, міста Севастополя і Луганської області (10.05.2006)], available in Ukrainian at: www.minjust.gov.ua/0/7477

53 Kulyk note 35 *supra,* at 111.

54 For a detailed analysis of the second ratification law see B Bowring, M Antonovych note 40 *supra,* at 159. See also O Varfolomeyev, 'Inconsistent Language Policy Creates Problems in Ukraine'((2006*);* available at: http://newsgroups.derkeiler.com/Archive/Soc/soc.culture.ukrainian/2006–05/msg00013.html

55 Report of the Committee of Experts on the ECRML 'Application of the Charter in Ukraine', ECRML (2010) 6, 7 July 2010, paras. 63, 58-60.

Together with international monitoring, how have these legal novelties and political controversies affected the actual distribution of language use in Ukraine? To answer this question, I shall now consider the educational sphere as a particularly vivid example of the changes that Ukrainian language policy and law have undergone since 1989.

It should be observed that when the Ukrainian language became the sole state language in 1989, nobody expected quick results. As a matter of fact, a 10-year plan for the gradual transition to Ukrainian was adopted[56] and a special commission was organized to design a programme on the operation of the Ukrainian language. In the meantime, the authorities were to create the conditions guaranteeing the effective learning of the state language through the network of the country's educational institutions, and the means by which to organize language learning courses for adults in their places of work, in businesses and in other sectors.[57]

In February 1991 the Supreme Council of Ministers adopted the resolution 'On the State Programme of the Development of the Ukrainian Language and Languages of National Minorities in the Ukrainian SSR till 2000', which ruled that within 10 years, Ukrainian would replace Russian as the language used in education.[58] The main aim of the resolution was 'to establish the status of Ukrainian in the educational sphere'. It also suggested that Ukrainian would become compulsory in pre-school education, in schools of different types and in higher education.[59] Several steps were taken to do this. First, in the autumn of 1992

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56 Resolution of the Supreme Council of Ministers of the Ukrainian SSR of 7.12.1989 No.302 *On the Urgent Measures for the Implementation of the Law of the Ukrainian SSR 'On the Languages in the Ukrainian SSR.'* [Рада Міністрів Української РСР Постанова від 7 грудня 1989 р. N 302 *Про першочергові заходи щодо організації виконання Закону УРСР 'Про мови в Українській РСР']*

57 Resolution of the Supreme Council of Ministers of the Ukrainian SSR of 7.12.1989 No.302 *On the Urgent Measures for the Implementation of the Law of the Ukrainian SSR 'On the Languages in the Ukrainian SSR.'* [Рада Міністрів Української РСР Постанова від 7 грудня 1989 р. N 302 *Про першочергові заходи щодо організації виконання Закону УРСР 'Про мови в Українській РСР']*

58 Resolution of the Supreme Council of Ministers of the Ukrainian SSR of 12 February 1991 No.41 *On the State Programme of the Development of the Ukrainian Language and Languages of National Minorities in the Ukrainian SSR till 2000* [Рада Міністрів УРСР; Постанова від 12.02.1991 No.41. *Про Державну програму розвитку української мови та інших національних мов в Українській РСР на період до 2000 року*]

59 See V Schevchenko, 'The Law on Languages: Ways of Implemention', *Osvita* (9 July (1991) [Шевченко В. *Закон про мови: шляхи реалізації* // Освіта.] On the practical implementation of the plans see V Stepanenko, 'Identities and Language Politics in Ukraine: the Chal-

the Ministry of Education instructed local school authorities that the proportion of first graders enrolled in Russian schools should correspond to the proportion of ethnic Russians within that school district, i.e., that the number of schools teaching in Ukrainian and Russian should correlate to the respective sizes of ethnic rather than linguistic groups. To achieve the goal, which basically meant radically changing the linguistic profile of education (which comprised more than half of the Russian-language schools), the government withdrew the right that parents had had, since 1959, to choose their children's language of instruction (this right was considered to facilitate Russification, already made possible by the social dominance of the Russian language and its greater prestige).[60] Thus, with each new class of first-graders, only Ukrainian language classes were offered in all schools except Russian schools.[61] Second, and also in 1992, the Ministry announced that schools in which Ukrainian was the primary language of instruction could choose whether or not they offered Russian language study.[62] Third, Ukrainian language and literature were made mandatory subjects in minority language secondary schools, putting an end to such widespread Soviet practices as exempting children in Russian schools from the need to attend Ukrainian language classes.[63] The Ukrainian government also launched a programme to publish new school textbooks in Ukrainian. Finally, it was decided, most schoolteachers would have to be retrained so that they could use Ukrainian as the language of instruction. [64] In the years to follow, the status of the state language was addressed in a number of documents including the 'State Programme on Ensuring the Functioning and Development of the Ukrainian Language in 2004-2010' and the Minis-

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lenges of Nation-Building' in F Daftary, F Grin (eds.) *Nation-Building, Ethnicity and Language Politics in Transition Countries* (Flensburg: European Center for Minority Issues, 2003), 124, at 107-135.

60 Kulyk note 35 *supra,* at 13.

61 Fournier note 35 *supra,* at 421. See also J G Janmaat, 'Nation Building, Democratization and Globalization as Competing Priorities in Ukraine's Education System', *Nationalities Papers*, vol. 36:1 (2008), 7, at 1-23.

62 Information Bulletin of the Ministry of Education of Ukraine, No. 19 (1992) (a periodical of the Ukrainian Ministry of Education). [Інформаційний збірник Міністерства освіта і науки в Україні]

63 Information Bulletin of the Ministry of Education of Ukraine, No. 10 (1998) [Інформаційний збірник Міністерства освіта і науки в Україні].

64 See C A Marshall, 'Post-Soviet Language Policy and the Language Utilization Patterns of Kyivan Youth', *Language Policy*, vol. 1 (2000), 240, at 237-260.

try of Education and Science's order 'On the Creation of Appropriate Conditions for Ensuring the Effectiveness of Studying of the Ukrainian Language in General Education Institutions with National Minority Languages as Languages of Instruction',[65] the main objective of which was to reinforce the position of the state language. More recently the Ministry of Education and Science issued the order 'On Approval of the Programme of the Improvement of Studying of the Ukrainian Language in General Education Institutions with National Minority Languages as Languages of Instruction in 2008-2011'.[66] As a result, educational institutions with instruction in minority languages were urged to introduce more subjects taught in Ukrainian to the effect that, from 2008, those schools which had been monolingual would be become bilingual. The Committee of Experts under the ECRML acknowledged that while this measure could help to gradually strengthen the proficiency of school children in the state language, there was an urgent need to provide clearer guarantees for the right of persons belonging to national minorities to receive instruction in their language.[67]

It should be mentioned that the aspirations to promote the Ukrainian language in education were not immediately satisfied. When the *Law on Languages* was adopted and in spite of the efforts made at political and practical levels, the share of Ukrainian language schools slightly decreased: they accounted for 74.6% of the total number of schools in 1985-86, for 74% in 1988-89, for 73.6% in 1989-90 and for 73.5% in 1990-91. This can be explained by the scarcity of resources assigned to education, by the growth in the number of schools which offered courses both in Russian and Ukrainian or other languages, and by the reluctance of local authorities to de-Russify education. The plans for rapid Ukrainization also failed because the policymakers often failed to into full consideration such complex issues as the tradition and practice of language use, the social and cultural

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65 Order of the Ministry of Education and Science of Ukraine No.4/10-2 of 24.04.2008 *On the Creation of Appropriate Conditions for Ensuring the Effectiveness of the Studying of the Ukrainian Language in General Education Institutions with National Minority Languages as Languages of Instruction*.

66 Order of the Ministry of Education and Science of Ukraine No.461 of 26.05.2008 *On Approval of the Programme of the Improvement of Studying of the Ukrainian Language in General Education Institutions with National Minority Languages as Languages of Instruction in 2008-2011*.

67 Report of the Committee of Experts on the ECRML 'Application of the Charter in Ukraine', ECRML (2010) 6, 7 July 2010, para.158.

prestige of a language, and the social conditions and cultural affiliations of the different regions of the country.[68]

Since that time, the situation has changed significantly. Over the last ten years, the country has experienced a notable increase in the use of Ukrainian as the main language of instruction and a decrease in the use of Russian.

The following tables summarize the data provided by the Ukrainian government in the four reports it submitted under ECRML and FCNM and they reflect the dynamics of these changes:[69]

Table 1

	1998-99	**2005-06**	**2006-07**	**2008-09**
General education institutions with instruction in **Ukrainian**	16,032	16,924	16,969	16,909
General education institutions with instruction in **Russian**	2,561	1,345	1,305	1,199
General education institutions with instruction in **Romanian**	108	94	91	89
General education institutions with instruction in **Moldavian**	18	8	7	6
General education institutions with instruction in **Hungarian**	65	70	71	66
General education institutions with instruction in **Crimean Tatar**	6	14	14	15
General education institutions with instruction in **Polish**	3	4	5	5

68 V Stepanenko, *The Construction of Identity and School Policy in Ukraine* (Nova Science Publishers, Inc., 1999), 126. See also Stepanenko note 59 *supra*, at 124.

69 For the data on 1998-1999 school year consult Report submitted by Ukraine under the FCNM, Article 14; 2005-2006 Second Report s submitted by Ukraine under the FCNM, Article 12, Paragraph 2.3; 2006-2007 the Initial Periodical Report of Ukraine under the ECRML, part II; 2008-2009 - Third Report submitted by Ukraine under the FCNM, Article 12, Paragraph 3, table 12.2.

Table 2

	1998-99	2005-06	2006-07	2008-09
Students instructed in **Ukrainian**	4,421,265	3,603,000	3,514,897	3,608,725
Students instructed in **Russian**	2,313,901	525,260	482,611	779,423
Students instructed in **Romanian**	27,776	22,365	21,167	21,671
Students instructed in **Moldavian**	4,509	3,127	2,559	4,756
Students instructed in **Hungarian**	21,214	14,823	13,386	16,407
Students instructed in **Crimean Tatar**	4,071	3,472	3,345	5,644*
Students instructed in **Polish**	1,109	943	1,302	1,389

The figure is taken from the special section dedicated to the situation of Crimean Tatars. Third Report submitted by Ukraine under the FCNM, at 59.

The data in the tables reveal that a difficult question related to the subject of language instruction remains the issue of the Russian schools. The number of Russian language schools has been declining steadily, while the number of other language schools has slightly increased. Zhurzhenko accounts for the general tendency to promote minority languages other than Russian in the following way:

> These minorities [non-Russians], which do not threaten the dominant identity of the titular nation, are an important attribute of the image of a democratic state. They are officially granted cultural and linguistic rights, even more willingly… the competition for their souls still continues …[70]

The tendency to switch to Ukrainian language education is undoubtedly driven by 'administrative Ukrainization'.[71] However, it would be fair

70 T Zhurzhenko, 'Language, Ethnicity and Cultural Boundaries in Ukraine: A Response to the Papers and Debate' in B Busch, H Kelly-Holmes (eds.) *Language, Discourse, and Borders in the Yugoslav Successor States* (Multilingual Matters, 2004), 70, at 67-75.

71 The term is borrowed from Stepanenko note 59 *supra*, at 124.

to say that parents' gradual change of attitude towards Ukrainian as 'the language of social advancement' is no less important.

This compares with parents' attitudes towards the Russian language in Soviet times. Parents are making a rational choice, as they did in the Soviet era. In the former USSR, the language and culture of advancement was Russian. In Post-Soviet Ukraine it is Ukrainian, which is the sole state language.[72]

The Ukrainian language has also strengthened its position in vocational and higher education. In the 2008-09 school year, 771 vocational training institutions used Ukrainian as a language of instruction, 35 institutions used Russian and 113 institutions used both.[73] The strengthening position of Ukrainian in vocational and higher education also stemmed from the introduction of obligatory entrance examinations in Ukrainian for all post-secondary educational institutions. This measure was challenged in January 2008 by the Crimean government officials, who requested the Ministry to allow entrance exams to be translated from Ukrainian into Russian. In response, the Ministry for Education and Science passed an order allowing for all tests except for those on Ukrainian language and literature to be translated into national minority languages. Translation was allowed as part of a transition period for the two years 2008 and 2009. Afterwards, children studying at schools with instruction in minority languages would have to integrate in the Ukrainian-language environment by taking entrance examinations in the state language.[74] The Committee of Experts under the ECRML found this measure to be detrimental to the 'regional or minority languages.'[75] Similar concerns were voiced by the Advisory Committee under the FCNM who argued as follows: 'any strengthening of the state language in educational institutions with minority languages needs to be coupled with accompanying meas-

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72 T Kuzio, 'National Identity in Independent Ukraine: An Identity in Transition', *Nationalism and Ethnic Poiltics*, vol. 2:4 (1996), 586, at 582-608.

73 Third Report submitted under the FCNM, Article 12, Paragraph 3, table 12.3.

74 Order of the Ministry of Education and Science of Ukraine of 24.01.2008 No. 33 *On Determining the Order of Conducting Independent Assessment of Learning Achievements of School-Leavers of Educational Institutions of the System of General Secondary Education,* point 7.2 [*Про затвердження Порядку проведення зовнішнього незалежного оцінювання навчальних досягнень випускників навчальних закладів системи загальної середньої освіти*].

75 Report of the Committee of Experts on the ECRML 'Application of the Charter in Ukraine', ECRML (2010) 6, 7 July 2010, para.257.

ures to help children acquire a better language proficiency from an early age. This cannot be achieved by a sudden change of the rules pertaining to language examinations in secondary education and entrance examinations'.[76] Indeed, the obligation to take entrance examinations in the state language can discourage parents from sending their children to minority language educational institutions.

Furthermore, in order to promote the use of the Ukrainian language in higher education and in science, the Ministry of Education included Ukrainian as a compulsory examination in bachelor's degrees and required post-graduate and doctoral students to sit an examination in Ukrainian.

Finally and as the ECRML Committee of Experts reports, there seems to be 'a trend at University level towards removing all possibilities to study certain topics in minority languages or bilingually'. Worries have arisen about 'the implications of such a change being implemented at University level as the university students do not at the present time have the necessary linguistic skills in the Ukrainian language.[77]

All in all, the legal developments in the field of education indicate that in the period 1989 - 2009 Ukrainian legislators devoted a great deal of attention to the promotion of the state language and that this resulted in a significant albeit gradual increase in the number of institutions using Ukrainian as their language of instruction. The opposite trend was observed in the dynamics of the Russian language educational institutions. Their share notably decreased, the result of both administrative Ukrainization and of the gradual rise to favour of the state language. Other languages, often caught in the crossfire between these two major languages, have been left somewhat unattended. And while there was a slight increase in the proportion of minority language schools, the government's failure to implement clear policies and a certain neglect coupled with the unwarranted requirements of the state language examinations (in all types of school, including minority language schools) might prove to have long-lasting negative effects for minority languages in educational institutions.

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76 See also para. 188 nd 192-194, FCNM report on Ukraine, ACFC/OP/II(2008)004.

77 Report of the Committee of Experts on the ECRML 'Application of the Charter in Ukraine', ECRML (2010) 6, 7 July 2010, para. 259.

5 · The Ukrainian language: most recent and future developments

Let us now turn to possible developments with regard to the position of Ukrainian *vis-a-via* other languages. In order to address the problem comprehensively, two points should be remembered: first, that the language issue in Ukraine is highly politicized and second, that depending on the governing regime one might expect the language to be subject to all manner of radical policy changes, from the most absolute exclusion to the most fervent promotion. Here, I would like to consider two extreme case scenarios, the Baltic states and Belarus, and examine whether the Ukrainian language might follow the path of development of the state languages in these countries or whether Ukraine might opt for its own, hopefully more balanced approach.

A. The Baltic scenario[78] presupposes the persistent imposition of the titular language and the corresponding tensions between various non-titular language speakers. Harsh language legislation is seen as a tool for preserving the titular language and ensuring its competitiveness. The undisputed domination by the titular language is perceived as one of the main attributes of sovereignty, and, conversely, statehood is largely seen as a tool to protect the language. Under these circumstances, the promotion of minority languages, including Russian, may be interpreted as an act of disloyalty. Hence, legislators are usually reluctant to resort to this kind of action.

The promotion of the titular languages in the Baltic states also has a particular objective: the eventual eradication of the Russian language and, therefore, of Russian domination. Efforts to gain a strong position in the European Union and in NATO cannot allow countries to show any tolerance towards Russian and the practice of this intolerance can be manifested through severe and excessive language requirements ensuring advantages for native-speakers of the titular languages.

B. The Belarusian scenario[79] shows us a country in which the initial strengthening of the state language was followed by the introduction of

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78 Based on Tsilevich, B. (2001) 'Development of the Language Legislation in the Baltic states', *IJMS* 3(2), at 137-154.

79 See among others, M Giger, M Sloboda, 'Language Management and Language Problems in Belarus: Education and Beyond', *International Journal of Bilingual Education and Bilingualism*, vol. 11:3 (2008), at 315-339.

Russian as the state's second language and, subsequently, by a second fall of the titular language into disuse. Given its limited role in public life, the very future of that titular language is now at stake. Its use might eventually be relegated to the villages, where it would exist as a folk language. Alternatively, we might see the development of kind of Russo-Belarusian *patois*, in which elements of both languages were used regularly in everyday speech. And this in turn might lead not to the extinction of the state language but to a bastard and fragmented version of it, a fate which purists could perceive as even worse than extinction. Finally, this relapse might lead to the development of a nation state based on the Russian language.

Having considered the scenarios above, to what extent might similarly extreme situations occur in the case of the Ukrainian language?

1. Ukraine's communist past seems to be dividing the country 'along ethnic, linguistic or regional lines'. On the one hand, the Ukrainian elite has been 'forging a national identity by (re)constructing the discursive boundaries' of short periods of its statehood; on the other, it has also adhered to the idea of building a Ukrainian-European identity by promoting this identity in different ways. Like the Baltic states, Ukraine is trying both to submerge its internal divisions and find an alternative to the previously supra-national community, the 'Soviet people'. Language is seen as an important facet of this identity and speaking Ukrainian is associated with making progress towards a united Europe, while Russian is increasingly regarded as the language of the past.

On the other hand and notwithstanding the country's initial fears, its multi-ethnic character and its large Russian-speaking minority population, Ukraine has never come anywhere close to experiencing the ethnic tension that has plagued Estonia and Latvia. Several internal factors have combined to help the country avoid this and these factors may also prove useful for future developments and serve as plausible explanations of why Ukraine is unlikely to repeat the Baltic scenario. In my view, the most important of these was the country's pioneering adoption of minority legislation (alongside its state language promotion measures) at a time which predated the European treaties on minority rights;[80] other contributing factors were Ukraine's European aspirations, namely its de-

80 *Law of Ukraine on National Minorities in Ukraine* of 25.06.1992 No. 2494-XII.

sire to join the EU and its need to adhere to the requirements of the *acquis communautaire* in the protection of the language rights of minorities and the obligations under the ratified European instruments, including the FCNM and the ECRML. No less important has been the particularly active role played by the OSCE and the HCNM. Other factors have been Ukraine's own legacy of multi-cultural tolerance and, paradoxically and in contrast to the Baltic states, the historical absence within the country of a developed sense of national identity. Without doubt, the complex internal inter-ethnic relations have helped generate an open window policy for language diversity in independent Ukraine. The result is that Ukraine has succeeded in making Ukrainian the main language of the state government and of politics and has applied its use in all spheres of public life while also guaranteeing rights to speakers of other languages. The presence of Russian is less formidable but has not been eliminated and in the eastern part of the country Russian is still used on a par with Ukrainian. This is why I believe that the chances of Ukraine opting at this point for a forceful imposition of the Ukrainian language are minimal and that such an imposition would be regarded as impractical.

2. Considering the possible development of the Belarusian scenario within the Ukrainian context, I would remind the reader that at the present moment, Ukraine is in the rather unusual situation of having both a president and a prime minister who speak Russian much better than they speak Ukrainian. The issue of whether Russian should be an official language has been raised again, especially since Yanukovych promised during his campaigning to upgrade the status of Russian and to adopt a new language law.[81] However, the introduction of the Russian language as a second state language seems improbable because the Ukrainian Constitution explicitly declares that Ukrainian is the only state language of Ukraine and because to change this would require an amendment to the Constitution. And while the president of Belarus held a referendum which allowed him to make the Russian language the second state language, the president of Ukraine has refused to address the language issue in the referendum. Thus, there are firm grounds for supposing that the Ukrainian language will continue to enjoy the guarantees envisaged for its protection at a Constitutional level as the sole state language.

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81 See among others, V Socor, 'Salient Issues in Ukraine-Russia Relations and Yanukovych's Moscow Visit', *Eurasia Daily Monitor*, vol. 7: 47, 10 March 2010.

However, Ukraine has also undertaken an effort to reassess and replace the 1989 Law on Languages. The most recent draft,[82] which has been in circulation since September, has stirred up a great deal of controversy and has been seen by many as a hampered attempt to marginalize Ukrainian. While this draft does not formally make Russian the second state language, it does grant Russian speakers the right to be use that language freely in all spheres of public life. In practical terms, this will give Russian equal status with Ukrainian and, some argue, may lead to the gradual replacement of Ukrainian by Russian.[83] The opponents to the draft recall various events which had preceded the draft and which offered intimations of the turnabout in the language policy development. Again, the field of education provides the most evident example.

The appointment of a new minister of education and science, Dmytro Tabachnyk, has shown that the present government's course of action is more pro-Russian and less pro-Ukrainian. Since March 2010 a number of important resolutions have been signed, including one that abolished state examinations in Ukrainian for bachelor degree holders and another that eliminated mandatory external independent testing in Ukrainian. This has allowed universities in Ukraine to recruit and teach students in the language chosen by the students and by the higher educational establishment in question. It's not difficult to see the similarities between such resolutions and the language policy that was implemented in Ukraine during the communist period. Neither is it difficult to imagine that such measures might result in a *de facto* de-Ukrainization of the educational system.

Unsurprisingly, champions of the Ukrainian national idea have seen these resolutions as an assault on Ukrainian identity and have thus been moved to demonstrations, student protests, and the filing of petitions — directed as much at Yanukovych as by Tabachnyk.

I suspect that this course of action risks encouraging ethnic conflict between radical ethnic Russians and ethnic Ukrainians. My guess is that there is a limit to how far ethnic Ukrainians can be provoked and that no drastic measures will be taken to reverse the situation, as much as any-

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82 Draft of the Law on Languages, No. 1015-3 of 7 September 2010, available at: http://gska2.rada.gov.ua/pls/zweb_n/webproc4_1?id=&pf3511=38474

83 See for example, 'Vladimir Litvin: The Ukrainian Language will not be able to Compete with the Russian Language [Владимир Литвин: украинский язык не выдержит конкуренции с русским], 12.03.2010, Вести.Ru , available at: http://digester.ru/Cluster.aspx?s=RANK_SORT&p=1&uid=2010031234&id=DD

thing else because of the memory of past events: these ethnic Ukrainians are the same people who took to the streets in 2004 to prevent the current president from coming to office and they could do the same thing to him again.

It thus seems that the road to a Ukrainian ethnic revival as proclaimed by the Ukrainian state continues to generate serious moral and legal controversy. On the one hand, Ukrainization through administrative measures would be regarded as an imposition that was incompatible with democratic principles; on the other hand, an indifference to the future fate of Ukrainian would mean that its previous discrimination had been justified. At the same time, the implementation of policies for the cultural and linguistic consolidation of society will need to meet the Russophone character of half the population of Ukraine. In the midst of this turmoil, the language needs of other ethnic groups will also need to be taken into account.

Funnily enough, twenty years on from the time of its independence Ukraine still faces the same challenges; and the outcome of its linguistic struggle remains uncertain. Notwithstanding the controversies about language, there is hope that the Ukrainian state will be able to handle the situation peacefully, and that the Ukrainian language will be able to maintain the social position it has gained without jeopardizing the positions of either the Russian language or of other, more vulnerable minority languages.

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THE CASE OF ESTONIAN IN ESTONIA. THREATS AND CHALLENGES OF ENGLISH AND THE RUSSOPHONE COMMUNITY

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SUMMARY: 1. Introduction. 2. History. 3. The 1989 Language Act. 4. Current sociolinguistic overview. 5. Language policy and planning in general. 6. Current Language Legislation in Estonia. 7. Constitution. 8. Language Act. 9. Names. 10. Language Inspectorate. 11. Language requirements in naturalization and long-term residence. 12. Language regulation in education. 13. Secondary, vocational and higher education. 14. Feedback on language policy.

1 · Introduction

Estonia possesses several sociolinguistic features that make its language policy and legal regulation different from those of other countries:

Sociolinguistic history: during the 20th century Estonian was twice in the lower diglossic position (before WW1 and during the Soviet occupation in 1940-1991) and then achieved the higher diglossic position through political liberation and sovereignty in 1918 and again in 1991.

Legal environment concerning statehood: Estonia suffered from the 51-year Soviet occupation and incorporation, followed by the restoration of independence. The fact that Estonia, Latvia and Lithuania functioned independently prior to 1940 makes their legal starting point and applicable standards of international law in various domains (citizenship issues, lan-

guage rights, etc.) distinct not only in the post-Soviet context, but rather unique in the whole world.

Size of population: given Estonia has just over 1 million residents, social processes take less time, revealing causal relationships and allowing more efficient government management, including language policy.

Impact of attitudinal delay: the recent U-turn in the legal status of the Estonian language has not been taken on board mentally by a considerable part of Estonia's population. Thus, various social groups still suffer from the effects of the Soviet occupation and have maintained views and attitudes of the past (both major language groups, Russians as past *Herrenvolk* and Estonians as past minority, as well as third groups still under the impact of Russification).[1] Several groups have not acquired the skills required in the current social environment, for example linguistic skills (e.g. mastery of the national language).

Phenomena of linguistic imperialism: pressure from neighbouring Russia, under the guise of human rights protection of (Russian) co-inhabitants, attempts to obstruct linguistic normalization processes in order to keep Russian speakers in Estonia exclusively in the Russian media space, thus affecting access to information and formation of attitudes.[2] Therefore, the linguistic threat is mainly virtual, coming from the neighbouring state, not from the Russophone community in Estonia directly.

Given the specific features above, we may position Estonian together with Catalan as a *glocal language*,[3] which cannot be placed into the traditional majority vs minority framework due to different power relation dynamics. Though it is a language with over one million mother tongue speakers and has the status of the sole official language of the state, Estonian is currently still under threat from another neighbour, Russian, an international language, with the perspective of being threatened by English in the near future. The current threat is based on the recent history of its being reduced to a minority language during the Soviet occupation and the following attitudinal delay that still keeps these power relation patterns alive. This temporary status loss

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1 M Rannut and U Rannut, 'Russification of non-Estonian pupils in Tallinn', *Estonian Papers in Applied Linguistics 6* (2010), Estonian Language Foundation, at 243-259.

2 M Rannut, 'Russification in the Soviet Era', *The Encyclopedia of Applied Linguistics* (2012), Wiley-Blackwell.

3 A Bastardas i Boada, *Les politiques de la llengua i la identitat a l'era glocal* (Barcelona: Generalitat de Catalunya, Departament d'Interior, Relacions Institucionals i Participació. Institut d'Estudis Autonomics, 2007).

that affected its most prestigious domains was accompanied by extensive migration of speakers of Russian, the major language. Together with the rise of democratic governance resulting in the restoration of independence, the previous process of language shift was halted and Estonian revitalized.[4]

Therefore, the issues concerning the Estonian language and its implementation and regulation in the social sphere in Estonia are of considerable interest to specialists in the area.

2 · History

The history of the Estonian language in the 20th century has witnessed ups and downs: Estonian was twice underdog, but has managed to achieve the status of a national language. Before WW1 the situation with three competing local languages (Estonian, German, Russian) was solved by the establishment of the Estonian state, with Estonian as the national language.

During 1918-1940, between the two World Wars, Estonia enjoyed sovereignty. According to the 1934 census, the ethnic composition of the population of Estonia in this period was as follows: Estonians constituted 88%, Russians 8%, Germans 1.5%, Swedes 0.7%, and Jews 0.4%, plus several smaller ethnic groups (Rannut, 2004). Most ethnic non-Estonians were bilingual in Estonian and their native language. The official language, Estonian, was used in all functional and territorial domains, in some instances alongside local minority languages. The majority of the largest minority group (Russians) lived in rural areas, the most 'Russian' areas being the town of Narva, containing 29.7% of Russians, the territories east of Narva, and the Petseri region. In Tallinn the percentage of Russians was 5.7%. Other major ethnic groups, Germans and Jews, lived mostly in towns; and Swedes in the Estonian coastal region and on the islands[5]. Though most of the minority population was bilingual in Estonian and the native language, there were also pockets of minority monolingualism.

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4 J Soler Carbonell, "Llengües mitjanes' i llengües internacionals en contacte a Catalunya i Estònia en l'era glocal. Una anàlisi sociolingüistica comparada" (*'Medium-sized' and 'international' languages in contact in the glocal era in Catalonia and Estonia. A comparative sociolinguistic analysis*, 2010), Universitat de Barcelona. Doctoral thesis.

5 M Rannut, 'Beyond linguistic policy: The Soviet Union versus Estonia', in T Skutnabb-Kangas and R. Phillipson (eds) *Linguistic Human Rights: Overcoming Linguistic Discrimination* (Berlin/New York: Mouton de Gruyter, 1994), at 179-208.

In 1940 in the middle of World War 2, Estonia was occupied and incorporated into the Soviet Union under the Secret Protocol of the Molotov-Ribbentrop Pact, signed between the USSR and Nazi Germany in August 1939. The pact planned the division of Eastern Europe between the two powers. From 1941 to 1944, the USSR lost control over these territories temporarily to Nazi Germany.

WW2 brought abrupt changes in the demographic composition of the country, reducing the numbers of indigenous minorities. In October 1939, most Germans left Estonia, in response to an appeal from Hitler. By 1941, the beginning of the Nazi occupation, Estonia was claimed by the Nazis to be *judenfrei* (Jew-free). In 1943, in accordance with a German-Swedish treaty, Estonian Swedes (ca. 7,500) left their homes in the Estonian coastal region and islands for Sweden, in order to get out of the war. In 1944, before the arrival of the Soviet army, around 75,000 Estonians left as refugees (mainly for Sweden and Germany), in fear of the return of the Soviet terror. In 1944, Estonia was re-annexed by the USSR and part of Estonia beyond the Narva river and the Seto areas with a mixed Estonian-Russian population was transferred to Russia, thus leaving the main bulk of Estonian Russians behind the border. As a result of these dramatic changes, by 1945 the Estonian population had decreased by one-fifth (200,000) to 854,000. At the same time, its proportion in the overall population had grown: in 1945, ethnic Estonians constituted 97.3% of the country's population and minorities a mere 2.7% (23,000).[6]

The Soviet regime brought further changes to the ethnic composition of Estonia. These changes resulted from executions of government and local officials, imprisonment of autochthonous inhabitants and mass deportations to Siberia and the Far North, coupled with immigration from Russia and other Soviet republics. Consequently, the proportion of Estonians in the overall population fell from 97.3% in 1945 to 61.5% in 1989.[7]

The Soviet government promoted mass migration to newly incorporated Estonia. In addition to placing members of the Soviet military there, workers and collective farmers were recruited through the organized recruiting system (*orgnabor*) to participate in construction work, the oil industry, etc. These migrants moved to Estonia to take advantage of the

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6 K Katus and L Sakkeus, *Foreign-born population in Estonia* (Rahvastiku-uuringud, Seeria B19, Tallinn: Eesti Korgkoolidevaheline Demouuringute Keskus, 1992).

7 Katus and Sakkeus note 6 *supra*.

higher living standards there than in the rest of the Soviet Union and the opportunities to occupy privileged positions in certain trades in which Estonians were not trusted. These trades included communications (which potentially allowed access to state secrets) and transport systems (which were open to the risk of sabotage and offered Estonians a chance to flee abroad).

The Soviet government also implemented a series of linguistic and social policies, which aimed at creating favourable conditions for territorial and functional language shifts from Estonian to Russian:

— Russian was declared the 'second native language' in education (not a foreign language), i.e. bilingual transitional programmes were launched in former Estonian schools and a massive program of Russian language teaching was implemented at the expense of teaching Estonian.[8]

— Though not officially stated, Russian became the majority language with the highest status in Estonia. It replaced Estonian in several high-status functional domains, including government, banking, the army, the militia (Soviet police), railways, naval and air transport, mining and energy production. Estonian was maintained only in three major domains: agriculture, local (food) processing and production and education.

— There was no need for newcomers to learn Estonian, as all services were also provided in Russian: parallel linguistic environments were created, where some residential areas, institutions, offices, plants, factories and education and entertainment facilities functioned exclusively in Russian.

As a result of these and other measures, the status and the use of Russian rose rapidly, creating a situation of asymmetrical bilingualism. Estonians had the obligation to learn Russian, as it was linked to social mobility. In contrast, knowledge of Estonian was not considered necessary by most non-Estonians. Thus, there was low knowledge of Estonian (13-20%) among various ethnic groups.[9] Thus, a sizeable Russian-speaking environment was created in Estonia, where the population there had only marginal contact with Estonians and the Estonian language, hindering any potential integration.

To sum up, by the 1980s, Russian had been established as the official language of the republic, while Estonian functioned as a *de facto* minority

8 Rannut (1994) note 5 *supra*.
9 Rannut (1994) note 5 *supra*.

language; other languages spoken in Estonia had no official recognition and gradually lost their speakers, mostly to Russian as the highest-status language. However, attitudes did not follow these changes in language environment so swiftly, reflecting attitudinal delay. Therefore, two competing major linguistic groups were formed, the Estonian-speaking and the Russian-speaking ones, both adhering to their own language hierarchy, considering their ethnic language to enjoy the highest status and identifying themselves as the majority in Estonia, while representing opposing views, beliefs and attitudes on several crucial issues. However, due to the ever-increasing constraints upon official and public use of the Estonian language, the threat of further decay and, in the long run, the death of Estonian had become a real possibility.

At the end of the 1980s, together with the weakening of the economic and military strength of the Soviet Union, the trend towards Russification in the language environment stopped. The years from 1988 onwards reflected a gradual restoration of Estonia's independence. The conditions of Gorbachev's perestroika and glasnost provided more freedom, making it possible to expose totalitarian ideology and Russification and, thus, resist them. The three Baltic republics were the most receptive to perestroika, taking two main directions that were not actually desired by the Soviet leaders, namely the restoration of national sovereignty and restoration of linguistic and cultural human rights.

3 · The 1989 Language Act

Estonia passed a Declaration of Sovereignty in November 1988, declaring the supremacy of Estonian law over Soviet law. The proclamation of Estonian as the official state language in Estonia, and its legalization as such by a corresponding Constitutional Amendment, was adopted in December 1988.

The Language Act that regulated language use and functions in more detail was passed in January 1989.[10] It was a provisional law, matching the needs of the process of transformation underway in Estonia. Although it described Estonian as the sole official language for political expediency, the main principle was based on Estonian-Russian bilingualism, which required

10 For more details, see Rannut (1994) note 5 *supra*.

that holders of certain jobs should have proficiency in both Estonian and Russian (in most cases knowledge of 800 words, i.e. an elementary level, was sufficient). To reach the required level, a four-year delay in the law was introduced, which meant it came into effect in 1993. This 1989 Language Act was in force until 1995, when a new Language Act was adopted.

The Language Act of 1989 should be seen as a remedy to language problems at that time. The main problem was a catastrophic growth of Russian monolingualism caused by the demographic changes, the low status of Estonian in several functional and regional domains, and a non-integrative approach to education. The law was guided by the following principles:

— It was envisaged that Estonian should operate as the official language, the only language for internal communication of state and local government institutions and the vehicular language between all legal bodies.

— The principle of bilingualism for individuals in services, including state agencies, with customers having the right to choose the language of communication, either Estonian or Russian. This introduced constraints on the monolingualism among administration and service personnel, which, given the actual situation, meant restrictions mainly on ethnic Russians, who were overwhelmingly monolingual at that time (Estonians were mostly bilingual). It also placed language constraints on ethnic Russians concerning upward mobility and employment in positions involving contact with the public.

— The legislation expressed no ethnic preferences, but instead introduced language requirements and confirmed language rights.[11] Simultaneously, several programmes were launched for other minority groups in Estonia in order to promote and encourage maintenance of their ethnic languages and cultures, which were struggling with the impact of Russification.

— Language policy was implemented through concrete short-term programs, such as the creation of language requirements for employment or the use of Estonian in public signage.

In formal terms, the 1989 Language Act did not alter the situation substantially, but rather maintained the *status quo* by granting the right to re-

11 U Ozolins, 'Upwardly mobile languages: The politics of language in the Baltic States', *Journal of Multilingual and Multicultural Development* 15 (2&3, 1994), at 168.

ceive education in one's native language (either Estonian or Russian). Nevertheless, Ozolins[12] considers these initially modest language policies of Estonia, Latvia, and Lithuania a crucial element in national reconstruction and transition from the Soviet system. The 1989 Language Act granted Estonian the status of the language of the state and government at all levels and of most social discourse, so signaling the redistribution of power and thus the formation of new elites in Estonia. The Act directly affected 12% of the Russian-speaking population, who were employed in positions where communication in Estonian with customers or with subordinates in state administration was required. As such, the ambiguity of the situation with the two endo-majorities remained, causing several further conflicts and offering grounds for external political influence.

In August 1991, independence was declared and Estonia's sovereignty was re-established. A new constitution came into force in 1992, replacing the old constitution adopted in 1938. After the restoration of independence, the Estonian government introduced a linguistic normalization program to rearrange the language environment and the linguistic integration of the non-Estonian speaking population. It launched extensive Estonian-language teaching initiatives with considerable resources and support.

Although 'visible' goals of the language policy (official use of Estonian, Estonian-language public signs and labels, etc.) were accomplished promptly, further steps were necessary toward national consolidation and linguistic normalization. These included an integrated information space and mastery of Estonian as the common language by all members of the population. Lack of competence in Estonian was only one of many issues facing Russian-speakers in Estonia. The Estonian language requirement for legal naturalization and some areas of employment signalled the fall in the status of Russian-speakers from the high position of the non-accommodating *Herrenvolk* to a minority group with limited rights. The shift from the socialist economic order to capitalism also destroyed established political and economic power relations, with emerging priorities requiring new social and economic networks.

These changes created a conflict between inner identity values and outer conditions (statelessness due to the loss of Soviet citizenship, decreased competitiveness in the economic marketplace, worsening living conditions) that led to an extensive identity crisis within the Russian-

12 Ozolins (1994) note 11 *supra*, at 161-169.

speaking population. Part of this population experienced the feeling of 'betrayal' and resisted the new environment, longing for the old times and the return of the Russian troops.[13] Members of this group also displayed negative attitudes toward the Estonian language and its speakers.[14]

Notably such attitudes were not witnessed among those proficient in Estonian.[15] Positive attitudes towards the new reforms were also witnessed among russified ethnic minorities and among autochthonous Russians who were bilingual in Russian and Estonian.[16]

In turn, those experiencing discontent became an easy object for manipulation by politicians from Russia who began to actively support Russians residing in Estonia in their demands for maintaining the Soviet-style language regime, meaning the abolition of the Estonian language requirement in employment and naturalization and the right to Russian monolingualism.[17] Although Russia has regularly raised the issue of alleged linguistic human rights abuses in the Baltic States in a variety of international forums, the bulk of the Russian population in Estonia has apparently gradually lost interest in these issues.[18] At the same time, due to the legacy of the Soviet period, the normalization process has been slow and complicated. Estonian society has continuously been linguistically divided, with little contact between Russian- and Estonian-speakers, due to their different workplaces, different cultural habits and the low number of mixed marriages. There is little adjustment in the local Russian population to the Estonian language and cultural environment.[19]

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13 J Kruusvall, 'Hinnangud loimumise edukusele, tulevikuohud ja torjuva suhtumise ilmingud [Evaluation of the success of integration, future threats and phenomena of negative attitudes]. *Integratsioon Eesti uhiskonnas. Monitooring 2005* (Tallinn: Mitte-eestlaste Integratsiooni Sihtasutus, 2006), at 31-41. Rannut (1994) note 5 *supra*.

14 J Kruusvall, 'Social perception and individual resources of the integration process', in M Lauristin and M Heidmets (eds.), *The challenge of the Russian minority : emerging multicultural democracy in Estonia,* (Tartu: Tartu University Press, 2002), at 117-162.

15 E Kuun, 'The ethnic and linguistic identity of Russian-speaking young people in Estonia' *Trames* 2008, nr 2, at 183-203.

16 Rannut and Rannut note 1 *supra*.

17 U Ozolins, 'Between Russian and European hegemony: Current language policy in the Baltic States'. *Current Issues in Language and Society* 6 (1, 1999), at 6-47.

18 For details, see G Hogan-Brun, U Ozolins, M Ramoniene and M Rannut, 'Language policies and practices in the Baltic States', *Current Issues in Language Planning* 8 (4, 2007), at 469-631.

19 Kruusvall (2002), note 14 *supra*, T Vihalemm and A Masso, 'Identity dynamics of Russian-speakers of Estonia in transition period' *Journal of Baltic Studies* 34 (1, 2003), at 92-116.

4 · Current sociolinguistic overview

At present, according to Statistics Estonia,[20] Estonians make up the bulk of the country's 1.3 million population (ca 69%). Other major ethnic groups include Russians (ca 25%), Ukrainians (2%), Belarusians (1%) and Ingrians (Ingermanland Finns) (0.8%). In total, 145 ethnic groups are represented in Estonia. As mentioned earlier, the non-Estonian population is dispersed unevenly: more than half of non-Estonians reside in and around Tallinn, the capital, and almost a third in the county of Ida-Virumaa, adjacent to Russia in the northeast of Estonia. As is common for immigrant residence patterns, the non-Estonian population is mainly concentrated in bigger cities: 91% of all non-Estonians are urban dwellers, residing in major cities. Autochthonous ethnic minority groups in Estonia are small in size, comprising Russians (mostly Old Believers from the shores of Lake Peipsi; approximately 39,000), Jews (1,700), Germans (1,900), Swedes (450, according to cultural autonomy election lists from 2007), Ingrians (10,000), Roma (600-1,500; the latter is the estimate of the Roma Union) and Tatars (2,400).[21] Since the restoration of independence in 1991, the overall population of Estonia has decreased. The number of Estonians has receded only marginally, while other ethnic groups have considerably decreased in size: Russians by more than a quarter, Ukrainians and Belarusians by more than a third, and members of several other minority groups by almost half.[22] This general decrease was mainly caused by post-1991 emigration from Estonia and employment emigration to other European states after Estonia joined the European Union. This emigration has decreased in recent years.

The linguistic landscape reveals a significantly different picture, with just two languages visible. According to the Population Census 2000,[23] altogether 109 different languages were declared as mother-tongues by the respondents, but the most common were Estonian (67.3% of the total were speakers of Estonian as a native language) and Russian (29.7%). Language loyalty is particularly strong amongst two ethnic groups: 98.2% of the Russians and 97.9% of Estonians speak their respective languages. The pro-

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20 Statistics Estonia http://www.stat.ee/63780?parent_id=39113

21 Population Estonia 1881-2000 http://www.stat.ee/62931 ; in the case of all other groups beside Russians, autochthonous minority members and late immigrants are not separated.

22 Statistics Estonia, note 20 *supra*.

23 Population Estonia 1881-2000, note 21 *supra*.

cesses of Russification (among Estonians) and, during the last 20 years, Estonianization (among Russians) have been insignificant due to the high status of these languages. One can also see that the proportion of Russian speakers is higher than that of ethnic Russians (29.7% *versus* 25.7%), due to the continuing Russification of residents from post-Soviet countries.[24] This is because, with the exception of ethnic Russians, only 40% of members of ethnic minority groups have maintained their language of ethnic affiliation: others shifted to Russian during the Soviet times. At present, due to the presence of these russified minorities, the number of people speaking Russian as their mother tongue is almost 400,000, which is considerably higher than the number of ethnic Russians (approximately 341,000). In total, over 97% of the population have Estonian or Russian as their mother tongue. Only about 3% of the population speak the other 107 languages. In comparison with the 1989 Census,[25] a decrease in the use of one's ethnic language has been recorded for all these minority languages, whose former speakers show a continuing pattern of assimilation. Commonly, smaller ethnic groups lose their languages in the third generation after leaving their native language territory; as a result, in the school-age population, only 32 languages are used as home languages.[26] Changes are also apparent in the direction of assimilation: while in Soviet times speakers of various languages tended to shift to Russian, nowadays a shift to Estonian has become more apparent, reflecting the high status of the language. According to the estimates of the Ministry of Education and Research,[27] based on whether students choose to attend a school using Estonian or another language of instruction, the share of speakers of Estonian as the first language will continue to rise to comprise approximately 80% of the Estonian population in the next generation. Simultaneously, new ethnic language communities (Turks, Chinese, Arabs, etc.) have appeared in Estonia as a result of globalization and migration movements.

Since the restoration of independence and rise of democracy, regional languages that were previously downscaled to backward local dialects and prohibited from public usage have witnessed renaissance and rise in status. The most widely spread among these is Voro and its eastern dialect Seto,

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24 Rannut and Rannut note *1 supra*.
25 Population Estonia 1881-2000, note 21 *supra*.
26 Rannut and Rannut note 1 *supra*.
27 Ministry of Education and Research http://www.hm.ee/index.php?048055

which together have about 70,000 speakers. The Võro language is a descendant of the old South Estonian tribal language and is the least influenced by North Estonian. During the 17th to the 19th centuries, South Estonian was a separate literary language. It then dropped out of written use due to competition with (North) Estonian, which became the standard, but was maintained orally by its autochthonous speakers.

Since the declaration of Estonian as the national language of the Republic of Estonia in 1989, knowledge of Estonian among non-Estonians has increased from 14% in 1989 to 38% in 2000.[28] However, since 1995, this trend has become less pronounced, possibly due to a shift in government policies, which now place greater emphasis on the social equity of different ethnic groups than on language issues. Though in itself this emphasis is highly commendable, this shift has reduced the motivation for learning the national language as a way of reaching an equal footing in society. Estonian now functions as the common language in all territorial and functional domains in Estonia. Those whose proficiency in Estonian is insufficient for social and territorial mobility have often opted to stay in districts in and around Tallinn as well as in other cities of northeast Estonia, with high rates of unemployment, homelessness and crime. Most of these are Russian speakers, who still ascribe high status to Russian, the previous dominant language. This attitude, common in postcolonial contexts, makes the learning of a previously minoritized language difficult for former elites. Their political and cultural loyalties, enforced through preference for Russia's media to Estonia's, are often also with Russia. Thus, it is not uncommon for local Russians to celebrate the arrival of the New Year by Moscow time or to support the Russian team during a soccer game between Estonia and Russia.[29]

As already mentioned, Estonian is the sole language spoken all over the country, but speakers of Estonian and other languages are distributed unevenly in Estonia. The main struggle over language domination takes place territorially. According to Ulle Rannut,[30] Estonian functions in four different types of language environment:

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28 Population Estonia 1881-2000, note 21 *supra*.

29 M Rannut, 'Estonianization Efforts Post-Independence' *International Journal of Bilingual Education and Bilingualism*, (2008), at 423-439.

30 U Rannut, *Keelekeskkonna mõju vene õpilaste eesti keele arengule ja integratsioonile Eestis*. [Impact of the Language Environment on Integration and Estonian Language Acquisition of Russian-speaking Children in Estonia], (Tallinn: Tallinn University Press, 2005).

— Estonian provides the sole linguistic environment throughout most of Estonia's territory, with the exception of major cities, such as Tallinn, Tartu and Pärnu, and their surrounding regions and Russian border areas in the east.

— Estonian competes with Russian in an environment of stratified linguistic pluralism in Tallinn, Tartu and Pärnu, and in single-industry towns with large Russian-speaking populations (Haapsalu, Loksa, Maardu, Paldiski, etc.); in these contexts there is only modest contact between Estonian and Russian-speaking communities.

— Estonian and Russian coexist peacefully on the eastern border with Russia, on the western shore of Lake Peipsi where an indigenous Russian minority is situated. In several municipalities in this region, Estonians account for less than 50% of the population, but, due to widespread social and individual bilingualism based on historical traditions, no conflicts over ethnic or linguistic issues have occurred in this area.

— Finally, Russian dominates in some towns in northeast Estonia, bordering with Russia, where Russian-speakers are the vast majority, and Estonians make up less than 20% of the population, e.g. Kohtla-Jarve (17.8%), Narva-Joesuu (15.2%), Narva (4.9%) and Sillamae (4.3%).[31] While the first and the third environments have existed in Estonia traditionally, contexts where Russian dominates or competes with Estonian were created during the Soviet times.

5 · Language policy and planning in general

Language policy may simply be defined as an application of power to language. Language policies make use of social technologies by influencing speakers of certain languages so that they can reap economic and/or political benefits. These include language practices, language ideology (beliefs and attitudes) and language management, with language interpreted widely to include its speakers and the language environment. Usually the goals of language policy lie outside language policy aiming at social changes, competitiveness, etc. (or the access to power, resources, security, information, entertainment, etc.) There is neither contact nor conflict between languages, but between speakers and language communities, pro-

31 Population Estonia 1881-2000, note 21 *supra*.

viding an infinite source of conflict. Thus, language planning problems are, as a rule, outside the language domain and not linguistic in their nature.[32]

The language component of current thinking about security belongs to the domain of soft security. Ager[33] divides linguistic insecurity into three:

— Territorial insecurity as a fear of regional (minority) languages, based on the threats of disintegration, regionalism and fragmentation. Policy in this case is directed at linguistic integrity and primacy of official/national languages in high-status functional domains (administration, court, education, army, public media, etc.). Officially, various integration models based on additive bilingualism and minority protection are encouraged.

— Social insecurity as a threat of a social outsider group (class, social layer, e.g. immigrants, poor, younger generation). Policy instruments here are based on the principles of non-discrimination, participation and cooperation, promoting social inclusion. The main emphasis here is on assimilation (in the standard language), though partial native language support is sometimes available.

— Virtual insecurity as a new domain in language conflict,[34] leading to status decrease and loss of functional domains (IT, science, higher education, media and entertainment), due to the ever-increasing impact of technology upon language environment. In this case, the physical presence of the ousting speech community is not necessary, as the battleground is virtual space.[35]

To eliminate these various linguistic threats and defend people from them, expert language planning and its consequent implementation through policy are required. Language policy may be implemented by states (and international organizations such as the EU or the UN), usually at the macro level, institutions and even by private individuals (micro level). Methods

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32 J Lo Bianco, 'Language planning as applied linguistics' in A Davies and C Elder (eds.) *The Handbook of Applied Linguistics* (London: Blackwell), at 738-763.

33 D Ager, *Identity, Insecurity and Image. France and Language*. (Clevedon, UK: Multilingual Matters, 1999).

34 M Rannut, 'Postmodern Trends in Current Language Development', in H Metslang and M Rannut (eds.) *Languages in development* (Muenchen: Lincom Europa, 2003), at 19-30.

35 M Rannut, 'Threats to National Languages in Europe', in G Stickel (ed.), National and European Language Policies (Frankfurt, Berlin, Bern, Bruxelles, New York, Oxford, Wien: Peter Lang Verlag, 2009), at 35-52.

and approaches as well as aims and indicators vary here. Usually a distinction is made between the four dimensions of language planning:[36]

— **Status planning** is concerned with policies attributing recognized status and functions in the national, regional and even institutional life of a language. Planning activities are carried out in the domains of legislation, management and marketing (or prestige planning).

— **Corpus planning** is concerned with the quality of a language's structure and lexicon, establishment of the literary norm, corresponding to the referential and non-referential potential of the language and its capacity for translation. Codification planning, terminological planning, name planning and translation (plus interpretation, adaptation, etc.) planning are the domains involved in this language planning dimension.

— **Acquisition planning** or language planning-in-education is concerned with teaching and acquiring languages and their literary norm as a necessary skill and basis for success in one's education and further career. This dimension of planning deals with literacy, various educational programs in a multilingual environment (second-language and native-language planning, linguistic accommodation of immigrant pupils, cf. EU Directive 486/77/EC, etc.) or with multilingual aims (foreign-language planning), teacher training and preparation of educational materials for language purposes.

— **Technological planning** is concerned with providing technological support to language, whether oral or written. This is usually divided into speech technology and text processing or, alternatively, into language resources (incl. corpora) and language software. Some authors have placed this dimension under corpus planning. However, quality seems secondary in this dimension, which is rather based on criteria of comprehension and further processing (e.g. a runny nose might cause bigger distortions in speech recognition systems than the usage of lexicon far from a literary standard, as systems may be trained through frequent exposure to this standard).

Sustainable development is guaranteed through competitive functioning in all language planning dimensions. The formula for success is based on the principle of conformity: language use must be provided through

36 Rannut (2009) note 35 *supra*.

language as an instrument of communication (language corpora and technology), regulated by law, allocated to high-status functions and sustained through inter-generational transmission.

6 · Current Language Legislation in Estonia

For its survival and sustainable development, Estonia, like any other country, needs a common language as a symbolic icon and as a means for information processing and retrieval and for integrative communication. At present, almost a generation since the restoration of Estonia's independence, the struggle against the negative impact of more than four decades of Soviet language policy is still not over. Gradual linguistic normalization, with Estonian as the national language known by the vast majority, has not yet been fully attained. Language policy, though quite successful by outside estimates, has not been stable, suggesting that full consensus on language issues at the highest political level has not yet been reached. Nevertheless, the core acceptable for all the main political parties has been articulated. This core includes the following principles:[37]

— a common language principle, with Estonian as the sole national and official language;
— minority language protection through territorial and cultural autonomy (hierarchization and regulation of autochthonous languages);
— respect for individual linguistic human rights;
— various functional foreign language regimes;
— active promotion of integration;
— compliance with international law.

Most language policy and planning issues are regulated in legislation. Current language legislation in Estonia covers all 4 language planning dimensions. It contains altogether over 400 legislative documents that regulate language issues in some detail. The main regulatory instrument is the Language Act in force from July 1, 2011. However, the Act does not regulate all dimensions and functional domains: for example, the use of languages in education, in pre-trial proceedings and judicial proceedings are

37 Rannut (2009) note 29 *supra*.

regulated in other Acts. Some language planning domains are not legally regulated: one example is terminological development, as this is directed and developed through national programmes providing economic incentives for terminological elaboration.

7 · Constitution

The current legal system in language matters takes the 1992 Constitution as its basis. In addition to constitutional freedoms and rights of people living in Estonia that reflect trends in modern international human rights law (cf. Chapter 2), the Constitution provides two principles that are important for language regulation. The Constitution proclaims Estonia to be a nation state and a politically unitary state (Article 2), so that ethnically autonomous regions would be unconstitutional. The second principle, linking with the norms of international law, ratified by the Riigikogu, the Estonian Parliament, before domestic legislation, is provided in Art. 123(2) of the Constitution: *The Republic of Estonia shall not conclude foreign treaties which contradict the Constitution. If Estonian laws or other acts contradict foreign treaties ratified by the Riigikogu, the provisions of the foreign treaty shall be applied*. These are regarded as an inseparable part of the Estonian legal system, as stipulated in Art. 3(1): *Universally recognized principles and norms of international law shall be an inseparable part of the Estonian legal system*. As such, Estonia is obliged to follow ratified international standards, which include language issues. European Union law prevails over Estonia's domestic law. Estonia has acceded to the main international (UN, Council of Europe) human rights instruments and also to the Framework Convention for the Protection of National Minorities, which contains specific language-related clauses. Estonia as a member state of the OSCE is also bound by Human Dimension standards and the recommendations of the HCNM. Estonia has discussed the signing and ratification of the European Charter for Regional and Minority Languages, but has not found it relevant, as most of the issues therein concern traditional minorities only.

Language is regulated in several articles of the Constitution (and specified in the Language Act). Besides establishing Estonian as the national language (Article 6) and placing responsibility for the sustainable development of it on the Government of Estonia, the Constitution proclaims sev-

eral linguistic human rights. The **non-discrimination principle** (equality before the law), contained in Art. 12(1) of the Constitution, mentions language explicitly: *All persons shall be equal before the law. No person may be discriminated against on the basis of nationality, race, colour, gender, **language**, origin, religion, political or other beliefs, financial or social status, or other reasons*. The latter is provided in more detail for judicial rights (Art. 21(1) on rights on arrest): *Any person who is deprived of his or her liberty shall be informed promptly, in a **language** and manner which he or she understands, of the reason for the arrest and of his or her rights, and shall be given the opportunity to notify his or her immediate family of the arrest*. Art. 21(2) on holding in custody includes: *No person may be held in custody for more than forty-eight hours without specific permission by a court. Such a decision shall be promptly made known to the person in custody, in a **language** and manner he or she understands*.

Communication rights (concerning the choice of language) are stated in Article 151 of the Constitution: *All persons shall have the right to address state or local government authorities and their officials in **Estonian**, and to receive answers in Estonian*.

In order to protect linguistic and ethnic minorities in Estonia, two bilingual regimes are provided, of territorial locality and of cultural autonomy. In the case of bilingual territorial locality, the right to choose the language for communication is based on the Constitution's Articles 51(2) *In localities where at least half of the permanent residents belong to an ethnic minority, all persons shall have the right to receive answers from state and local government authorities and their officials in the **language** of that ethnic minority.*

and 52(2) *In localities where the language of the majority of the population is other than Estonian, local government authorities may use the **language** of the majority of the permanent residents of that locality for internal communication, to the extent of and in accordance with procedures established by law.*

The second bilingual regime is based on cultural autonomy. Article 50 of the Constitution grants ethnic minorities *the right, in the interest of their national culture, to establish institutions of self-government in accordance with conditions and procedures established by the Law on Cultural Autonomy for National Minorities*. This Act, adopted in 1993, grants specific cultural rights, among which are language rights, to minorities, non-territorial minorities included.

8 · Language Act

The Language Act adopted in 2011 places its emphasis on the regulation of the use of Estonian and of foreign languages in communication, on Estonian language requirements and assessment and on national supervision. It is mainly based on the previous Language Act adopted in 1995, which lost clarity due to 17 amendments covering more than half the text and needed more logical arrangement. Thus, the new act does not introduce any major changes in language policy, but rather fosters the structure of the text. The main changes in content are the appointment of the Estonian Language Board as a legal body (instead of the former regulation by the Ministry) and the placing of responsibility for analyzing language policy and developing the Estonian language on the *Riigikogu*.

In accordance with world practice, the Language Act focuses on status planning issues. The Act regulates mainly the status of the Estonian language (23 articles on regulation or, more specifically, choice; 8 on supervision). Language corpus issues are regulated in 4 articles, technology in 2 and acquisition (proficiency and assessment) in 9.

The Act is divided thematically into 8 chapters: the first on general provisions and the second on regulation norms of language policy and on management of language environment. The third chapter regulates both the oral and written usage of the language of local and central government bodies; the fourth, information and servicing in Estonian. The fifth chapter provides the basis and principles for Estonian language proficiency, assessment and checking; the sixth and seventh regulate state supervision and responsibility; and the eighth contains final remarks. The Act has an Appendix with language proficiency categories corresponding to the Common European Framework of Reference for Languages (CEFR).[38] The following paragraphs give the main principles and features of the Act:

The purpose of the Act is specified in Article 1 in accordance with the Constitutional clause of the national language and with the protection formulation in the preamble to the Constitution: *The purpose of the Act is to develop, preserve and protect the Estonian language and ensure the use of the Estonian language as the main language for communication in all*

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38 *Common European Framework of Reference for Languages: Learning, Teaching, Assessment* (2001). Cambridge, UK: Cambridge University Press. http://www.coe.int/t/dg4/linguistic/cadre_en.asp

spheres of public life. Thus, through the Act, the common language principle is implemented. Although the clause directly protects the Estonian language, the beneficiaries are all those proficient in Estonian, whether first-, second- or foreign-language speakers of it.

The scope of this policy, determined in Article 2(1), is much wider than the purpose, covering also Estonian sign language and foreign languages: *This Act regulates the use of the Estonian language and foreign languages in oral and written administration, public information and service, the use of Estonian sign language and signed Estonian language, the requirements for and assessment of proficiency in the Estonian language, exercise of state supervision over compliance with the requirements provided in this Act and based on it and liability for the violation of the terms of the Act*.

From the previous Act, the constraints were copied into Art. 2(2): *The use of language by legal entities and private individuals is regulated if this is justified by the protection of fundamental rights or the public interest. For the purposes of this Act public interest means public safety, public order, public administration, education, health, consumer protection and safety at work. The establishment of requirements concerning use of and proficiency in Estonian shall be justified and in proportion to the objective being sought and shall not distort the nature of the rights which are restricted*.

This clause was introduced by the OSCE High Commissioner on National Minorities in 2001, after he achieved inclusion of this clause as Article 6 in the Language Act of Latvia. Thus, there are just two states in the world effectively constraining the scope of their national languages which are, at the same time, sole official languages. As the symbolic function of the national language was omitted, several state interventions in language matters seem to be arguable, such as swearing a compulsory oath in Estonian in the process of naturalization or a requirement for knowledge of Estonian by persons not in need of this in their work (as use of and proficiency in Estonian shall be justified and in proportion to the objective being sought). However, the European Court of Justice in 1987 upheld the requirement of the language qualification in light of the national policy of maintaining and promoting the use of the national language, which is, at the same time, the first official language, as a means of expressing national identity and culture. In the case Groener vs. Minister of Education, it stated explicitly: *The EEC Treaty does not prohibit the adoption of a policy for the protection and promotion of a language of a Member State which is*

both the national language and the first official language. Thus, such a constraint seems to be in discord with European Union policy, which does not prohibit protection and promotion of the national language of a Member State.

§ 2(3) of the Language Act states that measures for supporting foreign languages may not damage the Estonian language. The provision, taken from the European Charter of Regional and Minority Languages, is intended to ensure balance between the development and protection of the Estonian language and the support provided for foreign languages. The provision does not in any way reduce the right of national minorities to use, support or develop their languages. However, the scope of this remains vague, due to the constraint in Art. 2(2) that definitely prohibits state intervention in damaging the Estonian language if it is not in the public interest.

Articles 3 and 5 establish the status of Estonian as the national (official) language and a regional variety (local dialect), and define Estonian sign language, signed Estonian language, foreign languages and languages of national minorities together with their membership criteria. For this, the definition provided in the Act on Cultural Autonomy was used. There is no reference in the Act to either official or working languages of the European Union that are recognized as a special high-status group in the law of several European Union countries (cf. Latvia).

Art. 3(1) confirms the status of Estonian as the national language, in accordance with the Constitutional clause: *The official (national) language of Estonia is Estonian*. This is further clarified in several other articles, declaring it the language of state agencies and local government authorities, of majority state-owned companies, foundations established by the state and non-profit organizations with state participation (Art. 10(1)), as well as the language of service and command in the Estonian Defence Forces and in the National Defence League (Art. 10(2)). This requirement applies also to the language of reporting in Art. 14: *Agencies, companies, non-profit associations and foundations and sole proprietors which are registered in Estonia shall report in Estonian pursuant to the procedure prescribed by Acts* as well as to the language of seals, rubber stamps and letterheads of agencies, companies, non-profit associations and foundations and sole proprietors that are registered in Estonia (Art. 15) and the language of information (Art. 16).

A national language is not necessarily the mother tongue for the whole population and a home language for its residents. It is first and foremost an

integral part of the nation-building process, with official functions as the language of governance (working language of officials, language of official meetings and documents) and as the language of instruction at school and in further education. Traditionally, it has been the language of reporting, information and the media. Thus, the state allocates instrumental functions to the national language, operating as the common language through which it communicates with its residents, the third sector and private firms. In addition, the language acquires a symbolic function, adhering conscious values to a host of words and concepts relating to history and patriotism. Simultaneously it moulds language attitudes and beliefs, providing the basis for language loyalty and linguistic identity, constructing national culture and shaping the common medium of discourse.

Besides its status, the Language Act also regulates the quality of the Estonian language, thus bringing corpus planning issues to the level of the law. According to its corpus features, Estonian is legally divided into the Estonian Literary Standard, the language corresponding to good practice, local dialects and a non-standard language. The Act deals with these in Article 4, leaving non-standard language out of regulation. Article 4(1) maps the limits of official use and establishes the obligation to use Estonian Literary Standard for the agencies, bodies and persons concerned: (1) *Official use of language is the use of language by government authorities and state agencies administered by government authorities (hereinafter state agency) and of local government authorities and agencies thereof, the use of language in the documents, web pages, signs, signposts and notices of notaries, bailiffs and sworn translators and the employees of their bureaus or other agencies, bodies or persons authorized to perform public administration tasks. Official use of language shall be in compliance with the Estonian Literary Standard.*

The Literary Standard, defined as the system of spelling, grammar and lexical standards and recommendations (Art. 4(2)), concerns written language only. In the previous version the Literary Standard also included pronunciation, but this was omitted in the new Act due to the absence of an established norm. In Art. 1(2) of the 1995 Language Act, the Estonian Literary Standard was briefly mentioned, while all details were provided in a special government regulation. The separation and establishment of a distinct boundary between official and non-official use was the main challenge before. Due to several court cases on this matter, it was decided to clarify this issue in the Language Act.

Besides official language use, the good practice of the use of language is followed without sanctions for violation of it. This applies to texts aimed at the public that do not apply the requirement for official use of language, including the use of Estonian in the media. In the areas where local dialects are used, texts in these dialects are allowed as well, but these must be accompanied with texts of equal meaning that comply with the Literary Standard.

The Act also fosters the use of Estonian in technological planning. Art. 6(2), which states that *the government shall support the use of programmes (software) in Estonian that are aimed at a wide range of users and are educational*, aims to promote Estonian language versions of common educational software through both translation and obligation to purchase Estonian versions in state-financed deals. However, proposals made for the draft foresaw much more demanding wording and an active role of the state in this matter, requiring Estonianization of widespread software and domestic web pages as well as compulsory (machine) translation of cable TV programmes. Thus the Act, which turned out to be rather modest in this domain, was labelled 'the act for elderly people'.[39]

Article 18 regulates the translation of audiovisual works, television and radio programmes and advertisements. In the case of audiovisual works, a foreign language text must be accompanied by an adequate translation into Estonian in form and content. The method of translation (subtitling, dubbing, voice-over, etc.) is not specified in the Act. This leaves open the option that children's programmes might be sub-titled, not dubbed. In practice, this has not happened. There are several exceptions to this. A translation into Estonian is not required for language learning programmes or programmes that are immediately retransmitted or in the case of the newsreader's text of originally produced foreign language news programmes and of originally produced live foreign language programmes. In this case, the volume of foreign language news programmes and live foreign language programmes without the specified translations into Estonian may not exceed ten per cent of the volume of weekly original production. Nor is translation into Estonian required in the case of radio programmes that are aimed at a foreign language audience.

However, this leaves out the right to access to Estonian-language media, which are not accessible in some border areas. What's more, the sole media language offered in these areas (e.g. North-east Estonia near the

39 M Mihkla, 'Keeleseadus keskealistele', *Eesti Päevaleht* 19.08.2009.

border with Russia) is Russian, due to the composition of the local population, with a vast majority of ethnic Russians. Their language preferences and buying power influences the media market, including cable TV programmes and local radio stations.

The main human rights principle is given in Article 8, *Right to access public administration and information in the Estonian language in oral and written form*:

> *(1) Everyone has the right to access public administration in the Estonian language in oral or written form in state agencies, including the foreign representation of Estonia, local government authorities, notaries, bailiffs and sworn translators and their bureaus, cultural autonomy bodies and other agencies, companies, non-profit associations and foundations registered in Estonia*. This right is extended to *work-related information in Estonian to all employees and public servants, unless otherwise provided by law* (Art. 10(3)) as well as to consumers of goods and services who have the right to receive information and servicing in Estonian, according to Art. 17(1).

The exclusivity of national languages within the territory of the state moulds the new roles for other speech communities. If a group does not wish to assimilate or is not allowed to, it becomes a minority group in terms of political power and structural inequality, its identity often being defined by others while it nurses low self-esteem.[40] Therefore, minorities are faced with either following the path of mobility and opportunity or endangering the latter by emphasizing ethnicity and cultural identity. To balance these choices and provide special protection for (traditional) minorities, the Act contains several articles that regulate foreign (including minority) language use and communication. In Article 9(1) the right to use a national minority language is provided for: *In local governments where at least half of the permanent residents belong to a national minority, everyone has the right to approach state agencies operating in the territory of the corresponding local government and the corresponding local government authorities and receive from the agencies and the officials and employees thereof the responses in the language of the national minority beside responses in Estonian*.

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40 U Ozolins (1994) note 11 *supra*.

This is further expanded in Art. 11: *In local governments where the majority of permanent residents are non-Estonian speakers, the language of the permanent residents constituting the majority of the permanent residents of the local government may be used alongside Estonian as the internal public administration language of the local government on the proposal of the corresponding local government council and by a decision of the Government of the Republic*.

These articles are exact copies of the Constitution, as in the previous Act. However, due to financial circumstances these are difficult to apply, as the minority language may be used only as an additional language besides Estonian. Even more, localities with traditional minority settlements are bilingual as a rule and therefore do not need translation into the minority language for communication purposes. However, several towns with large monolingual Russian immigrant populations in North-East Estonia have asked for permission to implement this clause, but were refused it, as the population does not qualify as a national minority. To provide a solution to such difficulties, government bodies may be accessed also in foreign languages, according to Art. 12(4): *In oral communication with servants or employees of state agencies and local government authorities as well as in a foreign representation of Estonia and with a notary, bailiff or sworn translator or in their offices, a foreign language may be used by agreement of the parties*.

In addition to these options, several other language rights are provided in other Acts, such as the Act on Cultural Autonomy (cultural and educational language rights), the Act on Names (name rights) and several acts and regulations in education. There are also several functional domains that, according to a government regulation, may operate in a foreign language. These are tourism, foreign trade, customs, etc.

Chapter 5 establishes the requirements for proficiency in and use of the Estonian language. According to Article 23, public servants and employees of state agencies and of local government authorities, as well as employees of public legal entities and agencies thereof, members of public legal entities, notaries, bailiffs, sworn translators and the employees of their bureaus must be able to understand and use Estonian at the level needed to perform their service or employment duties. Employees in the private sphere must be proficient in Estonian to the level that is necessary to perform their employment duties, if this is justified by the public interest. These requirements, in force already from 1990, were taken from the previous Language

Act without modifications. The mandatory levels of language proficiency are based on the language proficiency levels defined by the Common European Framework of Reference for Languages compiled by the Council of Europe. The requirements for proficiency in the Estonian language do not apply to persons who work in Estonia temporarily as foreign experts or foreign specialists. More detailed information is provided in the corresponding government regulation.

In general, Regulation (EEC) 1612/68 of the Council (15 October, 1968) on freedom of movement for workers within the Community prohibits national rules which limit applications for, or offers of, employment to foreign nationals. However, the provision does not apply to 'conditions relating to linguistic knowledge required by reason of the nature of the post to be filled' (Article 3(1)) — an exception to the general rule in the regulation that entitles any EU national 'to take up an activity as an employed person, and to pursue such activity, within the territory of another Member State' (Article 1). A Commission Communication of 11 December 2002 on 'Free movement of workers — achieving the full benefits and potential' (COM (2002) 694 final) states that the language requirement must be reasonable and necessary for the job in question.[41]

9 · Names

Names are not regulated in the Language Act directly, as only references are provided to the corresponding Names Act, Commercial Code and Place Names Act. The Names Act was adopted on 15 December 2004. Under the Names Act, adopted in 2004, a personal name is written using Estonian-Latin letters and symbols and, if necessary, the transcription rules for non-Estonian personal names are used. The spelling of a non-Estonian personal name must be consistent with the spelling rules of the relevant language. In assigning and applying names to persons, the transcription rules for Estonian-Latin letters and symbols and foreign names are used as established in Government Regulation No. 61 (18 March, 2005).

Under the Identity Documents Act, if a person's name contains foreign letters, it is entered in a document according to the transcription rules of the

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41 Language requirements for employment: http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/languagerequirementsforemployment.htm

International Civil Aviation Organization (ICAO) and, if possible, the original letters are retained.

Although the Place Names Act requires that place names must be in Estonian, exceptions justified by reasons connected with history and cultural history may be made. It also provides for the possibility of establishing parallel place names. The principal and parallel name may be established in cases justified by reasons connected with history or cultural history in order to retain a place name in a foreign language in the case of places that already have a name in Estonian or for which a name in Estonian is going to be established. Place names in non-Latin alphabets are spelled in compliance with official character tables regulating transcription and transliteration.

10 · Language Inspectorate

Compliance with the Language Act is supervised by the Language Inspectorate (Art. 30), a competent government institution for checking the use of Estonian and foreign languages. The Inspectorate also oversees compliance with the requirements of proficiency in the Estonian language and the use of Estonian in the areas specified by law and on the basis thereof. It is the extra-judicial body that conducts proceedings in matters of breaches of the Language Act (Art. 38). About 2500-3000 inspection reports on supervision of compliance with the requirements of the Language Act are drawn up annually, of which a violation of the Language Act is found in 90% of cases. The large number of violations found by the Language Inspectorate is because inspection visits are conducted mainly when information about non-compliance has been received. Non-observance of the Language Act may result in warnings or written orders, depending on the supervisory actions and the extent of the non-observance. Fines too can be issued, based on the principles of the Administrative Procedures and Misdemeanour Procedures legal Acts. Decisions of the Language Inspectorate may be challenged in administrative tribunals.

In addition, some legal issues concerning linguistic discrimination and other linguistic rights fall under the jurisdiction of the Legal Chancellor and the Gender Equality and Equal Treatment Commissioner. Besides being the Guardian of constitutionality (his/her main function), the Legal Chancellor is also a protector of fundamental rights and freedoms and an

arbiter of discrimination disputes. Due to these functions, the Legal Chancellor receives 2-3 complaints on linguisticissues a year, which are, as a rule, ungrounded.

Possible cases of linguistic discrimination of minorities fall into the domain of competence of the Gender Equality and Equal Treatment Commissioner. The Commissioner has received 3 complaints on the grounds of language so far, however, these proved to be ungrounded.

11 · Language requirements in naturalization and long-term residence

In Estonia several social mechanisms and legal instruments are used in nation-building and establishing Estonian as the common language for the whole of society. For immigration, control was created with the Act on Immigration (already adopted in 1990) and the Act on Aliens (adopted in 1993). Under Art. 234 of this Act, a long-term residence permit is issued to the person who complies with the integration requirement, i.e. who has knowledge of the Estonian language to at least B1 level. However, this may be waived due to health problems (Alien Act Art 235).

Estonian citizenship has always been based on the principle of *ius sanguinis*. This meant that immigrants (including the Soviet period immigrants that constituted almost one-third of the population in 1991) had to go through the naturalization process, which requires B1 level knowledge of Estonian (of the Common European Framework of Reference for Languages[42]). In 1999, an element of *ius soli* was added to this policy, granting almost automatic citizenship to children born in Estonia from 1992 onwards (application by one's parents is all that is necessary in this case).

Since the re-establishment of Estonia's sovereignty in 1991, the initially heated debates on citizenship have cooled down.[43] According to Statistics Estonia,[44] 86% of the residents of Estonia are Estonian citizens, 6% are citizens of Russia, 1% are citizens of other states, while 7% are stateless. In rural areas, Estonian citizens account for 95% of the population, while in some towns around the capital and along the north-eastern border

42 CEFR, note 38 *supra*.
43 Hogan-Brun et al. note 18 *supra*.
44 Statistics Estonia, note 20 *supra*.

with Russia, Estonian citizens account for less than 50% of the population. The stateless group is on average older and consists mainly of Russian speakers who do not know Estonian, which means they cannot pass the language test required for acquiring citizenship.

Members of the younger generation have higher proficiency in Estonian and readily apply for Estonian citizenship. Naturalization in Estonia requires Estonian language skills at CEFR[45] level B1, which is commonly attained in primary school in the framework of compulsory education. Art. 8 of the Citizenship Act provides the requirements for knowledge of the Estonian language:

> (1) For the purposes of this Act, knowledge of the Estonian language means general knowledge of basic Estonian needed in everyday life.
> (2) The requirements for knowledge of the Estonian language are as follows:
> 1) listening comprehension (official statements and announcements; danger and warning announcements, news, descriptions of events and explanations of phenomena);
> 2) speech (conversation and narration, use of questions, explanations, assumptions and commands; expressing one's opinion; expressing one's wishes);
> 3) reading comprehension (official statements and announcements; public notices, news, sample forms, journalistic articles, messages, catalogues, user manuals, traffic information, questionnaires, reports, minutes, rules);
> 4) writing (writing applications, authorization documents, letters of explanation, curriculum vitae, completion of forms, standard forms and tests).

12 · Language regulation in education

One of the key roles of education is to provide general literacy and professional competence in the national language. As such, education is crucial for ensuring the development and status of the national language. Compulsory education is of fundamental importance here because of its impact on the use of the language in various domains.

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45 CEFR, note 38 *supra*.

According to the government documents *Estonian Language Development Strategy 2004-2010* (2004) and *Strategy for Integration in Estonian Society 2000-2007; 2008-2013*, language policies in Estonian education have the following goals:

— universal proficiency in the national language, including mastery of the literary standard, enabling employment in the Estonian language environment and access to higher education;
— maintenance of regional and non-territorial autochthonous languages by ethnic groups;
— integration of new immigrant children into the Estonian educational system.

The first step toward achieving these goals was the demolition of the segregated Soviet-period educational system that separated Estonian- and Russian-medium schools and used different curricula for each. Instead, various bilingual options based on the common national curriculum were introduced into Russian-medium schools to ensure that students achieve proficiency in the national language through meaningful education.

Language teaching in these and other types of schools is regulated by the corresponding laws. Under the Basic Schools and Upper Secondary Schools Act (Art. 9), in basic education (school years 1-9) any language may be the language of instruction. Under Art. 9(2) of the Act, the language of instruction is defined as the language in which more than 60% of the study takes place. The owner of a school (usually a local council) decides the choice of the language of instruction, taking into account the needs of the region and the state, ethnic composition, language skills and existing resources: availability of teachers and study materials, infrastructure, etc.

Education in basic schools can be acquired in Estonian, Russian, English and Finnish. In 81% of general education schools, the language of instruction is Estonian and in 14%, Russian. 4% of schools have departments with instruction in either Estonian or Russian; and in the remaining schools (1%), the language of instruction is English or Finnish. There are international schools in Tallinn and Tartu, as well as Jewish and Finnish schools in Tallinn and a Swedish school in Pürksi, which cater to the needs of local minorities and immigrants.

Under the Basic Schools and Upper Secondary Schools Act (Art. 9(3)), in a school or class where instruction is not conducted in Estonian, Esto-

nian language study is compulsory as of the first school year. At present, for ethnic Russians, the largest non-Estonian group, there are several options to meet this requirement: either Russian-medium primary school with bilingual teaching modules or Estonian-language immersion programs (early and late versions). For non-Estonian students, there is an option to enrol in an Estonian-medium school. For private schools the law is similar: Article 14 of the Law on Private Schools gives the owner of the school the right to determine the language of the school and requires the teaching of Estonian from the third grade.

The full implementation of language policy goals in education is facing several challenges, the first of which is the large number of pupils with Russian as a home language and their continuing isolation from Estonian speakers. At the end of the 1980s, more than 40% of the first-graders in Estonia chose the Russian-medium education track that provided only scant knowledge of Estonian.[46] In 1991, the share of pupils involved in Russian-medium education was 37%, in 2000 it was 28%, and in 2006 it was 20%. By the 2003/2004 school year in Estonia, there were 521 Estonian-medium schools, 87 Russian-medium schools and 25 bilingual schools. Currently, there are 27,000 pupils in Russian-medium schools, a number that is decreasing by 4-5% every year. In pre-school institutions, the share of Russian-speaking children is currently 20%, in primary education 19%, and in vocational training 31%.[47] The main reason for the drop in numbers is an extremely low birth rate (less than 3,000 children born to Russian-speaking families annually), resulting in a shortage of pupils and closure of schools. The second reason for the decrease in numbers is Russian parents' instrumental desire to place their children in Estonian pre-schools and schools in order to immerse them in the national language and thus increase their competitivity and career opportunities. This is reflected in the composition of pupils in Estonian-medium schools, in which one-sixth of the students are from language minority families.[48]

To improve the teaching of Estonian in Russian-medium schools, since 1996 Estonian has been taught from the first grade. Subject areas are taught mostly in Russian, but 60% of Russian-medium primary schools (grades

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46 Rannut (2009) note 29 *supra*
47 Ministry of Educationa nad Research, note 27 *supra*.
48 Ministry of Educationa nad Research, note 27 *supra*.

1-9) use Estonian as a language of instruction in certain subjects (history, geography, etc.), similar to partial immersion.[49]

Language immersion programmes also give a potential solution to the problem of Estonian as a second language. After several unsuccessful attempts in 1992 and 1995, a total immersion programme was launched in 2000 with the help of experts from Canada and Finland. Currently this program involves 12 schools. Currently, one in three Russian-speaking pupils attends either an early immersion (from grade 1) or late immersion (from grade 6) programme during his/her elementary school years.

To help maintain the national identity of pupils, schools in cooperation with the state and local authorities ensure that pupils in elementary education whose mother tongue is not the language of instruction in their school enjoy possibilities for studying their mother tongue and national culture. Government Regulation No. 154 '*The conditions and procedure for creating possibilities for the learning of the mother tongue and national culture for pupils who are acquiring basic education and whose mother tongue is not the language of instruction at school*' has been in force since 2003. Under the regulation, schools are required to organize the study of language and culture in at least two lessons a week as an optional subject for elementary-school pupils, as long as parents of at least ten pupils with the same mother tongue have submitted a written application to the Head Teacher. In recent years, Ukrainians, Lithuanians and Italians have used this opportunity and studied their mother tongue and culture as an optional subject within the school curriculum.

13 · Secondary, vocational and higher education

Under the Government regulation, as of the school year 2011/2012 Estonian upper secondary schools must ensure instruction in Estonian of at least 60% of the minimum compulsory curriculum to pupils entering the tenth school year. The transfer is flexible: five of the subjects to be taught in Estonian are determined at the national level and the schools themselves may choose the remaining subjects. In the school year 2007/2008, teaching of Estonian literature in Estonian was begun. Each year, one more subject taught in Estonian has been added.

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49 Ministry of Educationa nad Research, note 27 *supra*.

The main purpose of transfer to instruction in Estonian is to increase the competitive ability of Russian-speaking young people. Instruction in Estonian also helps to improve pupils' Estonian-language proficiency, which helps them in applying to higher educational institutions and studying in Estonian in those institutions, as well as in obtaining Estonian citizenship and finding employment. At the same time, current Estonian-as-a-second-language teaching strategies implemented in Russian schools have not brought about the required returns. Students of non-Estonian-medium primary schools are expected to acquire Estonian at the level B2 on the CEFR[50] scale, which will enable them to continue their studies or seek employment in the Estonian-language environment. However, only half of graduates reach this level annually.[51] This has forced 60% of the more talented graduates to continue their studies in small private universities offering Russian-medium education, which may lead to a further impasse. For the same reason, Russian students are over-represented in vocational schools: currently 32% of pupils in vocational education study in Russian. 50% of the groups offer instruction in Russian, preparing skilled workers for less popular professions (welders, locksmiths, etc). Under the Vocational Educational Institutions Act (Art. 18), the language of instruction at schools is Estonian but other languages of instruction may be used. The use of other languages is determined by the owner of the school, which in most cases is the Ministry of Education and Research. Currently, vocational education in Estonia can be acquired in Estonian and Russian; Russian is used in 21 vocational schools. According to Art. 22 of the Act, study of the Estonian language is compulsory at the secondary school level in vocational educational institutions where Estonian is not the language of instruction: in order to graduate from the school, the graduates who acquire secondary vocational education must pass the state examination in the Estonian language.

Under the Universities Act (Art. 22(8) and the Applied Higher Educational Institutions Act (Art. 17), the language of instruction at the level of higher education is Estonian. The use of other languages is decided by the council of a higher educational institution. Currently it is possible in Estonia to acquire higher education predominantly in Estonian and, to a lesser

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50 CEFR, note 38 *supra*.

51 National Exam and Qualifications Centre. Statistics. http://www.ekk.edu.ee/statistika/index.html

extent, Russian or English. In accordance with the Universities Act and the Applied Higher Educational Institutions Act, students whose proficiency in Estonian is not sufficient to complete the curriculum in Estonian may undertake intensified Estonian language study. In this case their nominal period of studies is extended by up to one academic year.

14 · Feedback on language policy

Language policy in Estonia is constantly monitored by domestic as well as international organizations and institutions. The Estonian Ministry of Foreign Affairs regularly submits reports on the implementation of various international human rights instruments to which Estonia has acceded and receives feedback in the form of observations, conclusions and recommendations from their committees. In most cases, international recommendations suggest maintaining the *status quo* for various ethnic and linguistic groups and their language skills. For example, the UN Human Rights Committee observes: *While noting the implementation of the 'Integration in the Estonian society 2000-2007' programme and the 'Estonian Integration 2008-2013' programme by the State, the Committee is concerned that the Estonian language proficiency requirements continue to impact negatively on employment and income levels for members of the Russian-speaking minority, including in the private sector. The Committee is further concerned at the fact that the confidence and trust of the Russian-speaking population in the State and its public institutions have decreased.*

The State should strengthen measures to integrate Russian-speaking minorities in the labour market, including professional and language training. It should also take measures to increase the confidence and trust of the Russian-speaking population in the State and its public institutions.[52]

The Committee on the Elimination of Racial Discrimination expresses a similar opinion: *While noting with appreciation the vision of the Estonian Integration Strategy, the Committee is concerned that the strong emphasis on the Estonian language in the objectives and implementation of the Strategy may run counter to the overall goal of the strategy by contributing*

52 Consideration of reports submitted by State parties under Article 40 of the Covenant. Concluding observations on Estonia. http://www.vm.ee/sites/default/files/CCPR-komisjoni_loppjareldused_ENG.pdf

to resentment among those who feel discriminated against, especially because of the punitive elements in the language regime.[53]

Simultaneously, insufficient progress in language acquisition and consequent inequalities within society are criticized. In 2010 the Advisory Committee of the Framework Convention for the Protection of National Minorities *expressed concern about separation between the majority population and the largest minority groups. Contacts between Estonians and the Russian-speaking population are relatively limited — about one third of Estonians have more than occasional contacts with the Russian-speaking population, and approximately half of the Russian-speaking population have the experience of daily contact with Estonians. Mostly inter-ethnic contacts exist at work, while communication networks outside work are ethnicity-centred.*[54] The same phenomenon of segregation left over from the Soviet period was pointed to by the OSCE High Commissioner on National Minorities during his visit in 2011. Segregation and insufficient or absent language skills may cause even more serious trouble. In its 2007 report the Committee against Torture *remains concerned by the fact that approximately 33% of the prison population is composed of stateless persons, while they represent approximately 8% of the overall population of the State.*[55]

In domestic discussion several other areas that need legal regulation have emerged. There have been several cases of alleged violations of public advertising and information, when oral announcements were made in shopping centres in a non-Estonian language or written information and advertisements were displayed in different languages on different sides of the board, which enabled effective concealment of the national language in mainly non-Estonian areas. Therefore, a more detailed regulation or guidelines for information seems to be necessary. There is also no legal obstacle to seemingly ungrounded foreign language requirements in private sphere

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53 Committee on the Elimination of Racial Discrimination. Seventy-seventh session, 2-27 August 2010. Consideration of reports submitted by State Parties under Article 9 of the Convention. Draft Concluding observations of the Committee on the Elimination of Racial Discrimination. Estonia.

54 *Estonia's Third Report on Implementing the Council of Europe Framework Convention for the Protection of National Minorities*. 2010 http://www.vm.ee/sites/default/files/Estonia_third_report2010.pdf

55 CAT/C/EST/CO/4 22 November 2007. Consideration of Reports submitted by State Parties under Article 19 of the Convention. Conclusions and recommendations of the Committee against Torture. Estonia.

employment. Complaints have also been filed over language choice in local government-financed hobby education (sports, music schools and courses, etc.), leading to alleged discrimination against Estonian speakers.

However, the main challenges seem to be unequal opportunities in education for graduates of non-Estonian schools: marginal Estonian language acquisition in basic schools at the elementary level, which makes integration problematic, and poor skills of Estonian revealed at national graduation exams, where the 60% score corresponding to the necessary B2 level is achieved by only half the non-Estonian students, restricting their employment and further education opportunities.

3

FRENCH IN QUEBEC: INTERNAL THREATS AND CHALLENGES

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SUMMARY: 1. Introduction. 2. Preserving and promoting French: the Charter of the French Language. 3. Preserving and promoting French: constitutional limitations. 4. Preserving and promoting French: What comes next? 5. Conclusion.

1 · Introduction

1. Canada has two official languages: French, which is spoken mostly in Quebec, and English, which is the common language used across the rest of the country. In the most recently published census, of 2006, the population of Canada was 32 million and 98% of the population could speak one or both of these official languages. There were 18 million Anglophones, 7 million Francophones and 6 million Allophones (in the Canadian context an allophone is a person whose mother tongue is neither English nor French). The figures also show that the number of Francophones had reached a state of constant decline (23% of the total) and that about 14% of Canada's French-speaking population lived outside the province of Quebec. The census also showed that in 2006 the speakers of Chinese languages together constituted the third largest group in Canada (note that at the time of writing this group may have become the second largest). In 2006 the population of the province of Quebec was about 7 1/2 million and

comprised six million Francophones, 587,000 Anglophones and 886,000 Allophones). Finally, we should note that while Quebec's Anglophone community had previously benefited from the almost total language transfer of Allophones to English, in 2006 this trend changed for the first time when 51% of Allophones were recorded to be adopting French as their main home language.[1]

2. As a medium-sized language community,[2] the French community in Canada has to compete with the formidable use of the English language not only in Canada but in the United States. In North America today, for every French language speaker there are 55 English language speakers. This article examines the legal measures being taken by the province of Quebec to preserve and promote the French language, it explains what are the main constitutional limitations restricting this action and it describes the challenges which French-speaking Quebecers will face in the future.

2 · Preserving and promoting French : the Charter of the French Language

3. Before 1977, when the National Assembly of Quebec adopted the *Charter of the French Language*,[3] English was the province's main language of commerce and the use of French was restricted to small businesses and was also the language of the cheap labour. Francophones did not play an important role in the economy[4] and immigrants in Quebec chose English as their common language and sent their children to English-speaking schools.[5] Generally speaking, French was only considered useful by the Francophone community. Today, however, the economic inequalities be-

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1 Statistics Canada, 2006 Census. For the language findings in the census, see the online document *The Evolving Linguistic Portrait, 2006 Census: Highlights* at www.statcan.gc.ca . Note that a new census was conducted during the summer of 2011 but that its data will not be available before 2012.

2 As defined by the workshop organizers.

3 Statutes of Quebec (hereafter, S.Q), 1977, c. 5; now Revised Statutes of Quebec (hereafter, R.S.Q.), c. C-11.

4 See the *Report of the Royal Commission on Bilingualism and Biculturalism*, Book III ('The Work World'), Parts 1, 2 and 3 ('Socioeconomic Status and Ethnic Origin'; 'The Federal Administration'; 'The Private Sector'), (Ottawa: Queen's Printer, 1969).

5 See the *Report of the Commission of Inquiry on the Situation of the French Language and Linguistic Rights in Quebec*, Book II ('Linguistic Rights'), (Quebec: Éditeur officiel du Québec,1972).

tween different social groups have been righted and this is surely Quebec's greatest triumph, especially in the area of its language policies which now dictate that immigrants should send their children to French-speaking schools.[6] But does this mean the Charter has created a new balance that truly favours the French language and can assure both the predominance of French and the presence of 'paix linguistique' in Quebec society?

4. Quebec's concern with the quality and status of French goes back many years. In 1961 the provincial government set up the French Language Bureau to promote the quality of the French language spoken in Quebec.[7] In 1969 it passed the *Act to promote the French language in Quebec*,[8] which was fiercely disputed because it gave parents the right to send their children to French or English schools according to their free choice. In 1974 and for the first time, French was declared the official language of Quebec and free choice in education was abolished.[9] And finally in 1977, the government passed the *Charter of the French language*.[10] Today, the structure of Quebec's French language policy is mainly based on the 29 regulations that were passed for the implementation of the *Charter* and on certain governmental policies or guidelines.[11]

5. Before we consider the content of the *Charter of the French Language*, it should be noted that in the period following its institution and even in recent years many of the *Charter*'s provisions were challenged before the courts and either invalidated[12] or amended. The text of the *Charter* constitutes a normalization of linguistic legislation and its approach is to address languages *per se*, not their speakers.

6. In its Preamble, the *Charter of the French Language* expresses the desire of the National Assembly of Quebec 'to make of French the normal and everyday language of work, instruction, communication, commerce and

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6 See the report by the Superior Council of the French Language entitled 'Le français, langue de cohésion sociale' — Avis à la Ministre responsable de la Charte de la langue française, 2008, published at www.cslf.gouv.qc.ca.

7 See the *Act on the Ministry of Cultural Affairs*, S.Q. 1960-61, c. 23, sec.13.

8 S.Q. 1969, c. 9.

9 The *Official Languages Act*, S.Q. 1974, c. 6.

10 See note 3 *supra*.

11 In 1996, for example, the provincial government adopted a policy regarding the use and the quality of French in government offices and legal contracts. At the time of writing there is also a policy regarding the use of French in new technologies. The text of these policies is published by the Secrétariat à la politique linguistique du Québec at www.spl.gouv.qc.ca.

12 See below, Part II.

business' and its intention to proceed 'in a spirit of fairness and open-mindedness, respectful of the institutions of the English-speaking community of Québec, and respectful of the ethnic minorities'. The *Charter* expressed Quebec's will to make French its common language and to create the instruments by which this might be achieved.[13] In Chapter I ('The official language of Québec'), section 1 declares that 'French is the official language of Québec'. In Chapter II ('Fundamental language rights'), sections 2-6 then describe Quebecers' rights to the following: 'to have the civil administration, the health services and social services, the public utility enterprises, the professional orders, the associations of employees and all enterprises doing business in Québec communicate […] in French (section 2); 'In deliberative assembly, […] to speak in French' (section 3); to conduct professional activities in the French language (section 4); 'to be informed and served in French' as 'consumers of goods and services' (section 5); and finally, where they are considered eligible, 'to receive [...] instruction in French' (section 6).

7. The first version of the *Charter* proclaimed that French was the only official language of the Quebec provincial legislature and courts but its provisions were invalidated by the Supreme Court of Canada.[14] The result is that today in Chapter III ('The language of the legislature and the courts'), while section 7 declares French 'the language of the legislature and the courts in Quebec', it then also lists the four constitutional limitations to this declaration: that 'bills shall be printed, published, passed and assented to in French and in English, and the statutes shall be published in both languages' (paragraph 1); that 'regulations [of the government...] shall be made, passed or issued, and printed and published in French and in English' (paragraph 2); that 'the French and English versions of [legislation] are equally authoritative' (paragraph 3); and finally, that either French or English may be used in judicial proceedings before the provincial courts and that judgment rendered by a court or by a quasi judicial tribunal shall, at the request of one of the parties, be translated freely into French or English (paragraph 4).

8. In Chapter IV ('The language of civil administration'), French is declared the official language of the provincial government. Texts and other

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13 To this end, the provincial government created the Commission de toponymie, the Office québécois de la langue française and the Conseil supérieur de la langue française (see sections 122, 157 and 185 respectively of the *Charter*, note 3 *supra*).

14 *Attorney General of Quebec v. Blaikie et al. (No.1),* (1979) 2 S.C.C. 1016; *Attorney General of Quebec v. Blaikie et al. (No.2),* (1981) 1 S.C.R. 312; *Quebec (Attorney General) v. Collier,* (1990) 1 S.C.R. 260; *Sinclair v. Quebec (Attorney General)*, (1992) 1 S.C.R. 579.

administrative documents are to be published in French, although the government may use other languages 'in relations with persons outside Quebec' or in notices sent to the Anglophone media and correspondence with individuals who have written to the government in English. The section then states that all the departments and agencies of the provincial government shall use French in written communications 'with other governments and with legal persons established in Quebec'. French is also declared the language of work and communication within the provincial government and is to be used in internal communications. To be appointed or promoted to a position in the government, a person must demonstrate French language competence. Furthermore, government notices must be in French except where English is required for 'reasons of public health or safety'. The provision of public services in certain cases may adopt an alternative language regime, however. This includes the government offices catering to municipalities with an English-speaking community of a certain size, public centres providing health and social services that are primarily addressed to Anglophones, and also school centres attended by the children of the Anglophone minority. These offices, centres and schools may post notices in both French and English and use French or English in their internal communications and in communications between each other. The right to government services in English is not made explicit in the *Charter* but the *Act Respecting Health Services and Social Services*[15] specifically confers on Anglophones the right to receive health and social services in the English language.

9. In Chapter V ('The language of the semipublic agencies'), French is declared to be the primary language of 'public utility enterprises' and 'professional orders', and these undertakings must be able to provide their services in French. Section 35 states that professional orders 'shall not issue permits except to persons whose knowledge of [French] is appropriate to the practice of their profession',[16] although exceptions are to be made for 'persons from outside Québec who are declared qualified to practise their profession' (section 37) and for professionals 'in a position that does not involve […] dealing with the public' (section 40) .

10. In Chapter VI ('The language of labour relations') the employers are required to use French in all written communications to employees and

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15 R.S.Q., c. S-4.2, sec. 15.

16 This requirement of the *Charter of the French Language* was found valid by the Supreme Court of Canada in *Forget v. Quebec (Attorney General)*, (1988) 2 S.C.R. 90.

collective agreements are to be drafted in French. Furthermore, employers may not dismiss or transfer an employee only because he or she has insufficient knowledge of a particular language other than French (note, however, that the *Charter* does not specify that knowledge of another language cannot be a prerequisite for employment, when required). Employee associations shall use French in written communications with their members as a group, although in correspondence with an individual member another language may be used. Any company employing 50 or more workers must conduct a francization programme to make French the language of work and will be issued a certificate when the use of French has been fully established at all company levels.

11. In Chapter VII ('The language of commerce and business'), the *Charter* declares that inscriptions on products (including menus and wine lists), directions for product use and product warranty certificates shall all be drafted in French. These French texts may be accompanied by translations in other languages but the translations 'shall not be given greater prominence than that in French' (section 51). Catalogues and commercial brochures are also to be drawn up in French. Computer programs and software must be available in French whenever this language version is available. Public signs, posters and commercial advertising must be in French but may be accompanied by translation in another language, provided that the French text 'is markedly predominant' (section 58). At this point, however, the *Charter* then provides numerous exceptions to the rule in cultural, religious and political contexts.

12. Finally, Chapter VIII ('The language of instruction') states that 'Instruction in the kindergarten and in the elementary and secondary schools shall be in French'. As stipulated by section 23 of the *Canadian Charter of Rights and Freedoms*, however, the *Charter of the French Language* does contain provisions allowing Anglophone parents to have their children instructed in English-language schools. And finally, section 89 states that where the *Charter* does not require the use of French exclusively, French and another language may be used together.

3 · Preserving and promoting French : constitutional limitations

13. As explained above, the *Charter of the French Language* has been the object of various legal challenges since its adoption in 1977 and this

has highlighted the limitations that the Constitution of Canada imposes on Quebec's authority in matters of French language promotion. What are these limitations? The first comes out from the distribution of powers as entrenched in the Canadian constitution. Canada is a federation of provinces and each level of government, federal and provincial, may make law within its own areas of jurisdiction. But the question of language is not enumerated as a head of power in the *Constitutional Act, 1867* and therefore is an area of concurrent jurisdiction. It means that each level of government may make law in those areas within their jurisdiction and regulate the language matters accompanying these laws as long as in doing so the legislation proposed does not contravene or violate an enshrined or constitutional right.[17]

14. Therefore in legislating to make French the official language of the province Quebec is incompetent to apply its laws to various undertakings which are subject to the jurisdiction of the Parliament of Canada, including federal agencies and crown corporations, banks, shipping lines, airlines, railways, radio and television companies and other undertakings engaged in interprovincial or international transportation or communication.[18] Instead, and because these undertakings are federally regulated, it is the Parliament that decides on matters of language legislation. Thus, for example, those provisions of the *Charter of the French Language* making French the language of Quebec's labour relations cannot be applied to some 300,000 employees working in undertakings under federal regulatory authority and located in Quebec. In other words, Quebec may make French its official language but at a federal level and under the Constitution and statutory law, French and English are both official languages.[19] Therefore and for federal purposes English and French have equal status and share equal rights and

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17 *Jones v . New Brunswick (Attorney General),* (1975) 2 S.C.R. 182; *Devine v. Quebec (Attorney General)*, (1988) 2 S.C.R. 790. For example and pursuant to sec. 91(27) of the *Constitutional Act, 1867*, the Parliament of Canada has exclusive jurisdiction in matters of criminal law, including criminal procedure, and it therefore also legislates in matters of the language in which criminal procedure is to be conducted. For an in-depth analysis of language and the division of powers in Canada, see the study *The Equitable Use of English and French before the Courts in Canada* conducted by the Office of the Commissioner of Official Languages, (Ottawa: Ministry of Supply and Services, 1995), at 11-14. This study is also available on the Commissioner of Official Languages website at www.ocol-clo.gc.ca. See also P W Hogg, *Constitutional Law of Canada* (Scarborough: Carswell, 2000), at 1048-151.

18 Hogg note 17 *supra*, at 1050. See *Air Canada v. Joyal,* (1976) S.C. 1211, at 1230 and *Association des Gens de l'Air du Québec v. Lang,* (1977) 2 F.C. 22, at 39.

19 *Constitution Act, 1982*, sec. 16; the *Official Languages Act*, R.S.C., 1985, c. L-1.

privileges in all institutions of the Parliament and of the Government of Canada, including those located in Quebec. The *Official Languages Act*[20] was first adopted by the Parliament in 1969 to promote French in Canada. At this time, the use of English in Quebec was widespread and French was almost entirely absent outside the province. Therefore, federal legislation today assures a minimum of visibility for the French language outside Quebec but, ironically, also competes with the *Charter of the French Language* in promoting equal status for French and English in Quebec.

15. Secondly and in regulating language matters falling within its jurisdiction, Quebec cannot contravene or violate the language guarantees that are enshrined in the Constitution and as they are interpreted and applied by the courts. What are these guarantees? The provisions of the *Charter of the French Language* regarding the language of the Quebec provincial legislature and the courts when first adopted in 1977 were held to be unconstitutional. Section 133 of the *Constitutional Act, 1867* imposes the compulsory use of French and English in the Parliament of Canada and in the Legislature of Quebec. This provision entrenches the right of members of the Parliament and of the National Assembly of Quebec to use English or French as the language of debate.[21] The Quebec Court of Appeal also observed that the Fathers of the Confederation intended to give Francophone residents the same opportunities to participate in parliamentary debates as Anglophone residents. In a reciprocal move, Anglophone residents were given the same rights in the Quebec provincial legislature. Therefore, documents drafted only in French and forming an essential part of bills presented to the National Assembly violated section 133 because an unilingual Anglophone voting on a given bill might remain ignorant of the content of the document.[22] Under section 133, the federal Parliament and the Quebec Legislature are obliged to keep their records and journals in French and in English and are also obliged to print and publish their laws in both languages. The Supreme Court of Canada has ruled that this obligation for statutory bilingualism shall apply to the printing and publication of legislative enactments as well as to the process by which legislation is adopted, with the latter requirement being implicit.[23] This obligation to use French

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20 *Ibid*.

21 *Attorney General of Quebec v. Blaikie et al., (No.1)*, note 14 *supra*.

22 *Quebec (Attorney General) v. Collier*, (1985) C.A. 559. See also *Reference re Manitoba Language Rights*, (1985) 1 S.C.R. 721.

23 *Attorney General Att.Gen. of Quebec v. Blaikie et al., (No.1)*, note 14 *supra*.

and English also extends to statutory instruments adopted by the government, by a minister or by group of ministers, and to those regulations that require government approval before they can be implemented.[24] Therefore, because the courts ruled that both versions of a legislative enactment are equally authoritative, Quebec cannot effectively make French the only official language of its legislation on any constitutional basis.

16. The limitation described above also applies to the language of Quebec's courts and tribunals. Section 133 of the *Constitutional Act, 1867* confers on all individuals the right to use French or English before the courts established by the federal Parliament or by the Legislature of Quebec. This right does not include the right to be understood directly without translation or to be answered orally or by writing in the language chosen.[25] This constitutional provision is seen as being a minimum and a Legislature may add to this minimum. For example and because the Parliament has authority to legislate with respect to criminal procedure,[26] the Criminal Code of Canada has been modified and now allows for criminal trials to be conducted in French or in English in any part of Canada, which of course includes Quebec.[27] So French and English may be used before civil and criminal courts in Quebec. And we should also remember that in Quebec, bilingualism in judicial proceedings is both a historical fact and a well established practice.

17. At the beginning of the period under discussion, the provisions in the *Charter of the French Language* regarding the language of commercial signs and advertisements were also held to be unconstitutional by the courts. When the *Charter of the French Language* was adopted, it declared that public signs and posters as well as commercial advertising in Quebec should be published in French alone and that only the French version of a firm's name could be used. Those provisions were declared unconstitutional because they infringed on Canadian citizens' fundamental freedom of expression as guaranteed under section 2 of the *Canadian Charter of Rights and Freedoms* and because these were not a limit that could be demonstrably justified in a free and democratic society.[28] By the same token,

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24 *Attorney General of Quebec v. Blaikie et al., (No.2)*, note 14 *supra*.

25 *MacDonald v. Montreal (City),* (1986) 1 S.C.R.460. See also *S.A.N.B. v. Association of Parents for Fairness in Education*, (1986) 1 S.C.R. 549.

26 See note 17 *supra*.

27 R.S.C., 1985, c. C-46, sec. 530-533.1.

28 *Ford v. Quebec (Attorney General),* (1988) 2 S.C.R. 712; *Devine v. Quebec (Attorney General),* (1988) 2 S.C.R. 790.

the Supreme Court of Canada also added that the legislative objective of promoting French and of protecting the 'visage linguistique'of Quebec society is a legitimate goal under the *Canadian Charter of Rights and Freedoms* and that this goal would be achieved not by prohibiting the use of languages other than French but by allowing French a marked predominance in commercial signs and advertisements.[29] For a short period after the decision of the Supreme Court of Canada in 1988, Quebec continued to impose this exclusive use of French by invoking the 'notwithstanding clause' found in section 33 of the Constitution Act, 1982. This clause can be used by a government to overcome a *Canadian Charter* decision taken by a court which strikes down one of their laws. The clause itself states that 'Parliament or the legislature of a province may expressly declare […] that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or section 7 to 15 of the *Charter of Rights and Freedoms*'. The same section then states that such a declaration is valid for a period of time not exceeding five years.[30] On the other hand, it must also be noted that when Quebec invokes this provision it paies the political price of provoking intense public protest, particularly in the rest of Canada. Today, as we have seen, it is the rule of the prominence of the French language that applies in this area.

18. Finally, certain provisions in the *Charter of the French Language* regarding the language of instruction have also been variously challenged before the courts.[31] Section 23 of the *Canadian Charter of Rights and Freedoms* confers on qualifying parents the right to primary and secondary education for their children in the minority language of their province of residence in any part of Canada, so that English is guaranteed in Quebec just as French is guaranteed in the other provinces and territories. The section also gives parents the right to receive and manage this education in publicly financed institutions.[32] And two further points should be noted: first,

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29 *Ford v. Quebec (Attorney General)*, see note 28 *supra*, at par. 61.

30 *Constitution Act, 1982*, sec. 33(3). But the provision may be re-enacted for an additional five-year period.

31 See *Attorney General of Quebec v. Quebec Association of Protestant School Boards et al*., (1984) 2 S.C.R. 66; *Solski (Tutor of) v. Quebec (Attorney General),* (2005) 1 S.C.R. 201; *Gosselin (Tutor of) v. Quebec (Attorney General),* (2005) 1 S.C.R. 238; *Nguyen v. Quebec (Education, Recreation and Sports),* (2009) 3 S.C.R. 208.

32 For a discussion regarding the rights conferred by sec. 23, see *Mahe v. Alberta*, (1990) 1 S.C.R. 342; *Arsenault-Cameron v. Prince Edward Island*, (2001) 1 S.C.R. 3; *Doucet-Boudreau v. Nova Scotia* (2003) 3 S.C.R. 593.

that Quebec's English-language minority already had its own educational institutions at the time of confederation (unlike the French-language minorities living outside Quebec) so that today this province has a formidable network of well-established public and private institutions providing primary, secondary and tertiary English-language education; and second, it was not until the 1970s that any legislation restricting access to English-language schools was enacted. Contrary to the situation prevailing in the rest of Canada, in Quebec the question of constitutional minority education guarantees is not about how adequate existing facilities are or even about having the right to manage and control education; the question is about access to education: because although even today French minorities in other parts of Canada may still be asking for educational services in their language, in Quebec it is not the Anglophone minority but the Francophones and Allophones who are demanding access to English-language schools.

19. Except as otherwise provided, the *Charter of the French Language* does not permit instruction in the minority language for children who do not qualify for minority-language education. Generally speaking, under the *Canadian Charter of Rights and Freedoms* qualifying parents have the right to send their children to English-language schools in Quebec and the 'Canada clause' was specifically enshrined in the *Charter of Rights and Freedoms* to invalidate the 'Quebec clause' contained in the *Charter of the French Language*.[33] Indeed, in 1977 when the *Charter of the French Language* was adopted, it provided that all children whose parents had received primary school instruction in English **in Quebec** had the right to English- language education in publicly funded schools in Quebec. The *Canadian Charter of Rights and Freedoms* adopted in 1982 gave this right to children whose parents had received primary instruction in English **in any province in Canada** (the 'Canada clause' as opposed to the 'Quebec clause'). Of course, the 'Quebec clause' was found to be inconsistent with the 'Canada clause' and held unconstitutional.

20. Members of Quebec's French majority and of the Allophone community succeeded in challenging the *Charter of the French Language* where it specified that only children who had completed most of their education in English in Canada and the siblings of these children should have access to publicly funded English-language education in Quebec. To deter-

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33 *Attorney General of Quebec v. Quebec Association of Protestant School Boards et al.*, note 31 *supra*.

mine whether a child qualified, the Quebec authorities calculated whether he or she had spent a longer period of time in the English school than in a French one. This strictly mathematical interpretation was ruled incompatible with the purpose of section 23(2) of the *Canadian Charter of Rights and Freedoms*. According to the Supreme Court of Canada in the case of *Solski*,[34] the framers of the *Canadian Charter* intended that this guarantee should 'provide continuity of minority language education rights, to accommodate mobility and to ensure family unity'.[35] Section 23(2) does not specify what period of time a child needs to have spent in a minority language school in order to benefit from the constitutional guarantee. What it does require is that the child should have experienced a significant proportion of his or her educational pathway in the minority language and the question it asks is this: Does the child intend to adopt the minority language as a language of instruction? The *Solski* ruling thus created a new category of school child: the child entitled to access to the official language minority schools. And this now means that in Quebec the constitutional guarantee in matters of education not only provides for members of the official language minority, as it was originally designed to do, but also for members of the French majority and the Allophone community. What is certainly clear is that this ruling is not concerned Quebec's intentions to promote French.

21. The last case deals with the phenomenon of Quebec's so-called 'bridging-schools', a phrase referring to the particular use made of a non-subsidized English-language school. The case involved a group of parents whose children were not entitled to receive publicly funded education in English under section 23 of the *Canadian Charter* and who therefore decided to enrol their children in a private unsubsidized English-language school for a short period of time (few months) and after ask Quebec's Ministry of Education for permission to enter a publicly funded English-language school. One result of this was that the *Charter of the French Language* was amended in 2002[36] to stipulate that time spent in a non-subsidized English-language school could not help to grant a pupil access to a subsidized English-language school. The amendment was held unconstitutional, however, because according to the Supreme Court of Canada in the case of

34 See note 31 *supra*.
35 *Ibid*. at par. 30.
36 *An Act to Amend the Charter of the French Language*, S.Q., 2002, c.28, sec.3.

Nguyen,[37] section 23 of the *Canadian Charter* does not specify whether the education previously received or being received has to be private or public. This decision, one could argue, reflects the Supreme Court's insensitivity to the reality of Quebec, its analysis only brushing the surface of the province's language dilemma and failing to consider the linguistic imbalance between Quebec and the rest of Canada. Quebec's system of private education has no equivalent in any other province. And as noted above, the Francophones and Allophones are the ones who are fighting for access to English-language schools, not the Anglophone minority.

22. The Quebec government could easily stop the use of English-language schools as bridging-schools simply by applying to them the *Charter of the French Language* that already applies to public and private subsidized schools. But it has refused to do so and has chosen another solution. Very recently, at the time of writing, the Quebec government adopted a statute that complies with *Nguyen* and now the period of time a child has spent in a non-subsidized English-language school can be used to determine whether he or she should have access to a publicly funded English-language school.[38] In other words, Francophone and Allophone parents who have the money can now effectively buy a constitutional right. The Supreme Court even indicated how the children of such parents might be granted access to the publicly funded English-language school system by proposing that they might spend a short period of time in an English-language school that simply did not advertise itself as a bridging school. In Quebec, the free choice of the language of instruction already exists at post-secondary and university levels. With the *Nguyen* ruling, free choice at primary and secondary levels of education must be added for those parents who can initially afford to send their children to a private, non-subsidized English-language school for one year or two years.

23. The Supreme Court's interpretation of section 23 of the *Canadian Charter* is mainly based on the need to protect linguistic minorities across Canada and not on Quebec's right to protect and promote its language and culture. Generally speaking, the approach taken by the Supreme Court in language matters is to treat official language minorities equally, whether the minority in question is Quebec's Anglophone community or the Francophone communities in the rest of Canada. But as proposed above, this

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37 See note 31 *supra*.

38 *An Act Following Upon the Court Decisions on the Language of Instruction*, S.Q., 2010, c. 23.

approach does not properly observe the reality of the situation. The status of Francophones living in other Canadian provinces is precarious and cannot be compared with the comfortable position of Anglophones in Quebec because the two groups are simply not on an equal footing. Except in certain cases,[39] the Supreme Court has constantly ruled against Quebec's policy in matters of language by putting the rights of individuals before Quebec's collective needs to protect its culture. For example, the general purpose of section 23 of the *Canadian Charter* is to counter the assimilation of linguistic minorities.[40] The fact is that assimilation has endangered the Francophones outside Quebec rather than the Anglophones in the province. Quebec wants to integrate immigrants in its French educational system but the Supreme Court's ruling in *Nguyen* has effectively shelved such intentions. While English-language schooling should be reserved for the members of Quebec's Anglophone minority, Anglophone education is gradually becoming an immense immersion system for Francophone and Allophone school children.

4 · Preserving and promoting French: What comes next?

24. At the time of writing, in the province of Quebec and particularly in the Montreal area (which is home to half of Quebec's entire population), when two speakers of different languages want to communicate with each other they use English. Even if French is the official language, the most frequently used common language in the province is English. In short, French is the official language but Quebec remains largely bilingual. How, then, can French really be made the common language?

25. First, the *Charter of the French Language* needs to be properly implemented. Although the *Charter* declares French the government's official language, in many areas services are still systematically offered in both French and English, which means that service users feel free to choose the language in which they respond to or correspond with the government; and although the law stipulates that Montreal is a French-speaking city,[41] municipal services are generally provided bilingually. The pretext for this,

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39 See *Ford v. Quebec (Attorney General)*, note 28 *supra*.
40 *Mahe v. Alberta*, note 32 *supra*.
41 *Charter of the Ville de Montréal*, R.S.Q., c. C-11.4, sec.1.

a literal interpretation of the *Charter*, is that since this text does not prohibit the use of languages other than French.[42] there is nothing actually forbidding the use of English with French. But while in strictly legal terms this may be so, it surely goes against the purpose and objectives of the *Charter of the French Language*. In public services, it is normally the user's duty to adopt the service's language rather than the service's duty to adopt the user's. Except in the case of health and social services and in the case of the bilingual institutions provided for by the *Charter*, French should be truly made the language of the Quebec government.

26. Because of Canada's experience of population ageing and its low birth rate, immigration is essential for both the country as a whole and for Quebec. As observed above, in the course of history Quebec's Anglophone minority has benefited from the language transfer of immigrant communities towards English.[43] Even today, 35 years after the *Charter of the French Language* first came into force, barely half of the total immigrant population has chosen French as its common language.[44] But what this also means is that the other half has chosen English. This high newcomer transfer rate has much to do with the attraction, in social and economic terms, that English exerts and that French does not. In the rest of Canada, 97% of all immigrants adopt English as their common language.[45] The fact that many more immigrants already speak French as their mother tongue or have a good knowledge of the language explains the increase in the number of immigrants choosing French in Quebec. A recent report shows that in the near future, people on the island of Montreal whose mother tongue is French will be a minority group not because of an increase in the Anglophone population but because of an increase in Montreal's Allophones.[46] At the time of writing, 50% of all Montrealers are Francophones, 17% are Anglophones and 33% are Allophones. This may not mean that immigra-

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42 *Supra*, par.12.

43 See *supra*, par. 1.

44 See the study by the Office québécois de la langue française titled *Rapport sur l'évolution de la situation linguistique au Québec, 2002-2007* and the *Synthèse du rapport* at www.oqlf.gouv.ca/ressources/sociolinguistiques/index_indic.html.

45 See C. Quell, *Official Languages and Immigration: Obstacles and Opportunities for Immigrants and Communities*, (Office of the Commissioner of Official Languages: Ottawa, 2002), at www.ocol-col.gc.ca/docs/e/obstacle_e.pdf.

46 See the study by the Office québécois de la langue française titled *Rapport sur l'évolution de la situation linguistique au Québec, faits saillants du suivi démolinguistique*, September 2011 at www.oqlf.gouv.qc.ca/etudes2011/20110909_faits_saillants.pdf.

tion as such is a threat to the French language, but one might argue that greater attention should be paid to educating new immigrants. If Quebec wishes to integrate newcomers in its culture and language, then it must pay attention to the languages being spoken in the workplace and in education. Clearly, these are the two places where immigrants can properly integrate in a society.

27. Francization programmes[47] under the *Charter of the French Language* have been effective in workplaces and these constitute a clear incentive for the use of the official language. But such programmes can only be implemented in businesses employing 50 or more than 50 workers and cannot be conducted in smaller undertakings. Should all businesses with a workforce of over three employees be required to comply with a francization programme? Does the government need more power and money in order to efficiently enforce the *Charter* in the workplace? These questions should be raised. In the Montreal area and according to a survey conducted in 2011,[48] it is easier for unilingual English speakers to find work than the people in other language groups. Knowledge of English also appears to be a very common condition for securing employment, whatever post is being offered. When served in English, Francophones switch to that language rather than insisting on being served in French. And while the Quebec government asks French-language schools to give French lessons to newcomers, at the same time it pays for immigrants' English-language tuition because English is often required for those applying to work in companies.[49]

28. Although the use of the French language in education is supposed to be normalized, freedom of choice regarding the language of instruction remains the rule for Quebec's 'collèges d'enseignement général et professionnel' (the institutions providing post-secondary education) and for its universities. According to certain surveys, 7% of all Francophone students and 60% of Allophones enrol in English-language 'colleges' or universities after completing their secondary education in French[50] and indeed, the largest college in the province of Quebec is an Anglophone institution. In Quebec society, there is real confusion between the notion of bilingualism

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47 See *supra*, par. 10.

48 See R Dutrisac, *Le français n'est pas nécessaire dans un grand nombre d'entreprises à Montréal*, Le Devoir, October11 and 12, 2011.

49 *Ibid*.

50 See the study by the Office québécois de la langue française, *supra*, note 44, at 18-20.

as a personal characteristic of individual citizens and bilingualism as a collective trait of a community that operates bilingually. Nobody argues against learning a second language and in French-language primary schools English is taught as second language from the pupils' first year onwards. If in this globalized world English exerts such a major attraction,[51] even here in Catalonia, then one can imagine its strength in Quebec, in North America. If bilingualism is to be promoted at schools on the principle that people need to have a second language, does this mean that Quebec society itself should operate bilingually? Which language should be promoted in Quebec: French or English? At the present time, the real message that the federal government and Quebec are sending out is that as a newcomer to the province you can choose between English and French. Considering Quebec's location in North America and the public's attraction to English as the international language of success, we believe that the provincial government should make French the object of a permanent promotion policy.

5 · Conclusion

29. Above all, we would argue, the problem in Quebec today is that the provincial government and the Francophone community do not have the desire to make French the province's everyday language of communication as well as its official language.

Francophones seem to be more preoccupied with learning English, the language of prestige, than with the quality of the French that is learnt and spoken in their schools. And beyond the Quebec, the *Charter of the French Language* (or Bill 101, as it is often called) is probably the most hated law in all Canada and has provoked general condemnation as an act of separatist legislation that violates individuals' rights and attacks English without any valid reason. Quebec is not unaware of this animosity and, when communicating with Allophones or Anglophones, many French-speaking Quebecers feel much more comfortable choosing English rather than insisting on their native French. Probably for the same reason, the Quebec govern-

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51 Globalization means more and more hegemony of the English language. See S K Sontag, *The Local Politics of Global English: Case Studies in Linguistic Globalization*, (Oxford:Lexington Books, 2003).

ment prefers to convince rather than pursue when dealing with those who contravene the *Charter*. Indeed, from various quarters in Quebec the opinion has been voiced that there is no political will to really implement the *Charter of the French Language* and to build a truly French-speaking society in North America. To sum up, Quebec is caught between two stools regarding its constitutional status: Canadian federalism and sovereignty. And the same would appear to be the case with the status of the French language on its territory.

4

SUSTAINABILITY OF MEDIUM-SIZED LANGUAGE COMMUNITIES IN THE AGE OF GLOBALIZATION: THE CZECH LANGUAGE

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SUMMARY: 1. Characteristics of the language. 2. Issues of internal origin. 3. Issues of supranational origin. 4. Issues of international origin. 5. Legal Measures. 6. Conclusion.

1 · Characteristics of the language

The Czech language belongs to the group of West Slavic languages. It is spoken by about 10 million people in the Czech Republic[1] and by about 200,000 people in other countries, mostly emigrants who left the country during the two world wars and the subsequent period of communist rule, and the children of these emigrants. Since the Czech Republic joined the European Union, the number of Czech-speaking migrants has grown only slightly. Many Czech speakers can be found in Austria (in Vienna) and in Poland, Germany, Ukraine, Croatia and Romania. About 90,000 speakers also live in the US and there are Czech speakers in Australia and Canada. Tens of thousands of Czech speakers live in Slovakia as the people who remained in that country after the dissolution of the Czech-Slovak Federation in 1993.

1 Data from the Czech Statistics Office, www.czso.cz/csu/redakce.nsf/i/obyvatelstvo_lide.

2 · Issues of internal origin

The status of the Czech language has to be seen in the context of the modern history of the Czech State.

The Czech Lands were part of the Austro-Hungarian Monarchy until 1918. During the earlier period of the Monarchy, Czech was mainly spoken in rural areas and had to compete with German. In 1880, however, its institutional use was officially recognized by 'Stremayer's Administrative Language Ordinance', issued by the Austrian government of Eduard Taaffe in Bohemia on 19 April and in Moravia on 28 April. This ordinance guaranteed Czech's equal legal status with German in any correspondence addressed to government officials and obliged these officials to answer letters in the language in which they had been written,[2] even while internally, government officials continued writing to each other in German.

With the foundation of the independent state of Czechoslovakia in 1918, Czech became an official state language and Law No. 122/1920 Coll., based on Article 129 of the *Constitutional Bill*, proclaimed the 'Czechoslovak language' an official language of the Republic (see § 1). With regard to other languages, the 1919 Treaty of St. Germain-en-Laye[3] ruled that a national minority living in a territory where more than 20% of the population spoke this minority's language was to be assured the right to use that language to communicate with the government in that territory (see § 2). This provision, criticized for the complicated procedure its implementation required (dividing the right to deal with the government in three categories according to the number of speakers in the administrative districts[4] in question) was mainly applied to the German- and Hungarian-speaking minorities living in Czechoslovakia's border areas.

Since World War II from the geographical point of view, the Czech language has co-existed with other languages in the following way: on the one hand, in the area of the Republic that is surrounded by what were three and are now two, mostly German-speaking states (Federal Republic of Germany, German Democratic Republic and Austria), German is mainly present as a foreign language; and on the other hand, in the area of the country border-

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2 O Urban, *Česká společnost 1848-1918* (Prague, 1982), at 326-331.

3 *Treaty of Peace between the Allied and Associated Powers and Austria; Protocol, Declaration and Special Declaration*, St. Germain-en-Laye, 10 September 1919.

4 R Petráš *et al*., *Menšiny a právo v České republice* (Prague, 2009), at 81.

ing the Slavic-speaking country of Poland, the contact with Polish actually comes mostly from the Republic's own Polish-speaking minority (in a 2001 census, Polish nationality was reported by 51,968 respondents, most of whom lived in the Republic's Moravian-Silesian region[5]). As for other languages, Czech's most intense contact continues to be with Slovak, the state language of the neighbouring Slovak Republic. Together with the Czech Lands, Slovakia was part of the common state of Czechoslovakia from 1918 until the dissolution of the Federation in 1993. Slovak was taught in the school curriculum and was present in the media and in culture. Even after the dissolution of Czechoslovakia, mutual intelligibility between Czech and Slovak remained very high and continues to be high today, with an overlap of at least 95%. Finally, relations between the two countries and languages are also still very intense. For example, many Slovak students study at Czech universities; and in Slovakia, the Czech language can be used and is actively used in official correspondence.

3 · Issues of supranational origin

The Czech Republic joined the European Union in 2004, together with a larger group of former communist countries.[6] The Czech language became one of the single original languages in the binding version of the EU Treaties (Article 55 of the *Treaty on European Union, TEU* [ex Article 53]).[7] At the same time, it became one of the working languages of the organs of the Union, regulated by Article 342 of the *Treaty on the Functioning of the European Union*[8] and by Article 1 of the document *Regulation No. 1 Determining the Languages to be Used by the European Economic Community*, of 1958, in its amendment[9] declaring the Czech language as one of the official and working languages of the institutions of the Union.

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5 The European Charter for Regional or Minority Languages, Initial Periodical Report, Czech Republic, MIN-LANG/PR (2008) 4, p. 27.

6 ABl. EU 2003 L 236.

7 OJ 2010/C 83/0, 30 March 2010: 'This Treaty, drawn in up in a single original in the […] Czech […] languages, the texts in each these languages being equally authentic…'.

8 Article 342: 'The rules governing the languages of the institutions of the Union shall, without prejudice to the provisions contained in the Statute of the Court of Justice of the European Union, be determined by the Council, acting unanimously by means of regulations'.

9 OJ L 17, 6.10.1958, OJ L 236, 23.9.2003. Article 1: 'The official languages and the working languages of the institutions of the Union shall be […] Czech …'.

As such, in the articles below Article 1 of the *Regulation* document, the use of Czech was also guaranteed in the following procedures: the drafting of documents to be submitted to the institutions of the Union (Article 2); the reception of documents sent by institutions of the Community (Article 3); the drafting of regulations and other documents of general application (Article 4); and the publication of the *Official Journal of the European Union* (Article 5).

The *Rules of Procedure* of the three courts of the Court of Justice of the European Union reflect the rules for language use laid down in *Regulation No. 1* of 1958 and, therefore, the rules for the use of Czech. Based on Article 7 of the 1958 *Regulation*, the first of these courts, the Court of Justice, applies Articles 29 to 31 of its *Rules of Procedure*, which state that the languages of a case can be any of the official languages, including Czech, and that the language of a case can be chosen by the applicant with exemptions defined by subparagraphs 2 (a), (b) and (c) of Article 7. Parallel provisions are made for proceedings before the second of these courts, the General Court, (Articles 35 to 37 of its *Rules of Procedure*) and before the third, the Civil Service Tribunal (Article 29 of its *Rules of Procedure*). In the preliminary ruling procedure, the language is the one used by the national court or tribunal which made the reference. And the choice of language is binding not only on the parties, but on any third parties who are granted leave to intervene.

Czech's inclusion in the family of 'official languages' of the European Union with the same legal status as much more numerically powerful languages (English, German or French) has clearly benefitted the perception of the Czech language within the Republic. At the same time, Czech citizens are aware that they should improve their knowledge of foreign languages in order for the country's businesses to participate more effectively in the exchange of goods with other European States and for Czech workers to move more easily within the EU and exercise other such EU rights. These are complementary processes and do not pose any threat to the Czech language.

4 · Issues of international origin

The Czech Republic has ratified most of the international legal instruments aimed at protecting human rights, including language rights. It is

party not only to those treaties which strengthen the status of the Czech language in specific international structures, such as the European Court on Human Rights, but to those aimed at the protection of Czech in foreign countries.

Czech may be used in the initial stages of proceedings before the European Court of Human Rights. The Czech Republic became member of the Council of Europe on 30 June 1993. However, as a successor state of former Czechoslovakia, it had already been party to the *European Convention on Human Rights* — the basis on which the European Court of Human Rights was established, under Article 19 of the *Convention* — since 18 March 1992 (No. 209/1992 Coll.). The Court's official languages are English and French (Rule 34, paragraph 1 of the *Rules of Court*)[10] but if it is easier for the complainants, they may write to the Registry in Czech as an official language of one of the states that ratifies the *Convention*. During the initial stage of the proceedings, complainants may also receive correspondence from the Court in Czech. However, if at a later moment the Court asks the government to submit written observations on complaints, all correspondence from the Court will be sent to the complainants in English or in French and, in principle, their representative will also be required to use English or French in subsequent submissions.[11]

Czech is protected abroad under the regional *Framework Convention for the Protection of National Minorities*, which was ratified by the Czech Republic on 18 December 1997 and came into force on 1 April 1997, and under the *European Charter for Regional or Minority Languages*, which was ratified on 15 November 2006 and came into force on 1 March 2007. Both instruments guarantee the use of Czech in Austria, Croatia, Romania, Slovakia and other European countries.[12]

A network of bilateral treaties with mostly neighbouring countries specifies the nature and degree of this protection. The 1991 *Treaty between the Czech and Slovak Federal Republic and the Republic of Poland on Good Neighbourliness, Solidarity and Friendly Cooperation* (No. 416/1992

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10 *Rules of Court*, 1 April 2011.

11 *Documentation for persons wishing to apply to the European Court of Human Rights*, www.echr.coe.int/ECHR/EN/Header/Applicants/Apply+to+the+Court/Application+pack/., also P van Dijk *et al* (eds.), *Theory and Practice of the European Convention on Human Rights* (2006), at 100 ff.

12 J Vaculík, *České menšiny v Evropě a ve světě* (Prague, 2009), at 320 ff, see also http://languagecharter.eokik.hu/byLanguage.htm.

Coll.) regulates the language rights of the Czech-speaking national minority living in Polish territory (Article 8). The *Treaty on Good Neighbourliness and Friendly Relations* of 27 February 1992 between Czechoslovakia and the Federal Republic of Germany (No. 521/1992 Coll.) supports the development of the Czech language in Germany (Article 21). The 1992 *Treaty between the Czech Republic and the Slovak Republic on Good Neighbourliness, Friendly Relations and Cooperation* (No. 235/1993 Coll.) guarantees legal protection and support for the national minorities which were constituted in the wake of Czechoslovakia's dissolution, meaning the Czech-speaking minority in Slovakia and the Slovak-speaking minority in the Czech Republic. Article 8 of the *Agreement between the Government of the Czech Republic and the Government of the Russian Federation* (No. 188/1996 Coll.) provides the basis for sending teachers of Czech to Russia, especially to the area of Novosibirsk. The 2001 *Agreement between the Government of the Czech Republic and the Government of the Republic of Croatia on Cooperation in the Fields of Culture, Education and Science* (Notice No. 47/2002 Coll.) guarantees the language rights of the Czech minority in Croatia.

Officially, the position of the Czech language abroad is supported by the Czech Centres, a series of institutions that depend on the Ministry of Foreign Affairs of the Czech Republic. The Centres promote the Czech language in foreign countries and contribute to the dissemination of Czech culture around the world. Czech is also promoted by private initiatives such as *Czech Dialogue*, a monthly magazine for Czechs living in the Republic and abroad. One of the first privately owned magazines to appear in post-1989 Czechoslovakia, *Czech Dialogue* strives to provide a platform for the exchange of opinions, experiences and life stories of people of Czech and Slovak origin all over the world. This magazine is internationally distributed to many Czech organizations and private subscribers.[13]

5 · Legal Measures

The Czech legislature makes a number of statutory provisions for the protection of the Czech language, even while the *Constitution* does not

13 www.cesky-dialog.net/ceskydialog.php.

safeguard its use[14] or grant it a specific status, and there is no specific legislation on language protection as such.

Several statutory laws require the use of Czech as an official language in specific proceedings: the *Act on Taxes* (No. 586/1992 Coll., as amended) states that both Czech and Slovak shall be official languages for correspondence with the government tax offices; and the *Act on Lotteries* (No. 202/1990 Coll., as amended), the *Act on Trade* (No. 455/1991 Coll., as amended) and the *Act on Social Services* (No. 582/1991 Coll., as amended) all state that Czech shall be a language of proceedings. Finally, the *Consumer Act* (No. 634/1992 Coll., as amended) requires the submission of a text in Czech on all products sold on the territory of the Czech Republic.

Others laws attribute specific legal consequences to the knowledge of the Czech language: the *Law on the Acquisition and Loss of Citizenship* (No. 40/1993 Coll., as amended) stipulates the command of Czech for Czech citizenship; and the *Law on the Permanent Residence of Foreigners* (No. 326/1999 Coll., as amended) requires the knowledge of the Czech language at CEFR level A1[15] from those seeking a residence permit on Czech soil. This second requirement affects thousands of people living in the Republic: in May 2010, the Ministry of the Interior registered 426,749 foreigners on the territory of the Czech Republic, of which 30% were Ukrainians, 17% were Slovaks, 14% were Vietnamese, 7% were Russians and 4 % were Poles.[16]

The 2004 *Law on Education* (No. 561/2004 Coll., as amended) states that the Czech language is the general language of instruction. At the same time, § 13 of this law states that national minorities shall have the right to be educated in their own language and that, in tertiary professional schools, the Ministry of Education may also allow instruction in a language other than Czech. The Ministry of Education also leads specific projects aimed at teaching foreigners the Czech language as a language of communication.[17]

This very liberal perception of the Czech language as a natural means of communication on the territory of the Czech Republic is sometimes subject to criticism and has prompted parliamentary activity of different kinds. Since 1990, there have been three parliamentary attempts to introduce spe-

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14 For example, see C Zwilling, 'Minority Protection and Language Policy in the Czech Republic', *Noves SL. Revista de Sociolinguistica*, autumn 2004, at 3.

15 See Order No. 348/2008 Coll.

16 www.czso.cz/csu/cizinci.nsf/kapitola/ciz_pocet_cizincu.

17 www.cizinci.cz/clanek.php?lg=1&id=433.

cial legislative provisions aimed at protecting the Czech language. On the first occasion, in 1993, and by Decree No. 67 of 17 January 1996, the government refused to pass a bill submitted by a group of deputies[18] on the *Law on a State Language of the Czech Republic and the Languages of National Minorities*. The government defended this refusal to codify the language law and to proclaim the Czech language a state language by pointing out that dangers would be involved in 'creating space for the politicization of this matter'. Moreover, the government described the regulation of the use of the Czech language in specific laws as proper. It did not share either the deputies' view of the immediate danger for the Czech language or their concern about the effects of an inadvisably intense use of foreign languages on the country's socio-political life. The government's main argument was that the bill would reduce the rights of national minorities.

On the second occasion, in 1999, the Government rejected another bill submitted by members of parliament on a *Language Law*.[19] In Decree No. 944 of 15 September 1999, it argued that the concept behind the bill was inherently flawed because the level of protection already afforded to the Czech language by other laws was sufficient for the country's needs at that time. It proposed that the bill contained unnecessary declaratory provisions, such as the requirement that the state should guarantee and support education in Czech and the study of Czech in foreign countries. Furthermore, it argued, a large number of proposed standards chose not to recognize the real standard at that time, such as the position of Czech as a language of instruction.

On the third occasion, in 2002, members of parliament submitted a draft intended to amend the Czech *Constitution*.[20] In this, a new provision (Article 14 a) stated that the Czech language was a 'national language of the Czech Republic and an official language of all the organs of state power of the Czech Republic' (paragraph 1), that the state should be obliged 'to minister to the Czech language' as a part of the state and of national identity (paragraph 2) and that the rights of those citizens of the Czech Republic belonging to national and ethnic minorities should remain inviolate (paragraph 3). Again, the government overruled the bill and stated, in Decree No. 1189 of 26 November 2003, that while comparable provisions had

18 Parliamentary Print No. 2018.
19 Parliamentary Print No. 319.
20 No. 1/1993 Coll., as amended.

been adopted by certain European constitutions, the bill remained problematic in the context of the Czech Republic's internal conditions: that the *Preamble* of the Czech *Constitution* is concerned with the civic rather than national basis of the Czech State. Doubts remain as to whether the draft fully respected the rights of national minorities to use their languages. Furthermore, its proposal that the state should assume legal responsibility for the cultivation of the language is unusual, given that this is typically a professional and pedagogical matter and is dealt with, among other things, by the Czech Language Institute of the Academy of Sciences of the Czech Republic. Crucial terms in the document also remain unclear, such as the question of 'national language'. Finally, Parliament voted against the bill on 15 June 2004.

The position of the Czech language in the territory of the Czech Republic is also defined by how it relates to the languages of national minorities. The *Constitution* and especially the 1991 *Charter of Fundamental Rights and Freedoms* as part of the constitutional legislation of the Czech Republic[21] (Articles 24 and 25) formulate the rights of persons belonging to national minorities to learn, use and develop and their languages. Both the *Framework Convention for the Protection of National Minorities* (which was ratified by the Czech Republic on 18 December 1997 and came into force on 1 April 1997) and the *European Charter for Regional or Minority Languages* (ratified on 15 November 2006 and implemented on 1 March 2007) contain provisions protecting the Polish, Slovak, German and Roma languages at a basic level. Among other things, Polish is a language of instruction in the Tesin area of the Republic all the way from preschool to university level.

Other specific regulations explicitly allow the use of languages other than Czech in official communication. The *Law on Courts and Judges* (No. 335/1991 Coll., as amended) states that any person who does not speak Czech may use her or his language before the court and that the cost of interpreting services in such cases shall be covered by the government. The *Law on Criminal Procedure* (No. 141/1961 Coll., as amended) regulates the right of those who do not understand Czech to use their own language before the bodies that hear criminal proceedings. The 1963 law the *Code of Civil Procedure* (No. 99/1963 Coll., as amended) guarantees the citizens'

21 Act No. 2/1993 Coll. promulgating the Charter of Fundamental Rights and Freedoms as part of the constitutional legislation of the Czech Republic.

right to use their mother tongue in civil courts and declares that interpreting service expenses are to be covered by the government. The 2002 *Law on Procedure of Administrative Courts* (No. 150/2002 Coll.) guarantees the use of a language other than Czech in proceedings before courts in administrative matters. The 2004 law the *Code of Administrative Procedure* (No. 500/2004 Coll., as amended) allows citizens belonging to national minorities to communicate with the administrative authorities in their language and declares that the cost of interpreting services is to be covered by those authorities. The *Law on the Rules of Procedure of the Chamber of Deputies* (No. 90/1995 Coll., as amended) entitles deputies to speak and present petitions in their native language.[22] The 2004 *Law on Education* (No. 561/2004 Coll., as amended) introduces the right of national minorities to education in their language (§ 13). Many of these provisions are collected and specified in the *Law on Ethnic and National Minorities* (No. 273/2001 Coll.).

6 · Conclusion

Czech language policy and legislation can be described as decidedly liberal and minority-friendly. There is no constitutional provision guaranteeing the protection of the Czech language and no specific legal act protects the majority language. Three bills intended to specifically implement such protective legislation were overruled, either by the government or by Parliament. It is true that a number of statutory laws require the use of Czech in specific proceedings and that certain international treaties protect the use of Czech abroad. However, Czech's progress as a language continues to be tied to the progress of national minority languages (especially Slovak), to the body of constitutional and statutory law that protects them and to the international agreements regulating minority language use.

It might be argued that all this is a consequence of the high degree of homogeneity of the Czech population and of the fact that no single other language has the power to pose a real threat to Czech. As observed above,

22 § 65 (1) The Deputies are entitled to speak and present petitions in their native language. If a Deputy cannot speak Czech, his/her speech shall be translated into Czech on the condition that the translation is requested by at least one Deputy. All written petitions presented in a language other than Czech shall be translated into Czech. (2) If another speaker cannot speak Czech, the provision of the previous Section shall be applied accordingly.

the inclusion of Czech in the family of official languages of the European Union has also clearly benefitted the perception of the Czech language on Czech territory.

The situation in the Slovak Republic is somewhat different. The Slovak language became an official language of the European Union when Czech did, but the formidable presence there of Hungarian (supported from the kin state) led to some very far-reaching legislation aimed at the protection of Slovak. This was contained in the *Law on the State Language of the Slovak Republic* (No. 270/1995 Coll., as amended), which not only defines Slovak as a 'state language' on the territory of the Slovak Republic but guarantees its 'primacy' in relation to other languages. The government is obliged to protect Slovak and to take measures ensuring its use in scientific research and development. The codified form of Slovak must be approved by the Ministry of Culture and any alteration in that form is prohibited. Except in minority-language schools, Slovak is the language of school instruction and all teachers are obliged to master it. The *Law* formulates a catalogue of further scenarios in which the use of Slovak is obligatory. Compliance with its provision is also to be controlled by the Ministry of Culture and the violation of compliance may incur fines of between 100 and 5,000 euro.

The Czech language is confronted by quite a different problem: the increasing competition of international languages, especially in the sphere of the media, led by English. In this area, the policies of the Czech Language Institute are the force preserving Czech in all its dimensions, ensuring that the language has the ability to denominate new technical or political terms and promoting this in the mass media.[23] At the same time, however, it should be noted that the Institute's authority in language matters and its role as a codifier of the literary standard of Czech derives from its experience and expertise, meaning that its standards are recommendations rather than rules.

23 www.cas.cz/sd/novinky/hlavni-stranka/110615-slovnik-spisovneho-jazyka-ceskeho-na-webu-UJC.html.

PART 2

INTERNATIONAL CONTEXT

5

MEDIUM-SIZED LANGUAGE COMMUNITIES AND THE EU LEGAL FRAMEWORK: EXPLORING THE CHALLENGES AND STRATEGIES FOR CHANGE

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SUMMARY: 1. Introduction. 2. The Legal Framework: Languages and (post-Lisbon) EU Law. 3. The Policy Framework: Sketching EU Action on Multilingualism. 4. Challenges: Procedure and Substance in EU Law. 4.1. Procedural challenges. 4.2. Substantive challenges. 5. Strategies: What Should MSLCs Seek to Address? 5.1. The 'procedural' impact of EU law on MSLCs. 5.2. The 'substantive' impact of EU law on MSLCs.

If the Treaty concerning the accession of the Republic of Croatia to the European Union (2012 0J L112/10) finally comes into force on 1 July 2013 [Article 3(3) of the Treaty of Accession], from that date onwards Croatia will be a Member State of the EU. Croatian will become a language of the Treaties (Article 4 of the Treaty of Accession and Article 54 of the Act concerning the conditions of accession of the Republic of Croatia and the adjustments to the TEU, the TFEU and the TEAEC) and, in all likelihood, an official and working language of the institutions of the EU (Council Regulation No 1/58 has still not been amended; however, see Article 52 of the Act of Accession). Therefore, if the Treaty comes into force, the number of languages of the Treaties and the number of official and working languages of the institutions of the EU will rise from 23 to 24. What is more, given the number of speakers of Croatian in Croatia (approximately 4.5 million), the number of medium-sized languages with institutional status in the EU will rise from the current figure of 14 to 15.

1 · Introduction

The conceptual focus of this project — Medium-Sized Language Communities (MLSCs) — is an interesting premise on which to reflect from the perspective of European Union (EU) law. Critically, the project's threshold definition (i.e. linguistic communities with between 1-20m speakers) is neutral or 'blind' with respect to the legal status that such languages might enjoy under national law — and, therefore, as we shall see, EU law. Since legal status at national level is an essential criterion of the EU language framework, certain MSLCs will fall outwith its definitional parameters. Two core questions follow on from this: first, whether MSLCs in general or certain MSLCs face *particular* challenges within the EU legal space (or not); and, second, if they do, are these challenges are more difficult for MSLCs to address? The emphasis on MSLCs also makes us distinguish between parity among *languages* at the conceptual level[1] and potential dis-parity around language community *needs* or *concerns*.

This chapter will be structured as follows. First, an outline of the post-Lisbon EU language governance framework will be presented, introducing the essentially *binary* approach to language definition practised to date. Second, a brief overview of the ethos underpinning current EU policy initiatives on the theme of multilingualism will be sketched, in order to determine the key objectives and priorities driving EU policy action in recent years.

Next, in section 4, two fundamental ways in which EU law impacts on languages and language communities will be discussed. Both *procedural* and *substantive* case studies will be used here, the latter focusing primarily on EU free movement law. A procedural/substantive division is engaged in order to examine the absence of a formal definition of MSLCs at EU level comprehensively, but the implications become clearer in the procedural sphere in particular. In terms of substantive EU law, it will be suggested that themes and trends within the protection of linguistic diversity focus less on the formal status of the language(s) in question but nonetheless raise difficult questions — shared across language communities — about the balance between national regulatory diversity and internal market effectiveness. Finally, some strategies for the future will be suggested, focus-

1 As emphasized in e.g. Council Conclusions of 22 May 2008 on multilingualism, 2008 OJ C140/14, para. 2.

ing more on *procedural* aspects, in order that the problematic gap between EU language law/policy and MSLC language practice might be narrowed, at least, if not closed.

2 · The Legal Framework: Languages and (post-Lisbon) EU Law

Following the trajectory of EU law in general, the basic rules framing EU language law are found in the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). This structural framework is then developed in more detail through a range of legislative legal instruments dealing with both language arrangements in general[2] and sector-specific procedural[3] or substantive[4] issues. Moreover, since the coming into effect of the Lisbon Treaty on 1 December 2009, the EU Charter of Fundamental Rights[5] has the same legal effect as the EU Treaties. These points will now be unpacked in more detail.

Article 3 TEU commits the Union to 'respect[ing] its rich cultural and linguistic diversity, and [ensuring] that Europe's cultural heritage is safeguarded and enhanced.' This intention is also reflected in Article 22 of the EU Charter of Fundamental Rights.[6] Although a Union regulatory contribution to several policy areas that touch upon cultural and linguistic diversity is envisaged in the TFEU,[7] this section will focus more narrowly on the EU Treaty rules that affect the setting of language arrangements more directly. The core rules in this regard are as follows:

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2 Notably Regulation 1/58 determining the languages to be used by the [European Union], as amended, (the most recent amendment can be accessed at 2006 OJ L363/1).

3 E.g. see the consolidated Rules of Procedure of the Court of Justice; the most recent version of the Rules can be found at 2010 OJ C177/1.

4 For example, general information on and links to both existing and proposed legislation on foodstuff labelling can be accessed here: http://ec.europa.eu/food/food/labellingnutrition/index_en.htm; language is an essential aspect of labelling law (see e.g. Directive 2000/13/EC of the European Parliament and of 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 2000 OJ L109/29). See again, section 4(b) below.

5 2007 OJ C303/1.

6 'The Union shall respect cultural, religious and linguistic diversity'.

7 See e.g. Article 165 TFEU (respecting cultural and linguistic diversity in contributing to policy on education); Article 167 TFEU (recognition of cultural and linguistic diversity with respect to negotiations under the Common Commercial Policy); Article 167 TFEU (respecting national and regional diversity in exercising Union competence on culture).

— First, it should be stressed that, within the framework of EU law, the key national actor is the Member State.[8] States, therefore, specify the official and working languages of the EU, not other way around.[9] This principle applies both in terms of the overall 'control' function performed by the Member States, in determining the provisions of the Treaties, but also with respect to deciding on the language(s) to be specified for inclusion within the EU language framework (see further below).

— **Article 55 TEU**: in stating (in para. 1) that the 23 language versions of the Treaty[10] are 'equally authentic', this provision establishes the concept, at least (since the word is not used here), of *official* EU languages. In the second paragraph, it is provided that '[t]his Treaty may also be translated into any other languages as determined by the 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.' This legal route is supplemented by a political statement, a Declaration attached to the Treaty by the Member States characterizing this process as an example of the commitment to diversity expressed in Article 3 TEU.[11]

— **Article 20(2)(d) TFEU**: in the context of EU citizenship, all Member State nationals have the right 'to petition the European Parliament, to

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8 See e.g. Article 4(2) TEU: 'The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.'

9 In its 2005 Communication on 'Multilingualism' (see note 23 *infra*), the Commission reminded us that while it would 'do all within its remit to reinforce awareness of multilingualism and to improve the consistency of action taken at different levels', '[r]esponsibility for making further progress mainly rests with the Member States (be it at national, regional or local level)' (p. 3).

10 i.e. Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish and Swedish.

11 Declaration on Article 55(2) of the Treaty on European Union: 'The Conference considers that the possibility of producing translations of the Treaties in the languages mentioned in Article 55(2) contributes to fulfilling the objective of respecting the Union's rich cultural and linguistic diversity as set forth in the fourth subparagraph of Article 3(3). In this context, the Conference confirms the attachment of the Union to the cultural diversity of Europe and the special attention it will continue to pay to these and other languages. The Conference recommends that those Member States wishing to avail themselves of the possibility recognized in Article 55(2) communicate to the Council, within six months from the date of the signature of the Treaty of Lisbon, the language or languages into which translations of the Treaties will be made.'

apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty [i.e. Article 55(1) TEU] languages and to obtain a reply in the same language'. The rights to petition the European Parliament and to apply to the European Ombudsman in any of the Treaty languages are extended, in Articles 227 and 228 TFEU, to all natural and legal persons lawfully resident in an EU Member State.[12] In the restatement of these rights in **Article 24 TFEU**, it is clarified that the 'institutions or bodies' referred to relate to those mentioned in Article 24 TFEU[13] or Article 13 TEU.[14] European Union 'bodies, office and agencies' do *not*, therefore, fall within the scope of Articles 20 or 24 TFEU; the implications of this are discussed in section 4 below. Finally, the generally restrictive proviso expressed in the final sentence of **Article 20 TFEU** ('[t]hese rights shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder') should be noted. It reflects the general principle that no EU rights are conferred in an absolute way, and that justifiable and proportionate restrictions on EU rights can be permitted and accommodated: again, this will be explained in more detail in section 4.

— In its decision in *Kik v OHIM*, the Court of Justice declined to consider the extent to which the prohibition of discrimination on grounds of nationality in Article 18 TFEU incorporated a general principle against discrimination on grounds of language.[15] **Article 21(1) of the Charter** now states unambiguously, however, that '[a]ny discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, *language*, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited' (emphasis added). Given the considerable legal strength recently attributed to protection against discrimination on grounds

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12 This is also reflected in the 'right to good administration' in Article 41 of the Charter, para. 4 of which confers similar rights on 'every person'.

13 i.e. European Parliament, Council, Ombudsman.

14 i.e. European Parliament, European Council, Council, Commission, Court of Justice, European Central Bank, Court of Auditors, Economic and Social Committee, and Committee of the Regions.

15 Case C-361/01 P *Kik v OHIM* [2003] ECR I-8283; for analysis, see N Nic Shuibhne, 'Case comment on *Kik v Office for Harmonization in the Internal Market*' (2004) vol. 41:4 *Common Market Law Review* 1093-1111 and contrast the Court's reluctance to engage with the notion of discrimination on grounds of language with the Opinion of AG Maduro in Case C-160/03 *Spain v Eurojust* [2005] ECR I-2077, paras 32-33.

of age,[16] we may be entering a phase of enhanced protection against discrimination more generally. This point will be picked up in section 4.

— **Article 342 TFEU**: this enabling provision establishes that '[t]he rules governing the languages of the institutions of the Union shall, without prejudice to the provisions contained in the Statute of the Court of Justice of the European Union, be determined by the Council, acting unanimously by means of regulations.' Regulation 1/58 is the pivotal measure adopted under this authority. The Regulation establishes a series of core principles that govern the use of languages in the EU institutions, in summary: all of the languages listed in Article 55 TEU are both (and the only) official and working languages of the Union institutions (Article 1); when communicating with Union institutions, a Member State or person subject to Member State jurisdiction may select any of the Article 55 languages and must receive a reply in the language they have chosen (Article 2); documents sent from an institution to a Member State or person subject to Member State jurisdiction will be in the (EU) language of that State (Article 3);[17] regulations, other documents of general application and the *Official Journal of the European Union* are published in all of the official languages (Articles 4 and 5); the institutions have some discretion to stipulate the use of specific languages in specific cases (Article 6); and the languages to be used in Court of Justice proceedings are set down in its rules of procedure (Article 7).[18]

— To date, every EU enlargement has seen a consequential enlargement of official EU languages. As noted earlier, States themselves specify the language(s) to be added to Article 55 TEU. When Maltese and Irish became official and working languages of the EU in 2004 and 2007 respectively, however, compromises were formalized regarding the extent of the translation obligations to be undertaken, at least temporarily.[19]

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16 See the decisions in Case C-144/04 *Mangold v Helm* [2005] ECR I-9981 and Case C-555/07 *Kücükdeveci v Swedex GmbH & Co KG*, not yet reported, judgment of 19 January 2010. For analysis, see S Peers, 'Supremacy, Equality and Human Rights: Comment on *Kücükdeveci*' (2010) 35:6 *ELRev* 849.

17 See also, Article 8: 'If a Member State has more than one official language, the language to be used shall, at the request of such State, be governed by the general rules of its law.'

18 Note that, generally, the choice of the language of the case rests with the applicant, unless the defendant is a Member State or a natural or legal person. Thus, the institutions must, essentially, respond to the language choices made by States and natural and legal persons.

19 See Council Regulation (EC) 930/2004 of 1 May 2004, 2004 OJ L169/1, requiring the drafting in Maltese of jointly (i.e. Parliament and Council) adopted regulations only; this transitional

— In terms of languages other than official/working languages of the institutions, the Council (i.e. essentially, the States speaking collectively) has concluded that where the status of such languages is 'recognized by the Constitution of a Member State on all or part of its territory or the use of which as a national language is authorized by law', then 'allowing citizens the possibility of using additional languages in their relations with the [EU] Institutions is an important factor in strengthening their identification with the European Union's political project'.[20] The Council thus indicated that it would authorize the 'official use' of such languages 'on the basis of an administrative arrangement' concluded between the Council and a requesting Member State ('and possibly by another Union institution or body on the basis of a similar administrative arrangement'). Significantly, Article 5 provides that any direct or indirect costs will be borne by the State, and not the EU. The specific measures/practices provided for in the Conclusion are (1) provision of certified translations of acts adopted through (at the time) the co-decision procedure (now, following Lisbon, the 'ordinary legislative procedure'), to be published on the Council website but with a proviso stating that the translations do not have legal force; (2) accommodation of other languages in speeches, provided reasonable notice is given in advance and subject to the availability of necessary staff and equipment; and (3) an interim translation service into an EU language to be provided by Member States with regard to communications in other languages from citizens intended for Union institutions. Spain and the UK have entered into such an 'administrative arrangement' with the Council.[21] The mechanism established by the

measure, due to a shortage of translators at that time, was removed through Council Regulation (EC) 1738/2006 of 23 November 2006, 2006 OJ 329/1, which also makes provision for retrospective translation of EU acts. With respect to Irish, see Council Regulation (EC) 920/2005 of 13 June 2005, 2005 OJ L156/3, amending Regulation 1/58 in order (belatedly) to include Irish as one of the official and working languages of the institutions, but creating another temporary derogation so that, similarly, only jointly adopted regulations are required to be published in Irish for a (renewable) period of five years. The derogation was recently extended: see Council Regulation (EU) No 1257/2010 of 20 December 2010, 2010 OJ L343/5 (to apply for a further five years from 1 January 2012).

20 Council Conclusion of 13 June 2005 on the official use of languages within the Council and possibly other Institutions and bodies of the European Union, 2005 OJ C148/1, Articles 1 and 3.

21 For Spain, see 2006 OJ C40/2, with respect to 'languages other than Castilian (Spanish) whose status is recognized by the Spanish Constitution'. For the UK, see 2008 OJ C194/7, with respect to 'languages whose status is recognized in the United Kingdom's constitutional system'. Since the UK does not have a written constitution, the intended languages are possibly those that the

Council Conclusion raises an interesting compromise, at least at the abstract level, reflecting the symbiotic relationship between the EU and its Member States. It also marks a break with the tradition of centralized EU responsibility for translation — and costs — and explores the position of language communities beyond those covered by the Article 55 TEU listing. These points have particular significance for the arguments developed in sections 4 and 5 below.

From this overview of the EU legal framework, it is clear that, formally at least, the EU Member States have striven for parity among the languages settled on as official and working languages of the EU institutions. And some of these languages are clearly spoken within MSLCs. It is also clear, however, that, apart from general expressions of commitment to linguistic diversity and protection against discrimination on grounds of language, and the limited mechanism now provided for in Article 55(2) TEU, no *formal* status has been accorded at EU level to any other languages spoken within the Member States, irrespective of the size of the language community in question.

Innovations such as those outlined in the 2005 Council Conclusion pursue language representation through a different route, establishing a relatively experimental State-rooted mechanism for publishing certain EU legal measures in non-Treaty languages and invoking those languages also in certain EU communications. This fits well with the idea of the EU as a multilevel governance space, as affirmed now in Article 10 TEU. But the practical uptake of these opportunities by States (or the extension of such mechanisms beyond the Council) has been poor to date. Moreover, in reality, of course, the success of the mechanism, where it *is* engaged, will depend entirely on the willingness of States to realize — and pay for — the commitments made.

Thus, it can be summarized that MSLCs are either official or working languages of the EU institutions or they are not; and if they are not, any representation of their languages in EU publications or institutional communication structures depends not on the EU institutions but on the MSLC's 'parent' State.

UK specified when ratifying the European Charter for Regional or Minority Languages i.e. Welsh in Wales, Scots and Gaelic in Scotland, Ulster Scots and Irish in Northern Ireland, as well as Manx Gaelic and Cornish.

Before discussing the legal implications of this language governance framework in more depth, the next section of the chapter first offers a brief overview of policy objectives and priorities on the theme of multilingualism in the EU, in order to ascertain whether MSLCs are represented more coherently in that context.

It should be emphasized, however, that the EU is unique in having as many official and working languages as it actually does in the first place. The United Nations has six, the Council of Europe just two. The European Commission (DG Translation) rationalizes the different expectations placed on EU language policy by characterizing the EU as a 'democratic organization' and highlighting the binding nature of EU law.[22] The long-running debate about the implications — and costs — of this in consequence, and about the compromises made internally within the institutions in terms of working languages in particular, continues. In sections 4 and 5, questions about whether EU language policy needs to be reconfigured — perhaps expanded even further — because of the specific needs of or challenges faced by MSLCs pick up on this more general debate too.

3 · The Policy Framework: Sketching EU Action on Multilingualism

Although this section of the chapter is undoubtedly over-simplified and necessarily brief, the key policy themes on which the EU institutions tend to focus in the broad context of language policy are outlined below, in order to get a sense of priorities within the EU political sphere. Just as we saw when sketching the EU language *governance* framework, the EU language *policy* agenda similarly projects and is, in turn, shaped by a strongly *binary* impression of the languages spoken within the Member States: once again, there are the official and working EU languages; and then, quite simply, there is everything else — 'regional and minority languages', in EU-speak.

The definition of 'regional and minority languages' that is normally used by the EU institutions stems from the Council of Europe's European Charter for Regional or Minority Languages i.e. languages 'traditionally used by part of the population in a state, but which are not official state language dialects,

22 See http://ec.europa.eu/dgs/translation/translating/officiallanguages/index_en.htm

migrant languages or artificially created languages'. The dominant conceptual focus within EU language policy has shifted subtly in recent years, from emphasizing the protection and promotion of linguistic diversity towards a commitment to and promotion of *multilingualism*.[23] The principal mechanism for the realization of this objective is effected through strategies for language teaching and language learning.[24] The dominant practical focus is the provision of funding. This funding relates to various thematic schemes to which language communities/projects can apply directly, and also to structural funding of, for example, the Network to Promote Linguistic Diversity (NPDL)[25] and the Mercator information network.[26] There is also a discernible reflection of *broader* aspects of EU language policy: for example, on what the Commission calls the 'multilingual economy',[27] and on multilingualism in terms of communicating with EU citizens.[28] Whether this amounts to concrete policy advances is, however, open to question.[29]

For the purposes of the present contribution, the absence of reflection on MSLCs in EU official documents is particularly striking. The policy merg-

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23 E.g. European Commission, Communication to the Council, European Parliament, European Economic and Social Council and Committee of the Regions, *A New Framework Strategy for Multilingualism*, 22 November 2005, COM(2005) 596 final. The Communication defines multilingualism as 'both a person's ability to use several languages and the co-existence of different language communities in one geographical area'.

24 The Communication (*ibid*.) suggests, for this purpose, a third understanding of multilingualism also i.e. 'a new field of Commission policy that promotes a climate that is conducive to the full expression of all languages, in which the teaching and learning of a variety of languages can flourish'. See section II.1 for an outline of initiatives in the field of language learning. This emphasis on language learning is also very evident in the 2007 Report of the High Level Group on Multilingualism, set up by the Commission as a follow-up on the Communication; available at: http://ec.europa.eu/education/policies/lang/doc/multireport_en.pdf. For an overview of other initiatives following the 2005 Communication, see the Commission's 2008 Communication, *Multilingualism: An asset for Europe and a shared commitment*, 18 September 2008, COM(2008) 566 final. See also, the accompanying Commission Staff Working Document, SEC(2008) 2443.

25 See http://www.npld.eu/pages/Home2.aspx

26 See http://www.mercator-research.eu/

27 See the 2005 Communication, note 23 *supra*, section III.

28 *Ibid*., section IV. At the end of the 2008 Communication, note 24 *supra*, the Commission indicates that a 'global review' of its 'cross-cutting policy framework for multilingualism' will be carried out in 2012; again, the strands of that policy focus on language learning extended to considerations of e.g. employability, competitiveness, and new technologies.

29 See, for example, the very critical Opinion of the Economic and Social Committee on Multilingualism, 2009 OJ C77/109, para. 4.1: 'The Committee believes that, while obviously well-intentioned, the Commission is merely rehearsing the arguments and is not proposing any substantial action by the European Union beyond urging the Member States to adapt their educational systems'.

ing of all non-official (in EU terms) languages, whether spoken by MSLCs or by (much) smaller groups, can certainly fuel a strong sense of solidarity across language communities, irrespective of relevant State borders. The danger, though, is that focusing exclusively on formal definitions can unhelpfully blur together objectively different language community needs and concerns. Yet this is not something that has been comprehensively explored within the context of EU language policy in general or more recently within the emphasis on multilingualism. Additionally, it will be seen that some of the issues raised for discussion in section 4 do not feature at all in EU policy discourse (or feature weakly or, at best, tangentially). This generates a feeling, overall, of parallel conversations about languages, of separate legal/governance and policy conversations that might generate more effective strategies if they were instead joined-up.

4 · Challenges: Procedure and Substance in EU Law

The purpose of this section is to examine two key ways in which EU law can impact on linguistic diversity and multilingualism, leading, then, to ask whether and how the impact of such challenges might be felt more acutely by MSLCs. The *direct* regulation of language arrangements applicable within various strands of EU administration is considered first, under the heading of *procedural* challenges. Then, the ways in which EU law in a *substantive* sense can bring national rules and practices under review in a more *indirect* sense will be discussed. Mirroring the procedural/substantive structure, practical strategies and questions for further research will then be identified in section 5.

4.1 · Procedural challenges

In broad terms, it would appear that speakers of a language recognized formally within the EU language regime are necessarily privileged. Thinking back to several features of the legal framework summarized in section 2 above, this is clearly the case — benefits include the ability to communicate with EU institutions and receive a reply in that language, and the routine publication of EU legislation and other official documents in that language also. In other words, speakers of an official EU language can take questions of access and accessibility somewhat for granted. Some efforts to bridge the

gap between official language speakers and everyone else have been made, but we saw that the mechanisms introduced depend on the actions (and thus willingness) of States and are, thus far at least, poorly realized.

Consider, for example, the Rules of Procedure applicable at the Court of Justice. Article 29(1) makes it clear that the language of a case must be drawn from the 23 official EU languages. There is a very limited window for the use of other languages provided in para. 4, in the context of witness/expert evidence.[30] More generally, however, national courts and tribunals wishing to invoke the preliminary reference procedure,[31] for example, must ensure that the questions and documents that they send to Luxembourg are in one of the official EU languages, irrespective of the language through which the proceedings have been conducted at national level. Similarly, Article 6 of Protocol No 2 on the application of the principles of subsidiarity and proportionality — a new mechanism for national scrutiny of the exercise of EU legislative power, widely heralded as a legitimacy-enhancing instrument of participation and representation — provides that '[a]ny national Parliament or any chamber of a national Parliament may, within eight weeks from the date of transmission of a draft legislative act, *in the official languages of the Union*, send to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity. It will be for each national Parliament or each chamber of a national Parliament to consult, where appropriate, regional parliaments with legislative powers' (emphasis added).

These examples demonstrate in real terms the clear disparity between different MSLCs, one that relates purely to formal status rather than potentially more meaningful criteria such as the size of the language community (and thus the volume of affected speakers), for example, or the prevalence of the language across a number of different EU Member States.

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30 i.e. 'Where a witness or expert states that he is unable adequately to express himself in one of the languages referred to in paragraph (1) of this Article, the Court may authorize him to give his evidence in another language. The Registrar shall arrange for translation into the language of the case.'

31 Under the preliminary reference procedure, national courts and tribunals can send questions about either the interpretation or validity of EU law to the Court of Justice. The national proceedings are suspended pending the judgment of the Court in Luxembourg, which is then applied back in the national court or tribunal so that the latter can resolve the case.

The picture is even more complicated in reality, however, given the understood and practised (if not often expressly admitted) dichotomy between official and working EU languages, and the pressure on *all* languages other than English, French and German (and even then, those languages in rapidly descending order) to find both a functional and valuable place within the EU language regime. To take just one example connected to the practise and study of EU law, not all judgments of the Court of Justice are published online simultaneously in all of the official languages; and there is an even more disparate publishing record for Advocate General opinions. Eventually, of course, the *European Court Reports* will bridge the gap, but this can mean a gap of very many months.

In order to explore the increasingly fragmented nature of EU language policy from a procedural perspective, and to highlight particular challenges for MSLCs where relevant, the remainder of this sub-section will focus on language arrangements within EU bodies, offices and agencies. Understanding the often quite different language arrangements applied within this rapidly expanding category of administrative actors enables us to track the evolving contours of EU language policy in real-time; and, importantly, EU bodies and agencies can have significant engagement with natural and legal persons, making questions about access and communication all the more relevant.

We saw in section 2 above that EU bodies, offices and agencies do not come within the scope of Articles 20(2)(d) or 24 TFEU i.e., they are not bound by the express language requirements of EU citizenship. However, it was also pointed out that Article 21(1) of the EU Charter of Fundamental Rights prohibits discrimination on grounds of language in a very general sense. And, significantly, Article 51 of the Charter confirms that its provisions 'are addressed to the institutions, bodies, offices and agencies of the Union'. Moreover, notwithstanding the specific limitations as regards EU citizenship and language rights in the TFEU, Article 9 TEU affirms that '[i]n all its activities, the Union shall observe the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies.'

There can be no doubt, then, about the responsibilities imposed on all such administrative entities (and on those who design them) from the perspective of compliance with Article 21(1). Moreover, it must be remembered that the Charter reflects what the Member States consider to have been pre-existing rights. It does not create new rights. Therefore, a general

principle against discrimination on grounds of language must have been part of EU law already to merit its inclusion in the Charter in the first place.[32] The Court of Justice may not have said so in *Kik*, but any judicial reluctance has now been superseded by the legal effect of the Charter in any event.[33]

But it was also observed that even fundamental rights are not absolute. Another way of expressing this point is to remember that restrictions on fundamental rights can be perfectly lawful. Restrictions will be permitted within EU law if they are found to be justifiable (normally defined as being grounded in good reasons of public interest) and proportionate (i.e. the restriction, even if justifiable, cannot go further than necessary in order to achieve the stated policy objectives). With an understanding of this basic normative framework in place, we can turn now to the emerging mosaic of language arrangements applicable across different bodies, offices and agencies of the European Union.[34]

For the purposes of this case study, the founding instruments of EU bodies, offices and agencies that refer to Regulation 1/58 were reviewed. The rules on applicable language arrangements fell into two categories:

1. Transposition of the language rules set out in Regulation 1/58 i.e. absorption of the framework developed for EU official/working languages;[35]

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32 For discussion of the origins of language rights as a general principle against discrimination on grounds of language, see I Urrutia and I Lasagabaster, 'Language rights as a general principle of Community law', (2007) vol. 8:5 *European Law Journal* 479, at 489-492.

33 The Court of Justice has since moved a little closer to acknowledging the rights-infused position within which language arrangements must be reviewed; see its judgment in Case C-161/06 *Skoma-Lux sro v Celní ředitelství Olomouc* [2007] ECR I-10841. The (then) Court of First Instance (now General Court) has skirted close to the discourse of language rights in a similar way: see its judgment in Case T-185/05 *Italy v Commission* [2008] ECR II-3207, para. 128. There, the Court focused on the prohibition of discrimination on grounds of language in Article 1d(1) of the Staff Regulations.

34 In terms of resources, the translation needs of EU bodies, offices and agencies are managed by the Translation Centre of the bodies of the European Union, established in 1994 (see Council Regulation (EC) 2965/94 of 28 November 1994 setting up a Translation Centre for bodies of the European Union, OJ 1994 L314/1; for further information on the organization and functions of the Centre, see http://cdt.europa.eu/EN/Pages/Homepage.aspx).

35 See: European Asylum Support Office (Regulation 439/2010/EU, 2010 OJ L132/11, Article 41); European Institute for Gender Equality (Regulation 1922/2006/EC, 2006 OJ L403/9, Article 16); European Police College (CEPOL) (Council Decision 2005/681/JHA, 2005 OJ L256/6, Article 19); Community Fisheries Control Agency (Council Regulation 768/2005/EC, 2005 OJ L128/1, Article 22); European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Council Regulation 2007/2004/EC, 2004 OJ L349/1, Article 27); European GNSS Supervisory Authority (Council Regulation

2. Application of the language rules set out in Regulation 1/58 *but* with scope for determining more limited internal language arrangements.[36]

Interestingly, the former approach is clearly more prevalent overall, but the latter nuance has been invoked more often in recent years, suggesting that it may now be emerging as the standard or default expectation. The founding Regulation for the European Centre for Disease Prevention and Control, for example, reflects the parameters of Approach (2), when it sets out that the language arrangements to be determined (by unanimity, for this Centre) can include 'the possibility of a distinction between the internal workings of the Centre and the external communication, taking into account the need to ensure access to, and participation in, the work of the Centre by all interested parties in both cases'.[37]

Approach (2) is an interesting development for several reasons. Primarily, it formalizes the difference between working and official languages more distinctly, but in quite a different way than attempted, for example, through the rules contested in the *Kik* case law. There, the — upheld — language rules established for the Office of Harmonization for the Internal Market impacted both internally *and* externally.[38] This is of fundamental

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1321/2004, 2004 OJ L246/1, Article 18); European Network and Information Security Agency (Regulation 460/2004/EC, 2004 OJ L77/1, Article 22); European Maritime Safety Agency (Regulation 1406/2002, 2002 OJ L208/1, Article 9); Community Plant Variety Office (Council Regulation 2100/94/EC, 1994 OJ L227/1, Article 34).

36 See: European Centre for Disease Prevention and Control (Regulation 851/2004/EC, 2004 OJ L142/1, Article 14(5)); Agency for the Cooperation of Energy Regulators (Regulation 713/2009/EC, 2009 OJ L211/1, Article 33); European Police Office (Europol) (Council Decision 2009/371/JHA, 2009 OJ L121/37; European Union Agency for Fundamental Rights (Council Regulation 168/2007/EC, 2007 OJ L53/1, Article 25). The authority to determine the actual detail/scheme of internal language arrangements is attributed to the administrative or management board of the relevant body, office or agency. There are some procedural differences within the different measures, however; for example, the decision as to the internal language arrangements for Europol is expressly required to be taken by unanimity.

37 Regulation 851/2004/EC, Article 14(5)(f).

38 See Regulation 40/94, 1994 OJ L11/1, Article 115. OHIM has five official languages: English, French, German, Italian and Spanish. An application for a Community trade mark (CTM) may be filed in any of the official EU languages, but applicants must specify a second language — and this must be an OHIM working language — in which the Office may send written communications. Furthermore, the applicant is deemed to accept this second language as the language to be used in opposition, revocation or invalidity proceedings in certain circumstances. If the CTM is granted, it is then translated into the language of each Member State designated in the application. In essence, the Court of Justice confirmed that the selection of these 'most widely known' five EU languages was both justified and proportionate.

importance since it distinguishes the formulation developed more recently with regard to the language rules applicable within Europol, for example, or the EU Agency for Fundamental Rights. The newer approach seeks to ensure that States as well as natural and legal persons can communicate with the relevant body, office or agency in an EU official language of *their* choice, while recognizing and trying to manage the practical demands of ensuring efficient *internal* working practices. This seems more palatable in a Union where protection against discrimination on grounds of language constitutes a fundamental right. Would *Kik* be decided in the same way today? Possibly; but there undoubtedly be more of an onus on the Court of Justice to defend the justification and proportionality of the OHIM language rules in the discourse of rights and discrimination.

The ongoing saga of the 'Community patent' (now European Union patent) proposal provides a similarly cautionary tale. More than ten years after the original substantive Commission proposal for a Council Regulation on the creation of a Community patent, which had designated English, French and German only as the three European Patent Office (EPO) official languages,[39] the Commission finally published a proposal specifically addressing Community patent language arrangements.[40] The 2010 proposal sought to reconcile an elusive symmetry between 'reducing translation costs while facilitating the dissemination of patent information in all EU official languages'. This followed a decade-long stalemate rooted in the impossible battle between demands for greater multilingualism, on the one hand, and both efficiency and financial costs on the other. Italy and Spain retained their objections to this compromise, however, forcing the other 25 EU Member States to proceed, for only the second time in EU history, through the Treaty's 'enhanced cooperation' procedure (which would allow the proposed system to go ahead with legal effect for those 25 States).[41]

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39 Proposal for a Council Regulation on the Community patent, COM(2000) 412. The EPO already exists outwith and thus independently of the EU framework, and works with these three official languages. The proposed Council Regulation would bring the EPO within EU governance for the purpose of administering EU patents.

40 Proposal for a Council Regulation on the translation arrangements for the European Union patent COM(2010) 350 final.

41 See the Commission's proposal for a Council Regulation implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements, COM(2011) 215 final, based on Council Decision 2011/167/EU of 10 March 2011 authorizing enhanced cooperation in the area of the creation of unitary patent protection (2011 OJ L 76/53.

The Council Decision authorizing enhanced cooperation for this objective has now, however, been challenged before the Court of Justice by Italy and Spain, towards the objective of ensuring that both Italian and Spanish are added to English, French and German as official languages of the EPO.

Running throughout the EPO saga, we can see that the differences inherent in even the official EU languages are in contentious play. The 2010 proposal noted that approximately 90% of patent applications are made in English, French and German already, reflecting the Court's 'most widely known' approach in *Kik* and, in effect, negating an MSLC claim on the basis that size *could* matter here. Even before the advocated EU synergy with the EPO in the original (2000) proposal, the (then) MEP Ulf Holm sent a Written Question to the Council in 1998, criticizing the exclusion of Swedish from the EPO language regime both in terms of the 'severe restriction' thereby placed on the use of, essentially, MSLC languages, characterizing this as 'an attack on our democratic principles' since 'Swedish citizens would lose their right to read documents nationally applicable in their own language', and alerting the Council to the 'marginalization of certain languages in the EU'.[42] Is this a valid and meaningful claim, or is it something relatively more ethereal that we just have to get over in the interests of efficiency and costs?

It is too soon to tell whether the language rules emerging in more recent EU bodies, offices and agencies mark a deliberate recognition of a rights-enriched normative landscape, in seeking, as they do, to confine the implications of working through fewer languages to the internal operation of the relevant authority. The juxtaposition of the Agency for the Cooperation of Energy Regulators alongside Europol and the Fundamental Rights Agency in terms of the application of Approach (2) would suggest that the subject matter addressed by the relevant agency is not, in and of itself, the determinative factor here. But the OHIM and EPO language rules are markedly different. Is the emphasis on economic operators in *Kik* convincing in that regard? I have argued elsewhere that such a test is too blunt, failing to accommodate very different financial and other resources that vastly different forms and categories of 'economic operators' — covering, as they do, everything from the sole trader to the multinational corporation — have at their disposal.[43]

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42 Written Question No. 1176/98, 1998 OJ C323/115.

43 See N Nic Shuibhne, 'The outer limits of EU citizenship: Displacing economic free movement rights?' in C Barnard and O Odudu (eds.), *The Outer Limits of European Union Law* (Hart Publishing, 2009), 167.

Five key reflections emerge from this procedural case study. First, it confirms that the language regime applicable within the EU in procedural terms is more fragmented — even internally — in reality than the binary official/everything-else framework tends to suggest. Second, the fault-lines of fragmentation are plainly obvious in some instances, thinking of the efficiency and costs drivers clearly underpinning the OHIM and proposed EPO rules. Third, a more nuanced distinction between official and working languages does nonetheless appear to be emerging within other bodies, offices and agencies of the EU. Its particular value is that it distinguishes more clearly between the internal and external impact of language rules. It is thus more about speakers in real terms than languages in a more abstract sense. Fourth, this distinction reflects and fits more comfortably with the rights-enriched normative landscape supported most recently through the acquired legal effect of the EU Charter of Fundamental Rights. But, fifth, there does not appear to be any comprehensive real discussion about different languages and the needs of different language communities within any of these developments.

Taking these five reflections together, the case study forces us more sharply to consider a vital question: given that even official EU languages often 'lose out', on what basis, precisely, might MSLCs make their particular claims about or raise objections to the way in which EU language arrangements have evolved in practice? Some suggestions will be discussed in section 5, following the presentation of a second case study.

4.2 · Substantive challenges

The purpose here is to consider the indirect ways in which EU law intersects with questions about the regulation of language, complementing the more 'direct' procedural arrangements discussed in section 4(a) just above. The vast corpus of internal market law is an especially useful case study to illuminate this point.

An extraordinarily complex, artificially engineered internal market, spanning 27 States and many more cultures and languages, functions at the heart of the EU integration project. This market involves voluminous transnational movement of goods, services, persons (both natural and legal) and capital from any of these 27 State markets to any of the others. In these processes, numerous linguistic (not just State) borders are inevitably — and constantly — crossed. And the regulatory questions that arise in this context

reflect once again tensions on the one hand and balance/reconciliation on the other: between costs and clarity; between efficiency and diversity; between enhancing consumer choice and preserving distinctness; between facilitation of movement and ensuring effective communication; and so on.

Much of this balancing work is effected through the negotiation and implementation of harmonizing legislation at EU level. The language dimension of food-product labelling was already noted as a good example of this.[44] And it is important to remember that, from the perspective of language communities, this legislation will have been contributed to and shaped by both State representatives acting through the Council of Ministers and directly elected representatives acting through the European Parliament. There is really no distinctly autonomous 'Brussels' to blame at the point of actual law*making*. The Commission proposes legislation; but the Council and Parliament adopt it. This system recalls once again the important symbiotic relationship between the EU and its States, and reminds us that policy choices that can sometimes require the restriction of language use are often blessed by an MSLC's parent State.

If this market is to function well, if there is (an accepted) value in facilitating transnational engagement of this intensity, then there simply must be compromises: at all levels. In other words, national regulatory autonomy — the ability of States to set their own standards — is inevitably going to be diluted across a whole range of policy interests and policy choices. In so much of the case law on EU free movement rights, the Court of Justice is being asked to make, in effect, a value-judgment. It is being asked to decide whether the national policy argument put forward can properly (and proportionately) justify the additional burden that meeting that distinct regulatory standard then places on the producers of goods or the providers of services who are seeking to access the market of that State but had sought to do so on the basis of satisfying the — different — regulatory standards of their own home State(s). If Spain and the UK wish to have different product requirements, for example, for a particular foodstuff, will Spain's cultural traditions be enough the justify the expense and practical challenges that might require the UK producer to amend their — perfectly

44 See Directive 2000/13/EC on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs, 2000 L109/29 (especially Recitals 5 and 6 of the Preamble, which explicitly ground Member State capacity to introduce language rules in the objectives of informing and protecting consumers; and Article 16, grounded in the 'language easily understood' idea).

safe but simply, in some respect or other, different — version of that product for the Spanish market?

Taking the 'positive' (in the sense of striving to accommodate State diversity and regulatory autonomy) first, it can be stated in summary that: (1) the Court of Justice *does* recognize the validity, in principle, of most policy arguments submitted by States who seek to justify and persevere with distinct national rules.[45] (2) The principle of 'mutual recognition' within EU law is itself a compromise, since it enables States to preserve distinct standards for their own producers, service providers, workers etc and asks of them only that they allow the free circulation of products, services etc from other States *unless* they can establish, on public interest grounds, that the regulatory standards of the State-of-origin fail adequately to protect the regulatory concern in question.[46] (3) There are numerous instances in the case law where the protection of linguistic diversity has itself been recognized as a legitimate public interest concern.[47] For example, in *Haim*, the Court observed that 'the reliability of a dental practitioner's communication with his patient and with administrative authorities and professional bodies constitutes an overriding reason of general interest such as to justify making the appointment as a dental practitioner under a social security scheme subject to language requirements. Dialogue with patients, compliance with rules of professional conduct and law specific to dentistry in the Member State of establishment and performance of administrative tasks require an appropriate knowledge of the language of that State.'[48]

So what or where, then, are the problems? (1) The Court of Justice has the unenviable task of ensuring that the foundational commitment of all of the Member States to the EU internal market, and its commitment in turn to realizing the inherently related objectives of free movement, is not left

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45 For longitudinal empirical analysis of this question, see C Barnard, 'Derogations, Justifications, and the Four Freedoms: Do they Really Protect State Interest?' in C Barnard and O Odudu (eds.), *The Outer Limits of European Union Law* (Hart Publishing, 2009), 273.

46 As established in Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* [1979] ECR 649. The logic behind the principle of mutual recognition is to allow both familiar home State products and different imported versions of that product to circulate within the market, leaving choices about ultimate preferences to the consumers themselves.

47 E.g. Case C-274/96 *Criminal Proceedings against Bickel and Franz* [1998] ECR I-7637 (where the Court confirmed that 'protection of an ethno-cultural minority' may constitute a legitimate aim, para. 29).

48 Case C-424/97 *Haim v Kassenzahnärztliche Vereinigung Nordrhein* [2000] ECR I-5123, para. 59.

aside whenever policies of national significance are raised.[49] We signed up for this, in the Court's view; and so it will ensure that we stick to it, even when it seems threatening in some way or, even, inconvenient. (2) However, the Court's perceived preference for the collective market goal over almost any distinct national policy goal is often criticized as being overly rigid or normatively misplaced.[50] Even where justification arguments tend to be accepted in principle, they tend to fail in *substance*, normally either because they are found to be disproportionate to the objective pursued,[51] or because the State making the argument has not supported its claims with any or with sufficient empirical evidence. The latter occurred in *Bickel and Franz*, noting the Court's reference to the fact that '[i]t does not appear, however, *from the documents before the Court* that [the] aim [of protecting an ethno-cultural minority] would be undermined if the rules [on language arrangements for criminal proceedings] in issue were extended to cover German-speaking nationals of other Member States exercising their right to freedom of movement' (para. 29, emphasis added). In *Haim*, the Court focused on the former requirement, proportionality, emphasizing that 'it is important that language requirements designed to ensure that the dental practitioner will be able to communicate effectively with his patients, whose mother tongue is that of the Member State concerned, and with the administrative authorities and the professional bodies of that State do not go beyond what is necessary to attain that objective.'[52] Only in some cases

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49 See, for example, the Court's statement in *Schwarz* that 'whilst [Union] law does not detract from the power of the Member States as regards, first, the content of education and the organization of education systems and their cultural and linguistic diversity…and, secondly, the content and organization of vocational training…the fact remains that, when exercising that power, Member States must comply with [Union] law, in particular the provisions on the freedom to provide services' (Case C-76/05 *Schwarz and Gootjes-Schwarz v Finanzamt Bergisch Gladbach* [2007] ECR I-6849, para. 70).

50 The controversies surrounding the judgment in Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Eyggnadsarbetareförbundets avd. 1, Byggettan, Svenska Elektrikerförbundet* [2007] ECR I-11767 are a recent example of this; the Court was typically charged with promoting the economic rights of service providers over the normatively more significant fundamental rights of social protection embedded within the Swedish constitution.

51 See again, Barnard note 41 *supra*, who demonstrates this empirically. Specifically on disproportionate language requirements, see Case C-193/05 *Commission v Luxembourg* [2006] ECR I-8673. This case related to language tests imposed on lawyers seeking to establish themselves in Luxembourg; this requirement was found to go beyond the legislative framework relevant to the establishment of lawyers, within which the Court felt that sufficient attention was already given to ensuring the acquisition of sufficient host State language competence.

52 *Haim*, para. 60.

does the Court emphasize that the national court is best placed to make this determination.[53]

Thus, when States seek to offer policy justifications for retaining distinct national standards that will have an impact on transnational movement within the EU internal market, it is essential that the *significance* of those policy choices be clearly established. This will ensure that the State's claims are extracted and concretized from the more abstract or normative values that might be argued for in each case. And remembering the requirements of proportionality, States must further ensure that the methodology of value-protection they have chosen/implemented could not be replaced by one less injurious to the competing objective — and value — of EU free movement rights. In other words, first, States may well have very good reasons to argue for protected national spaces on a given regulatory issue, but they must somehow *prove* this and not just say so. Second, there must also be very good reasons underpinning the *level* of protection in place.

But, again, as we saw to some extent above as regards procedural language arrangements, and as reflected perhaps even more strongly here, we return to the same conundrum: the challenges outlined in this free movement case study arise *irrespective* of the status (in either national or EU terms) of the language in question. If the Court of Justice imposes the same strenuous evidentiary requirements on all language communities, are there any *particular* burdens faced by MSLCs, and, in turn, any particular avenues of redress open to them?

5 · Strategies: What Should MSLCs Seek to Address?

This chapter first outlined the overarching EU legal framework governing language arrangements, setting this in context against a brief overview of the key EU policy strands that are oriented towards the protection and promotion of linguistic diversity. The chapter then explored both procedural and substantive aspects of EU law in more depth, in order to understand how the overarching legal framework plays out in reality.

In broad terms, EU governance of language arrangements — whether

53 See, for example, the recent judgment in *Runevič-Vardyn and Wardyn* (Case C-391/09, judgment of 12 May 2011); see paras 74-78, and para. 91.

in terms of its own procedural rules or how it impacts on State rules through other strands of substantive law — strongly resonates with two keywords. First, it is fraught with *complexity*. The starkness of the binary (official-working/all-other) approach to the status of languages within the EU masks a more complex reality — one that relates to both the number and varying needs of EU languages and language communities; and also reflects the de facto fragmentation of EU language rules (even when the relevant languages are, apparently, formally included). Second, it is simply a fact that while the vastness of the 27 State EU brings many good things, it also generates serious practical, financial and efficiency costs. Here, then, we encounter the need to agree on and realize *compromise*.

The key findings of the analysis undertaken here suggest that MSLCs are affected *more acutely* (i.e. relative to other language communities) by EU law and the choices then made within EU language governance in the *procedural* sense rather than in the *substantive* sense. This conclusion will now be explained in more detail.

5.1 · The 'procedural' impact of EU law on MSLCs

The fundamental starting point here is the fact of the inclusion of several MSLCs in the EU language regime alongside the complete lack of formal (or any) status for others. This becomes important because of the way in which official status at EU level opens a critical door in the context of procedural language arrangements.[54] We saw this very clearly in terms of communicative access — not only to EU institutions but also, because of the frequent transposition of those language rules, to a range of EU bodies, agencies and offices.

We also saw, however, that even official status in EU terms does not secure representation within language arrangements. This manifests both in a more explicit recent distinction between the external and internal functions of language in the sphere of administrative governance but also in situations where efficiency and reduced costs have taken precedence over more intensive multilingual practices (e.g. the language rules operating within OHIM and those proposed for the EPO).

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54 In section 3, it was also shown briefly that official EU status also enables MSLCs to access a range of EU language policy benefits. A more detailed discussion on this point is, however, beyond the scope of this primarily legal analysis.

This means that there is a difficult but critical question on which we need to reflect: what *precisely* is it that MSLCs would *want* through seeking inclusion within the EU language regime? It is essential that responses to this fundamental question are properly reflected on and refined. Inclusion within the EU language regime might be sought for *symbolic* objectives, based on the argument that the official languages of the EU polity should better or more accurately reflect the extent of the polity's language communities in a properly representative sense and grounding the particular claim of MSLCs in the representation of several such MSLCs *already*. It would have to be demonstrated, however, as to why the new arrangements whereby States can take responsibility — and pay for — greater use of non-(EU)-official languages in different aspects of EU communication, administration and publication are not enough. Poor take-up of the mechanisms and/or problematic implementation where they have been taken up could be engaged as persuasive evidence here.

This conclusion also reinforces the fact that the complex *functional* dimension of EU language arrangements must be addressed too. In 1995, the European Parliament forcefully declared 'its determination to oppose any attempt to discriminate between the official and the working languages of the European Union'.[55] In addition to the right of citizens to express themselves in their own language, the Parliament emphasized that 'the right of an elected representative to express himself and to work in his own language is an inalienable part of the rule of democracy and of his mandate' (para. 5). This sounds great. But the framing of the scope of the Resolution in the EU official languages *only* — which is what occurred here — already undermines the normative strength of these arguments, recalling the significance of inclusion within/exclusion from official language regimes. The illogical conclusion would be that MSLCs do not enjoy the same rights of expression or representation within the 'rule of democracy'.

However, if representation within the EU language regime is sought and can be defended on the part of those MSLCs not already recognized there, this can only be achieved in real terms on the basis of *compromise* at the functional level — not, as has been suggested in *Kik*, for example, on the basis of whether the entity is a legal/economic rather than natural

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55 European Parliament, Resolution on the use of the official languages in the institutions of the European Union, 1995 OJ C43/91, para. 2.

person; and not where unreasonable linguistic burdens are placed on those who must engage with EU institutions, bodies, offices or agencies. The emerging distinction between the external and internal implications of language arrangements seems, instead, a fairer basis for compromise. But even here, a difficult question arises: should all natural and legal persons have language *choice* or be subjected to an assessment of language *need*? It is clear that several MSLCs veer towards the former, ascribing related responsibility to the EU for dealing with the resultant demands on efficiency and costs.

A different instinct, perhaps mindful too of the collective value of ensuring that the EU and its internal market actually do continue to *work*, leans more to a yardstick of linguistic *need*, especially given the symbiotic mechanisms (if properly engaged and implemented) through which States can facilitate *choice* of language. This sites States in the role of interim agent, negotiating (and paying for) relevant practicalities between the natural or legal person and the relevant EU authority — which seems appropriate, and could (indeed, arguably *should*) be strengthened, in the linguistic sphere at least, from an option to a responsibility.

5.2 · The 'substantive' impact of EU law on MSLCs

It was suggested in section 4(b) that the challenges faced in trying to establish protected national spaces even for very understandable and legitimate reasons of policy are faced by all States within the EU; thus by all communities and, potentially, covering vast swathes of policy issues. This is one reason why the challenges faced by MSLCs are not necessarily *greater*. But more generally in the substantive side of things, there is some cause for optimism; for two reasons.

First, it was observed earlier in this chapter that we might have entered an enhanced phase of EU law in terms of effective protection against discrimination. Through both the legal status of the EU Charter of Fundamental Rights that has been effected by the Lisbon Treaty and developments in the case law more generally, EU law has moved beyond its traditional emphasis on nationality and gender discrimination, and more extensively into protection of the range of grounds listed in Article 21(1) of the Charter — and Article 21(1) includes language discrimination. It was noted that, to date, these developments have emerged in the field of age discrimination (through cases like *Mangold* and *Kücükdeve-*

ci). But there is no reason to assume that less normative significance could be attributed to discrimination on grounds of language when a suitable case makes its way to Luxembourg. Indeed, it will be interesting to see how the Court articulates this if the EPO complaint lodged by Italy and Spain proceeds to judgment.

It is crucial to remember that the EU does not have a *general* jurisdiction for the protection of rights. EU standards of protection are applicable only where the case at issue manifests a 'connecting factor' to EU law, to use the EU legal terminology. This is normally satisfied through the establishment of a transnational dimension. But in the case of protection against discrimination, given the adoption of an implementing Framework Directive on achieving equality in the context of employment,[56] the scope of protection is wider. Thus, questions about discrimination on grounds of language that can be linked to EU law in, at least, either of these two key ways (transnational situations; equality in the context of employment) will *have* to be addressed in the language and mindset of rights — a welcome advance from the more clumsy approach that we saw in *Kik*.

This still leaves us the challenge identified in section 4(b) i.e. the difficulty of establishing valid and proportionate policy justifications where a restriction on EU law has been established. But even here, there is scope for optimism, suggested by a recent judgment of the Court of Justice itself. In *UTECA*, the Court of Justice assessed Spanish legislation on the funding of films against inter alia Article 56 TFEU.[57] In particular, requirements that television operators had to allocate 5% of their operating revenue for the previous year to the funding of full-length and short cinematographic films and European films made for television, and 60% of that funding to the production of films of which the original language is one of the official languages of Spain, were challenged by the *Unión de Televisiones Comerciales Asociadas* (UTECA). The Court of Justice applied the three-step framework of free movement law outlined above i.e. first establishing that the national measures did constitute a restriction on the free movement of transnational services and then discussing the underlying policy objective of protecting multilingualism within Spain in the context of justification

56 Directive 2000/78, 2000 OJ L303/16

57 Case C-222/07 *UTECA v Administración General del Estado* [2009] ECR I-1407; I am grateful to Bruno de Witte for raising this judgment for discussion.

and proportionality. Crucially, however, the Court found that there was nothing to suggest that the national measures were *disproportionate* in this case. The interesting paragraph for present purposes reasons as follows:

> [t]he fact that [a linguistic] criterion may constitute an advantage for cinema production undertakings which work in the language covered by that criterion and which, accordingly, may in practice mostly comprise undertakings established in the Member State of which the language constitutes an official language *appears inherent to the objective pursued*. Such a situation cannot, *of itself*, constitute proof of the disproportionate nature of the measure at issue in the main proceedings *without rendering nugatory* the recognition, as an overriding reason in the public interest, of the objective pursued by a Member State of defending and promoting one or several of its official languages.'[58]

This way of thinking about proportionality needs to be worked out by the Court in more detail, to ensure that this version of the test does not unduly undermine the valuable contribution of proportionality assessment in the first place. And so it is not yet clear how this generous appreciation of the proportionality of the national measures under review here fits with the stricter thrust of the case law on this point more generally. It does offer an attractive logic for certain disputes, however, and it made a material difference to the Court's thinking here, in a case about 'the objective…of defending and promoting one or several of its official languages constitutes an overriding reason in the public interest' (para. 27). And so, the critical point to remember is this: where a good case can be made in a case involving the needs of MSLCs, the Court of Justice has indicated that it *is* willing to listen.

58 *UTECA*, para. 36 (emphasis added).

6

THE IMPACT OF EUROPEAN UNION LAW ON MEDIUM-SIZED LANGUAGE COMMUNITIES

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SUMMARY: 1. Introduction. 2. The languages of the European Union Treaties. 3. The official languages of the institutions of the EU. 4. The working languages of the institutions of the EU. 5. The language rules of the Union bodies, offices and agencies. 6. The legal situation of the MSLs that lack institutional status in the EU. 6.1. The effects of EU secondary law on the MSLs without institutional status: the partial derogation of internal official language status. 6.2. The effects of EU secondary law on MSLs without institutional status: marginalization in socioeconomic activities. 7. The low profile of the MSLs that lack institutional status in the EU. 8. General conclusions.

If the Treaty concerning the accession of the Republic of Croatia to the European Union (2012 0J L112/10) finally comes into force on 1 July 2013 [Article 3(3) of the Treaty of Accession], from that date onwards Croatia will be a Member State of the EU. Croatian will become a language of the Treaties (Article 4 of the Treaty of Accession and Article 54 of the Act concerning the conditions of accession of the Republic of Croatia and the adjustments to the TEU, the TFEU and the TEAEC) and, in all likelihood, an official and working language of the institutions of the EU (Council Regulation No 1/58 has still not been amended; however, see Article 52 of the Act of Accession). Therefore, if the Treaty comes into force, the number of languages of the Treaties and the number of official and working languages of the institutions of the EU will rise from 23 to 24. What is more, given the number of speakers of Croatian in Croatia (approximately 4.5 million), the number of medium-sized languages with institutional status in the EU will rise from the current figure of 14 to 15.

1 · Introduction

Today, in the 27 Member States of the European Union (EU) there are nearly 70 autochthonous, traditionally spoken languages.[1] However, inside the EU not all these languages enjoy the same recognition, with the result that certain linguistic communities are favoured to the detriment of others. Equally, the goals of the single market (specifically, the free movement of goods, workers, establishment and provision of services) and the dynamic that accompanies the integration of Member States also have a notable effect on language use, again benefiting some (normally the ones with the highest numbers of speakers) but harming others.

In this chapter I will focus on the impact of EU law on the languages of the Medium-Sized Language Communities (MSLCs) and explore whether this impact is positive or negative. I examine the difficulties MSLCs face and finally propose some measures intended to resolve these difficulties. (For the concept of MSLCs, see the Introduction at the start of the book). I start with an analysis of the most important features of the linguistic regime of the EU, focusing on the status of language of the Treaties (section 2), the status of official language of the institutions (section 3), and the status of working language of the institutions (section 4). In section 5 I explore the language rules of the Union bodies, offices and agencies. I then analyse the legal situation of the MSLs that lack institutional status in the EU and their low level of recognition (sections 6 and 7). Section 8 closes the chapter with some general conclusions and the proposal of some measures aiming to make the linguistic regime of the EU more equitable.

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1 We count only languages that are historically established in the area, and leave aside languages which have appeared more recently as a result of immigration. Given the difficulty of distinguishing between languages and dialects, there is no unanimous agreement on the exact number of languages traditionally spoken in the EU. See the detailed study by P Juaristi, T Reagan and H Tonkin, 'Language diversity in the European Union. An overview', in X Arzoz (ed.), *Respecting Linguistic Diversity in the European Union* (Amsterdam/Philadelphia: John Benjamins Publishing Company, 2008), 47, at 48-58 especially, which lists 63/64 languages spoken as first languages in the EU, plus four special cases.

2 · The languages of the European Union Treaties

The languages of the Treaties are the languages in which the text of European Union Treaties is 'equally authentic'. The treaties list the languages in their last article. Currently there are 23: Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish and Swedish.

The status of 'language of the Treaties' entails two main consequences. The first is the right to invoke before the courts any of the versions of the European Union Treaties drawn up in those 23 languages, given that the texts drawn up in these 23 languages ('the texts in each of these languages') are 'equally authentic'.[2] The second consequence is, in fact, one of the legal effects which traditionally correspond to the official languages, but which the TFEU confers on the languages of the Treaties: namely, that the citizens of the Union have '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 Treaty languages and to obtain a reply in the same language.' [Article 20(2)(d) TFEU. See also Article 24 TFEU].[3] This right is, in the case of the European Parliament and of the European Ombudsman, extended to all natural or legal persons residing or having their registered office in a Member State [Articles 227 and 228(1) TFEU]. Article 41(4) of the Charter of Fundamental Rights of the European Union[4] even refers to '[e]very person', although the ambit is limited to the relations with the institutions of the Union.

The treaties do not establish official languages, but limit themselves to stating who is competent to determine 'the rules governing the languages of the institutions of the Union', and to laying down the procedure to fol-

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2 See Article 55 of the Treaty on European Union (TEU). A consolidated version of the TEU is published in 2010 OJ C83/13 (see the note to the reader on page 2 of the cover of the OJ). See also Article 358 of the Treaty on the Functioning of the European Union (TFEU). A consolidated version of this Treaty was published in 2010 OJ C83/57 (see the note to the reader on page 2 of the cover of the OJ).

3 Currently these institutions are the following: the European Parliament, the European Council, the Council, the European Commission, the Court of Justice of the European Union, the European Central Bank and the Court of Auditors [Article 13(1) TEU]. The Economic and Social Committee and the Committee of the Regions are the Union's advisory bodies [Article 13(4) TEU].

4 2010 OJ C83/389.

low. According to Article 342 TFEU, the Council is entrusted with determining these rules, which must be adopted unanimously: 'The rules […] shall […] be determined by the Council, acting unanimously by means of regulations'. Therefore, the consent of each and every Member State is required. In fact it was by stipulating the rules governing the languages of the institutions that the Council determined the official languages. In practice, these rules, set out in Council Regulation No 1 of 15 April 1958 determining the languages to be used by the [European Union], are limited to recognizing the official and the working languages of the institutions and to setting out the consequences deriving from this recognition.

Before going on to examine the official languages, we should recall another linguistic provision contained in the treaties that is of particular interest to us. This is Article 3(3) TEU, which lays down that the Union shall respect its rich cultural and linguistic diversity. This commitment, which is one of the Union's aims and objectives, is reiterated in Article 22 of the Charter of Fundamental Rights of the European Union, which also states that '[t]he Union shall respect cultural […] and linguistic diversity'.[5]

3 · The official languages of the institutions of the EU

The EU recognizes 23 languages as official. The official languages were established in Council Regulation No 1 of 15 April 1958, and last amended by Council Regulation (EC) No 1791/2006 of 20 November 2006:[6]

> The *official languages* and the working languages of the institutions of the Union shall be Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish and Swedish. (Emphasis added).

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5 The Treaties also contain other, more specific, provisions referring to languages. See N Nic Shuibhne in Chapter 5; A Milian i Massana, '2004-2009: l'evolució del règim lingüístic en el dret de la Unió Europea. De l'ampliació del 2004 al Tractat de Lisboa', *Revista d'Estudis Autonòmics i Federals*, nr 10 (2010), 109, at 145-155. The latter failed to mention Article 41(4) of the Charter of Fundamental Rights of the European Union.

6 2006 OJ L363/1. Council Regulation No 1/58 is adopted under the authority contained in Article 342 TFEU.

Thus, of the almost 70 languages mentioned above, 23 enjoy official status in the EU. These are the languages that each Treaty recognizes as the languages of the Treaties, and they coincide with the official languages of the Member States, understanding as such those languages which are official in all the territory of a Member State or which are official languages of a Member State's central institutions.[7]

What are the principal legal effects that derive from the status of official language? As official languages, every person subject to the jurisdiction of a Member State, and the Member States themselves, may address the institutions in any of the official languages and the reply shall be drafted in the same language (Article 2 Council Regulation No 1/58). So the official languages — which in turn are those of the Treaties — are the languages, and the only languages, in which individuals and Member States can draft documents to be sent to institutions, and vice versa. This consequence of the status of official language, in effect since 1958, has, since the entry into force of the Treaty of Amsterdam on 1 May 1999, also been assigned to the status of language of the Treaties. As we saw in section 2, this effect is also present in the TFEU. Incidentally, the TFEU explicitly disposes — and this also dates back to the Amsterdam Treaty, even though it is not established expressly — that the use of these languages constitutes a true *right* for the citizens of the Union and persons concerned [Articles 20(2)(d) and 227 TFEU]. As we saw above, the TFEU also extends this right beyond the relations with the institutions to the citizens of the Union and natural and legal persons residing or having their registered office in the EU who wish to apply to the European Ombudsman and to the citizens of the Union who wish to address the Union's advisory bodies.

Returning to the status of official language, Council Regulation No 1/58 also establishes that the regulations and other documents of general application shall be drafted in all the official languages (Article 4),[8] with

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7 The preamble to the Council Regulation No 1/58 states: 'Whereas each of the four languages [currently 23 languages] in which the Treaty is drafted is recognised as an official language in one or more of the Member States of the Community [currently the EU]'.

8 A temporary and renewable derogation measure from Article 4 is provided for Irish: institutions of the European Union shall not be bound by the obligation to draft all acts in Irish and to publish them in that language in the *Official Journal*. However, this derogation does not apply to Regulations adopted jointly by the European Parliament and the Council. See Council Regulation (EC) No 920/2005 of 13 June 2005, 2005 L156/3, and Council Regulation (EU) No 1257/2010 of 20 December 2010, 2010 OJ L343/5.

the result that the *Official Journal of the European Union* is published in 23 different versions (Article 5).

It may seem surprising that the EU recognizes so many languages, especially in comparison with other international organizations. Such a high number responds to the need to guarantee legal certainty, and to the principles of equality and non-discrimination. The recognition of all those languages is the only way to guarantee communication between all citizens of the EU and its institutions, and also to ensure publication of the regulations and other documents that have direct applicability or direct effect in a form that is comprehensible to all these citizens. We should recall that the EU is not an interstate international organization, but a supranational organization. Irish is the only language of the 23 which it was not essential to recognize, since English — the official language of the United Kingdom and therefore also of the EU — is also official in Ireland and all Irish citizens know and understand it (while in fact the knowledge of Irish is extremely limited). Nor, perhaps, following the same logic, was it essential to recognize Maltese, since English is also an official language in Malta; however, in contrast to Ireland, it cannot be taken for granted that all Maltese citizens understand English and for this reason the recognition was necessary.

If we focus on the number of 'native speakers' within the EU, 14 of the 23 official languages correspond to MSLCs.[9] Since the rules that govern the use of the official languages in the institutions are the same for all, this regime does not have a negative impact on communities that speak a medium-sized language (MSL). But this general comment does not apply to MSLCs whose language is not recognized by these institutions and which therefore lacks legal status in this context. I will refer to these MSLCs later on, in sections 6 and 7.

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9 The approximate number of speakers of the languages of these 14 MSLCs is as follows: Romanian (c. 19 million), Hungarian (c. 12 million), Greek (c. 10.5 million), Czech (c. 10.3 million), Portuguese (c. 10 million), Bulgarian (c. 8.5 million), Swedish (c. 8 million), Slovak (c. 5.5 million), Danish (c. 5 million), Finnish (c. 4.7 million), Lithuanian (c. 2.9 million), Slovenian (c. 2 million), Latvian (c. 1.8 million) and Estonian (c. 1 million). These figures are taken from Juaristi, Reagan and Tonkin note 1 *supra*, at 58-59 and correspond to the number of 'native speakers' within the EU. The number of 'native speakers' in the respective country, the figure that really interests us, is not very different.

4 · The working languages of the institutions of the EU

The official languages are in turn the working languages of the institutions, as laid down in Article 1 of Council Regulation No 1/58: 'The official languages and the *working languages* of the institutions of the Union shall be…'. (Emphasis added). While the Council Regulation No 1/58 develops the status of official language, it only provides a general framework for the working languages, establishing the following: 'The institutions of the Community [currently of the EU] may stipulate in their rules of procedure which of the languages are to be used in specific cases' (Article 6). As we see, Council Regulation No 1/58 authorizes the institutions to omit some of the working languages 'in specific cases'. The English version of the provision does not coincide exactly with the older versions in French, Dutch and German, according to which the institutions may modulate the linguistic regime in their Rules of Procedure.[10] In any case, in practice, only a small number of languages are used as internal working languages (and therefore, in activities that lack legal effect vis-à-vis third parties) — mainly English, then French and, to a much lesser extent, German.[11] The percentage of use of the other working languages is insignificant. This *de facto* reduction of working languages exceeds the authorization of Article 6 of Council Regulation No 1/58. This is not a mere 'modulation'; other working languages are excluded across the board, not only 'in specific cases'.

So here we find the first fissure among the 23 languages recognized in the institutions, in so far as the MSLs and certain other languages with larger numbers of speakers are marginalized as working languages. Those who usually protest most forcefully about the place of their languages in the internal activities of the EU are Member States such as Spain and Italy whose official languages have a high number of speakers, rather than the States

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10 For example, the French version of Article 6 reads: 'Les institutions peuvent déterminer les modalités d'application de ce régime linguistique dans leurs règlements intérieurs.'

11 For the linguistic practices in the Council see A Lopes Sabino, 'Les langues au Coneil de l'Union européenne: légalité et légitimité. Enjeux, pratiques et perspectives', in D Hanf, K Malacek and E Muir (ed.), *Langues et construction européenne* (Brussels: Peter Lang, 2010), 81, at 83-84; for the European Commission see L Krämer, 'Le régime linguistique de la Commission européenne', in D Hanf, K Malacek and E Muir (ed.), *Langues et construction européenne* (Brussels: Peter Lang, 2010), 97, at 99-106. For the linguistic practices in the institutions see A de Elera-San Miguel Hurtado, 'Unión Europea y Multilingüismo', *Revista española de Derecho Europeo*, nr 9 (2004), 85, at 112-115.

whose official language is an MSL. In fact, those Member States have more powerful reasons for opposing, since their languages compete on the international stage with the three that are generally used. Even France, whose language has an active presence in the institutions as a working language, often protests against the increasing presence of English. On the other hand, for the MSLs, the sociolinguistic impact of their non-recognition as working languages is insignificant on the international stage and the internal impact in their respective countries also appears negligible.

However, at State level this marginalization has one small but tangible indirect impact on MLS, which is felt via the language requirements imposed on applicants seeking appointment as servants of the EU. In accordance with the Staff Regulations of Officials of the EU (henceforth, Staff Regulations) and the Conditions of Employment of other Servants of the EU (henceforth, Conditions of Employment),[12] a servant may be appointed or engaged only on condition that 'he produces evidence of a thorough knowledge of one of the languages of the EU and of a satisfactory knowledge of another language of the EU to the extent necessary for the performance of his duties.'[13] These language requirements apply both to permanent officials (Administrators and Assistants) (Article 28(f) Staff Regulations), and to other servants (Contract and Temporary Agents) (Articles 82(3)(e) and 12(2)(e) Conditions of Employment).

Therefore, in order to participate in the admission tests and open competitions, based on tests, candidates are obliged to fulfil general and specific conditions, among them a thorough knowledge of one of the official languages of the EU (language 1) and a satisfactory knowledge of another (language 2). While language 1 will normally be any of the 23 official languages, to be chosen by the candidate, language 2 will in practice be chosen between one of English, French or German. In this way, linguistic dispersion is avoided and communication between the servants ensured. Likewise, since citizens whose main language is one of these three languages are also obliged to have a satisfactory knowledge of a second lan-

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12 See Regulation (EEC, Euratom, ECSC) No 259/68 of the Council of 29 February 1968, laying down the Staff Regulations of Officials and the Conditions of Employment of other Servants of the European Communities and instituting special measures temporarily applicable to officials of the Commission, 1968 OJ L56/1 — English special edition: Series I Chapter 1968(1), at 30, and see the following Regulations amending that Regulation.

13 Although not expressly stated, it is understood that these languages are only the *official* languages of the Union.

guage (habitually, as we said, a satisfactory knowledge of English, French or German), this obligation means that they are not at an advantage with respect to other citizens of the EU. Therefore, these language requirements do not infringe Article 18 TFEU which prohibits 'any discrimination on grounds of nationality'. In fact as the linguistic proficiency expected of servants is the same for all, other requirements may be imposed depending on the duties of the posts vacant, particularly in the case of vacancies for linguists (translators, interpreters) and other special profiles.

In practice, to favour the integration of all the countries, the filling of vacant posts aims to achieve a balance between Member States.[14] For this reason, the Staff Regulations and the Conditions of Employment establish that recruitment shall be conducted on the broadest possible geographical basis from among nationals of Member States. Nevertheless, no posts shall be reserved for nationals of any specific country. This rule, however, has not always been respected and the Court of Justice has noted that the national preference for safeguarding the geographical balance can only be subsidiary and in cases in which candidates present equal merits. However, the national preference is justified in the case of the incorporation of new countries.[15] In any case, as far as the language requirements are concerned, it should be borne in mind that candidates for a post cannot be expected to have a thorough knowledge of a particular official language, where the effect of that language condition is to 'reserve a post for a specific nationality without such actions being justified on grounds connected with the proper functioning of the service'.[16]

The language requirements obviously condition the languages in which the selection procedures are conducted. The three 'language 2' (English, French and German) are the languages mainly used in the admission tests and in the written and oral tests in the open competitions, and they are also the principal languages for the assessment centre.

So, the circumstance that English, French and German are *de facto* the working languages means that these languages acquire a predominant position inside the language requirements of the civil service. This situation

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14 For example, '[t]he Commission has long pursued a multi-national staffing policy designed to ensure that there is a balanced representation of nationals from all member states throughout the services', in particular, at senior levels. Neil Nugent, *The European Commission*, (Palgrave, 2001), 174.

15 M P Chiti, *Diritto amministrativo europeo*, (Milan: Giuffrè, 4th ed., 2011), at 408-409.

16 See Case 15/63 *Lassalle v European Parliament* [1964] ECR 31, para. 38.

has a linguistic impact inside the MSLCs, in so far as it stimulates the learning of one of these three languages (in particular, of English) as a second language. Of course, this impact is also felt in the Member States whose official languages are languages with a larger dimension, but in neither of these cases is the linguistic situation seriously affected.

The action brought by some Member States against a Commission decision to publish vacancy notices for senior management posts in English, French and German, and against Commission vacancy notices for different posts published only in those three languages (in some cases published only in the English, French and German editions of the *Official Journal of the European Union*) bears witness to the sensitivity of the issue of the rules governing languages and the risk that they may lead to discrimination on grounds of language between candidates in a selection procedure.[17] This sensitivity is also expressed in the action brought by the Kingdom of Spain against calls for applications for temporary staff to serve with Eurojust. In all these cases it is striking that the most militant Member States, the ones that contest the Commission vacancy notices or against Eurojust are, as we noted above, States whose official languages have a large number of speakers; these legal actions have not generally been supported by States whose official languages are MSLs.[18]

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17 The publication of the vacancy notices in the English, French and German editions of the Official Journal, without any advertisement in the other editions, is indeed discriminatory. According to the ruling of the Court of First Instance (now the General Court), '[e]ven if [the] candidates have an understanding of at least one of the languages English, French and German it cannot be presumed that they will look at an edition of the Official Journal other than that published in their mother tongue.' Case T-185/05 *Italian Republic v European Commission* [2008] ECR II-3207, para. 138. The circumstance that the advertisements should not contain the full text of the vacancy notices is not considered discriminatory, in the case that the candidates are required to know one of the three languages and if the advertisement refers to the English, French and German edition of the Official Journal where the full text of the vacancy notices has been published.

18 Case C-160/03 *Spain v Eurojust* [2005] ECR I-2077 (action supported by Finland); Case T-185/05 *Italian Republic v Commission* [2008] ECR II-3207 (action supported by Spain and Latvia); Case T-156/07 and T-232/07 *Spain v European Commission* [2010] ECR II-191 (action supported by Lithuania and Greece); Case T-166/07 and T-285/07 *Italian Republic v European Commission* [2010] ECR II-193 (action supported by Lithuania and Greece). An appeal before the Court of Justice against this judgment has been lodged by the Italian Republic. See also Case T-117/08 *Italian Republic v European Economic and Social Committee* Judgment of 31 March 2011, not yet reported (action supported by Spain); Case T-205/07 *Italian Republic v European Commission* Judgment of 3 February 2011, not yet reported.

5 · The language rules of the Union bodies, offices and agencies

The inequality between the 23 official and working languages is accentuated in the case of the EU bodies and agencies. Council Regulation No 1/58, following the authority contained in Article 342 TFEU,[19] limits itself to establishing the language rules of the EU institutions. Thus, the 23 official and working languages are the official and working languages of the institutions: 'The official languages and the working languages of the *institutions* of the Union shall be…' (Emphasis added), begins Article 1 of Council Regulation No 1/58. What rules, then, govern the languages of the European Ombudsman and of the advisory bodies? And what are the languages rules of the bodies, offices and agencies that depend on the institutions?

The rules governing the languages of the institutions are applied to the European Ombudsman and the advisory bodies (the Economic and Social Committee and the Committee of the Regions), with certain slight modifications. It is only natural that they should be subject to the same rules, given the close relation between the European Ombudsman and the advisory bodies with the institutions. We should also recall that the TFEU extends to the European Ombudsman and the advisory bodies, in the terms that we have already seen above, the right to draft documents to be sent to institutions in any one of the Treaty languages, and to obtain a reply in the same language.

The provisions with regard to the bodies, offices, and agencies vary widely.[20] At one end of the scale, it is stipulated that the provisions laid down in Council Regulation No 1/58 shall apply to the body or agency, which is established without further provisions,[21] or specifying some of the consequences of these language rules,[22] or specifying that specific documents

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19 Article 342 TFEU reads as follows: 'The rules governing the languages of the *institutions* of the Union shall, without prejudice to the provisions contained in the Statute of the Court of Justice of the European Union, be determined by the Council, acting unanimously by means of regulations.' (Emphasis added).

20 See N Nic Shuibhne in Chapter 5.

21 See: European Maritime Safety Agency [Regulation (EC) No 1406/2002 of the European Parliament and of the Council of 27 June 2002, 2002 OJ L208/1]; European GNSS Supervisory Authority [Council Regulation (EC) No 1321/2004 of 12 July 2004, 2004 OJ L246/1]; Community Fisheries Control Agency [Council Regulation (EC) No 768/2005 of 26 April 2005, 2005 OJ L128/1]; European Institute for Gender Equality [Regulation (EC) No 1922/2006 of the European Parliament and of the Council of 20 December 2006, 2006 OJ L403/9].

22 See: European Network and Information Security Agency [Regulation (EC) No 460/2004 of the European Parliament and of the Council of 10 March 2004, 2004 OJ L77/1].

should be written in all the official languages.[23] An intermediate regulation foresees the application of the provisions of Council Regulation No 1/58, but later authorizes the management or administrative board to decide (by unanimity or otherwise) 'on the internal language arrangements'.[24] The distinction between the working and the official languages is formulated here. At the other end of the scale, we find provisions that are not subject to Council Regulation No 1/58, and in fact do not even mention it. For example, the administrative board is granted freedom to decide on the linguistic arrangements for the Agency, with the sole limitation that the Member States may address the Agency in the Community (Union) language of their choice;[25] or it establishes that the management board shall determine by unanimous decision the rules governing the languages of the Centre, 'including the possibility of a distinction between the internal workings and the external communication'.[26] In this latter case, freedom is given to establish the language rules and the distinction between the working and the official languages is expressly authorized. However, the rules on languages should be adopted 'taking into account the need to ensure access to, and participation in, the work of the Centre by all interested parties in both cases.'

It is plain to see that there is a lack of consistent regulation regarding the linguistic regime of the bodies, offices, and agencies. In fact it has been claimed that there is no clear system based on the application of chronological, organizational or functional criteria, or even on criteria regarding the rights of individuals in their dealings with the body, office or agency in question.[27] In any case, it appears that the tendency has re-

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23 See: European Agency for the Management of Operational Cooperation at the External Borders [Council Regulation (EC) No 2007/2004 of 26 October 2004, 2004 OJ L349/1]; European Police College (CEPOL) [Council Decision 2005/681/JHA of 20 September 2005, 2005 OJ L256/63]; European Asylum Support Office [Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010, 2010 OJ L132/11].

24 See: European Union Agency for Fundamental Rights [Council Regulation (EC) No 168/2007 of 15 February 2007, 2007 OJ L53/1]; European Police Office (Europol) [Council Decision of 6 April 2009 (2009/371/JHA), 2009 OJ L121/37]; Agency for the Cooperation of Energy Regulators [Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009, 2009, OJ L211/1].

25 See: European railway agency [Regulation (EC) No 881/2004 of the European Parliament and of the Council of 29 April 2004, 2004 OJ L220/3]. At the request of a Member of the administrative board, the linguistic arrangements shall be taken by unanimity.

26 See: European Centre for Disease Prevention and Control [Regulation (EC) No 851/2004 of the Europan Parliament and of the Council of 21 April 2004, 2004 OJ L142/1].

27 D-U Galetta and J Ziller, 'Il regime linguistico della Comunità' in M P Chiti and G Greco, *Trattato di Diritto amministrativo europeo*, Tomo II, 2 ed. (Milan: Giuffrè Editore, 2007), 1067, at

cently been to distinguish between the working and the official languages, a practice that benefits a few languages, in particular English. Inside the variety of regulations, we should also add the cases in which the norm establishing the body, office or agency in question says nothing about language rules.[28]

In general, the Staff Regulations and the Conditions of Employment of other Servants in force in the institutions also apply to the bodies, offices and agencies.[29] The tendency in these bodies to reduce the number of working languages encourages the application of the practice of the institutions, that is, to require a small number of languages as second language.

The Office for Harmonization in the Internal Market (OHIM) deserves special mention. The distinctive nature of its linguistic provisions — the rules governing languages are found in the Council Regulation that establishes the OHIM —[30] lies in the fact that only five languages are recognized as languages of the OHIM: English, French, German, Italian and Spanish. In accordance with the provisions contained in the Council Regulation, this means that, although the application for a Community trade mark shall be filed in one of the official languages of the EU, proceedings for opposition, revocation or invalidity proceedings may be brought only in one of the five languages of the OHIM, except if the parties agree that they are to be conducted in another official language. This reduction in the languages of the proceedings aims to simplify the work of the OHIM and to cut costs. Its legal significance is considerable, because it is the first time that a legislative act of the EU expressly reduces not only the number of working languages, but also the number of official languages for certain official activities. This is so because opposition, revocation or invalidity proceedings

1086. For a detailed analysis of the linguistic regime in the European Environment Agency, the European Food Safety Authority and Europol, see E Chiti and R Gualdo, *Il regime linguistico dei sistemi comuni europei. L'Unione tra multilinguismo e monolinguismo. Quaderno 5 Rivista trimestrale di diritto pubblico* (Milan: Giuffrè, 2008).

28 See: European Environment Agency [Council Regulation (EEC) No 1210/90 of 7 May 1990, 1990 OJ L120/1]; European Medicines Agency [Regulation (EC) No 726/2004 of the European Parliament and of the Council of 31 March 2004, 2004 OJ L136/1]; European Food Safety Authority [Regulation (EC) No 178/2002 of 28 January 2002, 2002 OJ L31/1]. Nor is anything said of the Translation Centre for bodies of the European Union [Council Regulation (EC) No 2965/94 of 28 November 1994, 1994 OJ L314/1].

29 See Article 1a(2) of the Staff Regulations of Officials of the European Communities.

30 Article 115 of the Council Regulation (EC) No 40/94, of 20 December 1993, on the Community trade mark, 1994 OJ L11/1.

cannot be considered as internal workings, given that they create official relations with legal effect vis-à-vis the parties.

For the Court of Justice, the reduction of the official languages of the OHIM does not contravene EU law. In the Kik case,[31] the Court upheld the linguistic provisions contained in Article 115 of Council Regulation 40/94, on the grounds that this linguistic regime pursues the legitimate aim of seeking an appropriate linguistic solution to the difficulties arising where the parties cannot agree on which language to use, is appropriate and proportionate in so far as it limits the choice of the second language to the languages which are the most widely known in the EU, and therefore does not amount to discrimination on grounds of nationality. The Court of Justice also affirms, and this is especially relevant, that the various references to the use of languages contained in the Treaty establishing the European Community — which today would be those contained in the TFEU — '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.'[32]

Therefore, in the bodies, offices and agencies, the distinction between the working and the official languages is consolidated and similarly the door for a reduction in the official languages is opened. The MSLs are marginalized, even though this marginalization does not affect their vitality in their respective countries. For this reason the States affected hardly reacted at all to the language rules of the OHIM. Significantly only one State — Greece — supported the appellant, Ms Kik.

In any case, the linguistic regime of the bodies, offices and agencies encourages the learning of one of the EU's most widely-spoken languages as a second language — in practice, English, since this is the language that is most spoken by EU citizens. Once again, the languages competing are the ones with the greatest international diffusion. This probably explains why Spain supported, as intervener, the defendant, that is, the OHIM, in the appeal brought by Ms Kik.

The aim of reducing the number of official languages even further emerges again in the case of the European Union patent.[33] Only English,

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31 Case C-361/01 P *Christina Kik v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* [2003] ECR I-8283.

32 Para. 82.

33 See N Nic Shuibhne in Chapter 5.

French and German are recognized as official languages of the European Patent Office (EPO) and, therefore, as languages of the EU patent. The opposition of Italy and Spain to this rule has forced the other 25 Member States to make use of the enhanced cooperation procedure provided for in Article 20 TEU. The decision authorizing enhanced cooperation in the area of the creation of unitary patent protection in Council Decision 2011/167/EU of 10 March 2011,[34] has been challenged before the Court of Justice by Italy and Spain. The impugnation of the decision by these two countries, whose respective languages were recognized by the OHIM, stresses once again that it is the States whose languages are widely spoken that become involved in linguistic disputes.

6 · The legal situation of the MSLs that lack institutional status in the EU

EU law recognizes only three levels of linguistic status — the languages of the Treaties, the official languages and the working languages — and as we have seen, 23 languages currently enjoy all of these three levels. All these languages, as we have also seen, are recognized as official in one or more of the Member States, understood as a language which is official in all the territory of a Member State[35] or which is official in the central institutions of a Member State. Therefore, in accordance with EU law, some 45 languages lack institutional recognition. In terms of the number of speakers, four of the languages that lack this recognition would be spoken by MSLCs: Catalan, Galician, Sardinian, and Occitan.[36]

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34 Council Decision (2011/167/EU) of 10 March 2011 authorizing enhanced cooperation in the area of the creation of unitary patent protection, 2011 OJ L76/53.

35 There is one language that does not have institutional recognition in the EU despite being official throughout the territory of a Member State. This is Lëtzeburgesch, spoken in Luxembourg. As it has only 300,000 or so speakers, it does not qualify as an MSLC, and so we will not consider it here.

36 According to Juaristi, Reagan and Tonkin note 1 *supra*, at 59, six languages with more than a million 'native speakers' in the EU lack institutional recognition: Catalan (c. 6 million), Galician (c. 3 million), Russian (c. 1.9 million), Sardinian (c. 1.6 million), Occitan (c. 1.5 million) and Romani (c. 1.5 million). However, the Russian-speaking population is spread among different countries (mainly Latvia, Estonia, Lithuania, and Poland) and does not reach a million in any of these States; therefore the Russian language communities are not considered as MSLCs here. It should also be borne in mind that Russian is spoken by more than 100 million people in a neighbouring State. As for Romani, the great dispersion of its speakers in different States means that they cannot be considered as an MSLC.

However, the sociolinguistic situations of Catalan, Galician, Sardinian and Occitan and their legal recognition in the respective States differ widely. Catalan in Catalonia[37] and Galician in Galicia are fully official and enjoy great vitality. This is particularly true of Catalan which is actively and continuously used in all areas of everyday life. Sardinian, on the other hand, has only semi-official status (Law of the Italian Republic of 15 December 1999, No 482, and Regional Law of Sardinia of 15 October 1997, No 26) and its use is very limited; Occitan, for its part, has no recognized status in its territory. For these reasons these two languages cannot be included among the MSLs. On the other hand, Basque, a language spoken by fewer than a million people (670,000 in all) presents characteristics and needs that could qualify it as an MSL, and in fact some of our observations with respect to the Catalan and Galician communities also apply to the Basque community.

The fact that Catalan and Galician lack institutional status in the EU obviously has a negative sociolinguistic effect inside these communities. Natural or legal persons residing in the EU are not entitled to use these languages in their dealings with the institutions. The harm caused by the lack of institutional recognition do not end here. EU secondary law has a series of even more perverse effects, in so far as they directly favour linguistic assimilation. These effects are little known and so far we have not focused on them as they do not concern the 14 MSLs that enjoy institutional status in the EU. As we will see in the following subsections, they are often exerted through national law.

6.1 · The effects of EU secondary law on the MSLs without institutional status: the partial derogation of internal official language status

One of these effects is a partial derogation of the status of official language that Catalan and Galician hold inside their respective territories.[38]

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37 The 'native speakers' of Catalan in Catalonia number around 4 million. Many of the other residents of Catalonia know and are able to speak the language, giving a total of around 6 million. Catalan is also an official language of the Balearic Islands and the Community of Valencia, where it is known as Valencian. Elsewhere in Spain, Catalan is also spoken by 45,000 inhabitants of the eastern part of Aragon, although it is not legally recognized in this area.

38 A Milian i Massana, *Globalización y requisitos lingüísticos: una perspectiva jurídica. Supraestatalidad, libre circulación, inmigración y requisitos lingüísticos* (Barcelona: Atelier, 2008), at

What form does this partial derogation take? It occurs when, in accordance with the internal distribution of powers, the Catalan or Galician governments decide on procedures which are regulated by a European Union legislative act which, in turn, requires the use of one of the official languages of the Union. In this case, as a result of the supremacy of the EU legal order, the procedure must be pursued in Spanish, an official EU language, in spite of the fact that Catalan and Galician are fully official languages in Catalonia and Galicia respectively. Of course, the text drawn up in Spanish may be accompanied by versions in Catalan or Galician, but this does not alter the fact that the full official status of these languages is diminished because their use is at best merely testimonial.

In Catalonia, this partial derogation has affected Catalan, for example, in the area of metrological control, a matter which comes under regional jurisdiction in Spain. Until 2009 this matter was regulated by the Council Directive 71/316/EEC of 26 July 1971,[39] which established that: 'The application and the correspondence relating to it shall be drawn up in an official language [one of the official languages of the Union, according to the interpretation of the provision] in accordance with the laws of the State to which the application is made. The Member State has the right to require the annexed documents should also be written in the same official language. The applicant shall send simultaneously to all Member States a copy of his application' (Annex I, § 1.1). The legal conflict between the full effect of the status of Catalan as official language (a status recognized in the Spanish Constitution) and the Council Directive was brought before the Spanish Constitutional Court, which ruled in favour of the prevalence of the supremacy of European Union law.[40] Currently, metrological control is regulated by Directive 2009/34/EC of 23 April 2009, which in its annex I, § 1.1, incorporates the equivalent text of the Council Directive of 1971.[41]

73-77; A Milian-Massana, 'Le régime juridique du multilinguisme dans l'Union européenne. Le mythe ou la réalité du principe d'égalité des langues', *Revue Juridique Thémis*, vol. 38:1 (2004), 211, at 235-238.

39 Council Directive 71/316/EEC of 26 July 1971 on the approximation of the laws of the Member States relating to common provisions for both measuring instruments and methods of metrological control, 1971 OJ L202/1 — English special edition: Series I Chapter 1971(II), 707.

40 See STC 236/1991, 12 December 1991.

41 In the annex I, § 1.1, of the new Directive the words 'Member' and 'that' have been introduced, improving the original text without changing its meaning in any way. Directive 2009/34/EC of the European Parliament and of the Council of 23 April 2009 relating to common provisions for both measuring instruments and methods of metrological control (Recast), 2009 OJ L106/7.

Another example of the phenomenon of marginalizing languages that are official in part of the territory of the Member States is found in Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday products, resale and exchange contracts.[42] In this case, the Directive establishes a complex system for the languages in which these contracts and the pre-contractual information (this information must form part of the contract) must be drawn up. However, the interesting point here is that the Directive expressly lays down that the language or languages must be 'an official language of the Community' [Articles 4(3) and 5(1)], a stipulation that marginalizes other languages such as Catalan or Galician. This is a matter of great consequence because these languages are official in Catalonia and Galicia and, therefore, the contracts signed in these territories in Catalan or in Galician, respectively, are recognized, with regard to the languages used, as valid and effective. In other words, although it does not impede the use of these languages, by obliging the use of the official EU languages the provision makes their use subsidiary, unnecessary and testimonial — with the result that they are used only very rarely.[43]

Unlike these cases and others one might mention, there are some others in which EU secondary law does not restrict the official status of the official languages that lack institutional recognition in the EU. One example is Directive 2006/126/EC of the European Parliament and of the Council of 20 December 2006 on driving licences.[44] The Directive authorizes Member States to make entries (the explanations of the numbered items which appear on the licence) in a national language other than the official language

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42 2009 OJ L33/10.

43 Following Directive 2009/34/EC, Spain has enacted Law 4/2012, of 6 July 2012, which states as follows: 'Contracts […] shall be drafted […] in the language or in one of the languages of the Member State in which the consumer resides or of which he is a citizen, as he decides, provided that it is an official language of the European Union. If the consumer is resident in Spain or the entrepreneur carries out its activities in Spain, the contract must also be drafted in Castilian and, if requested by either of the parties, may also be drafted in any of the other languages of Spain that are official in the place where the contract is executed.' [Article 11(1)]. This partially excludes Catalan and Galician, as well as Basque, which are official languages in their respective Communities, by ruling that their use is optional (the verb used is 'may', not 'shall'). See also Article 9(3) of the Royal Decree-Law regarding the language of the pre-contractual information. For timeshare contracts relating to property, see also Article 30(3).

44 Directive 2006/126/EC of the European Parliament and of the Council of 20 December 2006 on driving licences (Recast), as amended by Commission Directive 2011/94/EU of 28 November 2011, 2006 OJ L403/18 and 2011 OJ L314/31.

of the State. In this case, the Member State 'shall draw up a bilingual version of the licence' (Annex I).

Wherever possible, this should be the path to follow. At present, however, what we see is a flagrant contradiction. As a constituent part of the right to good administration, EU law recognizes the right of every person to write to the EU institutions in one of the languages of the Treaties and to receive an answer in the same language,[45] but simultaneously it erodes the internal status of the languages which are official in part of the territory of the Member States and discourages citizens from using these languages in their relations with the regional institutions. This situation undermines their right to good administration (if this right in fact exists) in the internal regional context.

6.2 · The effects of EU secondary law on MSLs without institutional status: marginalization in socioeconomic activities

In addition to the marginalization just described, this lack of institutional recognition has another negative result, this time in the private realm. It affects both languages that are official in part of the territory of a Member States and those that lack status at national level.

There are numerous EU legislative acts that establish linguistic provisions to ensure that the internal language requirements imposed by the States do not create barriers that breach the fundamental freedoms of EU law. What often happens is that the regulations and directives issued to establish common linguistic rules and harmonizing criteria only include the official languages of the EU or the official languages of the Member States.[46] As the linguistic provisions often establish the compulsory use of those languages, or establish the possibility of obliging their use, the result is that the languages that lack institutional recognition in the EU are indirectly marginalized in national law. One paradigmatic example is provided

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45 Article 41(4). The provision is addressed to 'the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law.' [Article 51(1) of the Charter of Fundamental Rights of the European Union].

46 When the EU provisions make reference to the official language or languages of the Member States, they appear to refer only to the languages that are official in all the territory of each of the Member States or in its central institutions. As a result, these provisions exclude languages that are official only in part of a Member State's territory.

by the language requirements for labelling. Among the legislative acts that contain these requirements,[47] Directive 2000/13/EC of the European Parliament and of the Council of 20 March 2000 is particularly relevant. The basic language requirement is set out in Article 16(2), which provides as follows: '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 [the mandatory particulars provided for in Article 3 and Article 4(2)] shall be given in one or more languages which it shall determine from among the official languages of the Community.' The recent Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 repeals Directive 2000/13/EC as from 13 December 2014. The new legislative act maintains the same language requirement and extends it beyond the mandatory labelling particulars to all mandatory particulars in general.[48]

This phenomenon, which affects the use of languages that lack institutional recognition in the private domain,[49] only has a truly harmful effect with respect to languages which are widely used in most social ambits and which have great vitality inside a broad community. Only in these cases is their use habitual in socioeconomic activities, and the introduction of language requirements (for labelling, for example) would be proportionate. In relation to labelling, in its Language Policy Act of 1998 the Catalan parliament was unable to establish that certain labelling particu-

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47 See, for example, Directive 2000/13/EC of the European Parliament and of the Council of 20 March 2000 on the approximation of the laws of the Member States relating to labelling, presentation and advertising of foodstuffs, 2000 OJ L109/29, Article 16; Directive 2001/37/EC of the European Parliament and of the Council of 5 June 2001 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco products, 2001 OJ L194/26, Article 5(1), 5(5) and 5(6); Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use, as amended by the Directive 2004/27/EC of the European Parliament and of the Council of 31 March 2004, and by the Directive 2010/84/UE of the European Parliament and of the Council of 15 December 2010, 2001 OJ L311/67, 2004 OJ L136/34 and 2010 OJ L348/74, Article 63(1)(2) and (3).

48 See Article 15(2) of the Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers, amending […] and repealing […], 2011 OJ L304/18.

49 Of course, the European rules do not impede the use of non-recognized languages, since such a measure would be contrary to the freedom of expression. However, the obligation, in a Member State, of using the State's official language, discourages the use of the other languages (for example the languages which enjoy official status in part of the State's territory) since they are unnecessary to ensure comprehension of the message.

lars of certain products distributed in Catalonia — among them, packaged food products — must include Catalan because this would have contravened the European regulations, which only consider the official languages of the EU. With this measure, the Catalan parliament aimed to avoid the marginalization of the Catalan language entailed by the obligation to label in Spanish. Given the vitality of Catalan and its high number of speakers, the measure would not have been disproportionate or irrational. Recall that Catalan has, at least, six million speakers — that is, more, and in some cases many more, than seven of the 23 official and working languages of the institutions of the EU. The number of books published in Catalan in Catalonia bears witness to its vitality if we compare it to those published in other MSLs: Catalan 10,780 (2010); Danish 13,667 (2009); Finnish 10,650 (2010); Czech 18,520 (2008); Estonian 3,045 (2010); Latvian 1,752 (2010) and Lithuanian 3,176 (2010).

Some of the EU rules that affect socioeconomic activities do take into account languages other than the official languages of the EU. An example is Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009,[50] regulating life insurance. In addition to establishing that the information for policy holders 'shall be provided (…) in an official language of the Member State of the commitment', it foresees the use of other languages, in these terms: 'However, such information may be in another language if the policy holder so requests and the law of the Member State so permits…' (Article 185.6). Nonetheless, for all other uses only the official languages of the Member States are considered (Articles 153, 271.2, 280.2, 283 and 293.1).

In other cases — for instance, in the Directive on services — there is a clear will to respect Member States' internal linguistic regimes.[51] What remains unclear is whether the will to respect the internal linguistic regimes of the Member States corresponds only to those of the Member States which have more than one official language of the State, understanding 'official language of the State' as a language which is official in all the territory of the Member State or in the central institutions of the Member

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50 Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (recast), 2009 OJ L335/1.

51 See points 11 and 60 of the preamble, and Articles 1(4), 5(3)§2 and 7(5) of the Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, 2006 OJ L376/36.

State. In any case, the rules deriving from the liberalization of services marginalize all the regional or minority languages and place the official languages that are not official in the whole of a State or in its central institutions at a clear disadvantage.[52] In what language or languages, to cite an example, may the recipient of a service, a citizen of a Member State, formulate reclamations to providers established in another Member State? In the best scenario he/she may formulate it in the language or in the official languages of his/her State, but he/she is unlikely to be able to do so in a language which only enjoys official status in part of its territory.

In general, the fundamental freedoms of the European common market restricts *de iure* the Member States' autonomy in regulating languages.[53] At the same time, these EU freedoms also provoke *de facto* the assimilation of minority languages by majority languages. Consider, for example, the rights of free movement and residence of EU citizens [Article 21(1) TFEU], the free movement of workers [Article 45(1) TFEU] or the freedom of establishment (Article 49 TFEU). All these freedoms favour the movement of citizens between the Member States and allow a growing number of these citizens to reside in another Member State. They must learn the language of their host State to communicate with the autochthonous community. But when in this new place of residence more than one language is spoken, the newcomers normally decide to learn the official language of the State rather than one that is only official in that region or is a minority language. This phenomenon affects all the languages that are not the official State languages, that is, all the languages that lack institutional recognition

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52 On the effects of the Directive on services, and of its transposition into national law, in the legislation on Catalan, Galician and Basque, see A Nogueira López, 'Simplificación administrativa y régimen de control previo administrativo de actividades de prestación de servicios. ¿Hay espacio para los derechos lingüísticos?', *Revista de Llengua i Dret*, nr 52 (2009), 205; A Nogueira López, 'Cambio de paradigma en el control administrativo de actividades y derechos lingüísticos' in A Milian i Massana (ed.), *Drets lingüístics, de debò? Els drets lingüístics en les actuacions administratives i en determinades activitats supervisades per les administracions* (Barcelona: Institut d'Estudis Autonòmics). Currently in press.

53 See B de Witte, 'Common Market freedoms versus linguistic requirements in the EU States' in A Milian i Massana (ed.), *Mundialització, lliure circulació i immigració, i l'exigència d'una llengua com a requisit* (Barcelona: Institut d'Estudis Autonòmics, 2008), 109, at 110. See also C Boch, 'Language Protection and Free Trade: The Triumph of the Homo McDonaldus?', *European Public Law*, vol. 4:3 (1998), 379; F Palermo, 'The Use of Minority Languages: Recent Developments in EC law and Judgments of the ECJ', *Maastricht Journal of European and Comparative Law*, vol. 8:3 (2001), 299; M Candela Soriano, 'Les exigences linguistiques: une entrave légitime à la libre circulation?', *Cahiers de droit européen*, vol. 38 :1-2 (2002), 10; Milian i Massana (2008) note 38 *supra*, at 39-66.

in the EU. For the new residents it is usually more practical to learn the official language of the State, which is also official in the territory of the linguistic community where a regional official language or a minority language is spoken, and which is also an official language of the EU. In this situation, the autochthonous residents of the region are compelled to use the official language of the State and to abandon the official language of the region in order to communicate with the new residents, a practice that favours or accelerates linguistic substitution. Indeed, '[t]he fight for survival of [regional or] minority languages in the national context is made more difficult by the added European dimension.'[54] So the freedom of movement may constitute a threat to the safeguarding of languages that lack institutional recognition in the EU, and therefore to the safeguarding of the MSLs lacking institutional status. It is true that MSLs that enjoy extended social use may be attractive to new residents who see them as a means to integration, but when faced with the choice of which language to learn new residents tend to opt for the one that is official throughout the State.

Although it may appear paradoxical, the harmful effects of the EU legal order are more intense the greater the vitality of the MSL or regional language. The reason for this is that the abandonment of the use of the language is more noticeable and affects a wider range of areas. Of course, EU law does not benefit minority languages either, but the damage caused to them is less intense, for two reasons: first, because it is the internal State legislation that causes them most harm, and second, because there is no chance of the EU norms that would be beneficial to them being implemented, because this would contravene the principle of proportionality (something which, in many cases, does not apply to MSLs).

In conclusion, to return to the effects of EU secondary law, it is worth mentioning another ambit in which EU law has traditionally marginalized languages without institutional recognition. This is the area of the programmes for learning European languages.[55] The effects of this marginali-

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54 B de Witte, 'Surviving in Babel? Language Rights and European Integration' in Y Dinstein and M Tabory (eds.), *The Protection of Minorities and Human Rights* (Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1992), 277, at 292.

55 See Decision 253/2000/EC of the European Parliament and of the Council of 24 January 2000 establishing the second phase of the Community action programme in the field of education (the Socrates programme) 2000 OJ L28/1. In the Lingua and Comenius Actions, the Decision only takes account of the official languages of the institutions, Irish (which was then only a language of the Treaties) and Lëtzeburgesch. (See the Annex of the Decision). The national languages of the European Economic Area (EEA) countries and the national languages of the newly partici-

zation were particularly serious. In addition to discouraging the learning of these languages, the programmes also ignored the fact that they were used in schools in the corresponding linguistic communities; in Catalonia, for example, the vitality of Catalan and the commitment to guaranteeing its survival have meant that primary and secondary education is given mainly in this language.[56] The European institutions did not change direction until Decision 1720/2006/CE of the European Parliament and of the Council of 15 November 2006;[57] this Decision no longer takes into account only the official languages of the EU and Lëtzeburgesch, but includes all 'modern foreign languages' [Articles 17(2)(c) and 25(2)(e)], thus incorporating the other languages spoken in the EU.

7 · The low profile of the MSLs that lack institutional status in the EU

The EU legal order considers all languages without institutional status as regional or minority languages, regardless of their vitality or the number of their speakers. Although the EU has no specific powers in the area of language, the institutions have adopted certain measures designed to promote and preserve these languages and have encouraged Member States to protect them.[58] These measures, of interest to languages that are truly mi-

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pating countries are also eligible in the Actions of the Socrates Programme. See B de Witte, 'Language Law of the European Union: Protecting or Eroding Linguistic Diversity?' in R Craufurd Smith (ed.), *Culture and European Union Law* (Oxford: Oxford University Press, 2004), 205, at 238-239; Milian-Massana (2004) note 38 *supra*, at 235-236; Milian i Massana note 5 *supra*, at 120-121.

56 See Article 35 of the Statute of Autonomy of Catalonia (Organic Law 6/2006, of 19 July 2006); STC 31/2010, 28 June 2010, FJ 14(a) and, above all, 24; Article 11 of the Catalan Education Act 12/2009, of 10 July 2009; Articles 20 and 21 of the Catalan Language Policy Act 1/1998, of 7 January 1998.

57 Decision 1720/2006/EC of the European Parliament and of the Council of 15 November 2006 establishing an action programme in the field of lifelong learning, 2006 OJ L327/45.

58 We do not have room to list these measures here. For a summary of the language policy competences and the measures adopted, see de Witte note 55 *supra*, at 234-240. On the measures see also N Nic Shuibhne, *EC Law and Minority Language Policy. Culture, Citizenship and Fundamental Rights* (The Hague/London/New York: Kluwer, 2002); B de Witte, 'The Constitutional Resources for a EU Minority Protection Policy' in G N Toggenburg (ed.), *Minority Protection and the Enlarged European Union: The Way Forward* (Budapest: Open Society Institute/Local Government and Public Service Reform Initiative, 2004), 107, at 118-121; A Milian-Massana, 'Languages that are official in part of the territory of the Member States. Second-class lan-

nority languages, are of little use to languages with a greater presence such as Catalan and Galician (the two MSLs that are not recognized), or to languages like Basque, which is clearly recovering, or Welsh, and do practically nothing to compensate for the harm caused by European integration examined in section 6.

Because of the anomalous, unjust and disproportionate situation of Catalan inside the EU, Catalonia and the Balearic Islands have on several occasions lobbied the Spanish government and the European Parliament to recognize it as an official language of the institutions of the EU, or, at least, as a language of the Treaties. An early petition made in 1989 by the Catalan and Balearic Parliaments led to the Resolution on Languages in the Community, and the situation of Catalan, adopted by the European Parliament on 11 December 1990, but its impact was limited because it encouraged the use of Catalan only in certain cases.[59] Much more recently, during the negotiation of the final drafting of the European Constitution, the Parliament of Catalonia urged the Catalan government to request the Spanish government to include Catalan among the languages of the Treaty establishing a Constitution for Europe.[60] This request was not fulfilled, but instead gave rise to Article IV-448(2) of that Treaty, and Declaration No 29, on Article IV-448(2), annexed to the Final Act.[61] I stress this because, although the Constitution for Europe was not adopted, Article IV-448(2)

guages or institutional recognition in EU law?' in X Arzoz (ed.), *Respecting Linguistic Diversity in the European Union* (Amsterdam/Philadelphia: John Benjamins Publishing Company, 2008), 191, at 198-200. In addition to the measures adopted directly, the EU has also contributed in indirect ways to the protection of linguistic minorities through the conditions of admission imposed on States applying for membership (currently, Articles 2 and 49 TEU). On this indirect route of protection, which came into being with the criteria defined at the European Council held in Copenhagen in 1993, and which has in fact been particularly effective, see: G Sasse, 'Minority Rights and EU Enlargement: Normative Overstretch or Effective Conditionality?' in G N Toggenburg (ed.), *Minority Protection and the Enlarged European Union: The Way Forward* (Budapest: Open Society Institute/Local Government and Public Service Reform Initiative, 2004), 59; F Hoffmeister, 'Monitoring Minority Rights in the Enlarged European Union' in G N Toggenburg (ed.), *Minority Protection and the Enlarged European Union: The Way Forward* (Budapest: Open Society Institute/Local Government and Public Service Reform Initiative, 2004), 85; B de Witte and G N Toggenburg, 'Human Rights and Membership of the European Union' in S Peers and A Ward (ed.), *The European Union Charter of Fundamental Rights* (Oxford/Portland: Hart Publishing, 2004), 59, at 62-68.

59 1991 OJ C19/42.

60 Motion 12/VII of the Parliament of Catalonia on linguistic 'normalisation', BOPC No 52, 07.05.2004, at 4 and 5.

61 Treaty establishing a Constitution for Europe, 2004 OJ C310/1.

and Declaration No 29 were incorporated in the Treaty of Lisbon,[62] and today constitute Article 55(2) TEU, and Declaration No 16, on Article 55(2), annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon.[63] At the same time, pressure was brought to bear on the Spanish government to promote the modification of Council Regulation No 1/58 to recognize Catalan, Basque and Galician as official languages of the Union's institutions. This request did not prosper either: the initiative culminated in the Council Conclusion of 13 June 2005 on the official use of additional languages within the Council and possibly other Institutions and bodies of the European Union.[64]

Article 55(2) TEU empowers Member States to translate the Treaty into any other language which, in accordance with their constitutional order, enjoys official status in all or part of their territory. A certified copy of this translation shall be provided by the Member States concerned to be deposited in the archives of the Council. This provision, which also applies to the TFEU (Article 358 TFEU), covers the languages which, in accordance with the respective constitutional order, enjoy official status in part of the territory of a Member State (and can therefore be applied to Catalan and Galician, although also, for example, to Basque), but in fact offers them nothing substantive. The translations of the TEU and the TFEU into these languages will lack official value and legal effect, and so will serve only to extend the diffusion of the text of the two treaties. So, on this point, the recognition set down in Article 55(2) TEU is merely symbolic. Certified copies of translations of the TEU and the TFEU into Catalan/Valencian, Galician, Basque and Frisian have been deposited in the archives of the Council. I am not sure that Frisian in fact meets the requirements of Article 55(2) TEU.

The importance of Article 55(2) TEU lies rather in the fact that it introduces a distinction between the languages which, in accordance with the respective constitutional order, enjoy official status in part of the territory of a Member State and the other regional or minority languages. This distinction may encourage the EU to establish specific recognitions in favour of the former languages in the future; what is more, it is actually

62 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, 2007 OJ C306/1.

63 2010 OJ C83/344 (Consolidated version. See the note to the reader in page 2 of the cover of the OJ).

64 2005 OJ C148/1.

obliged to establish them, if we bear in mind the terms of the commitment expressed in the final part of the first paragraph of Declaration No 16: '[T]he Conference confirms the attachment of the Union to the cultural diversity of Europe and *the special attention it will continue to pay to these* and other *languages*.' (Emphasis added). Bear in mind that 'these […] languages' are the same languages cited in Article 55(2). The expression 'these and other languages' proceeds from Declaration No 29 which accompanied the Treaty establishing a Constitution for Europe, a precedent in which, during its drafting, the expression 'linguistic diversity' (which did not distinguish between languages) was deliberately replaced by the expression 'these and other languages'.[65] So Article 55(2) TEU, in combination with the Declaration No 16, obliges the institutions to act in favour of 'these languages', which means that this provision constitutes — or should constitute — the first step on the way to a future *ad hoc* linguistic status for the languages which, in accordance with the respective constitutional order, enjoy official status in part of the territory of a Member State such as Catalan and Galician.

The Council Conclusion of 13 June 2005, on the official use of additional languages within the Council and possibly other Institutions and bodies of the European Union, did not represent a significant step forward for Catalan and Galician, languages that are among those affected by the Conclusion. These languages are defined as: '[L]anguages other than the languages referred to in Council Regulation No 1/1958 whose status is recognized by the Constitution of a Member State on all or part of its territory or the use of which as a national language is authorized by law.'

The content of the Conclusion must be applied by means the administrative arrangements concluded between each institution or body and the requesting Member State.[66] This kind of cooperation is, in formal

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65 Compare CIG 81/04, of 16 June 2004, annex 52, and CIG 84/04, of 18 June 2004, annex 17. For a detailed study of Article IV-448(2) of the Treaty establishing a Constitution for Europe and Declaration No 29, on Article IV-448(2), see Milian-Massana note 58 *supra*, at 203-207.

66 For a detailed analysis of the Council Conclusion and the administrative arrangements, see, for example, F Esteve Garcia, 'El nuevo estatuto jurídico de las lenguas cooficiales en España ante la Unión Europea', *Revista de Derecho Comunitario Europeo*, nr 24 (2006), 439, at 462-475; N Mir i Sala, 'Els acords administratius signats pel Govern espanyol sobre l'ús oficial de les llengües espanyoles diferents del castellà en el si de les institucions i els organismes de la Unió Europea', *Revista de Llengua i Dret*, nr 46 (2006), 317, at 330-356; Milian-Massana note 58 *supra*, at 209-217. For the singular procedure adopted by the European Parliament, which does not follow the Council Conclusion, see also: G Garzón Clariana, 'La pratique linguistique du

terms, interesting and innovative inside EU law.[67] However, in substantive terms, it is unworkable, for the reasons I will mention below. As far as I know to date, only two Member States (Spain and the United Kingdom) have concluded administrative arrangements. Spain has signed six arrangements (with the Council,[68] the European Commission,[69] the Committee of the Regions, the Economic and Social Committee, the European Ombudsman and the Court of Justice of the European Union), the languages concerned being those other than Castilian (Spanish) whose status is recognized by the Spanish Constitution (Catalan/Valencian, Galician and Basque). The UK has concluded one arrangement with the Council which includes the languages whose status is recognized in its constitutional system.[70]

Council Conclusions and the administrative arrangements allow citizens to send communications to the respective institutions or bodies in the languages indicated, including, therefore, Catalan and Galician. However, these communications must be sent via an internal body designated by the Member State which must translate them into the official language of the State and send them, together with the translation, to the corresponding EU institution or body. The same indirect procedure must apply *mutatis mutandis* to the reply from the EU institution or body in question. This intervention of an intermediate State translation body may cause serious problems regarding the time-limits that have to be observed, and if we add the fact that the institutions and bodies of the EU do not take responsibility for the content of the translations it is clear that the procedure is totally impracticable, at least when the rights or interests of private individuals are at stake. And in the case of Spain, the administrative arrangements concluded with the Council and the European Commission are the only ones that have been published in the *Official Journal of the European Union*; to my knowledge Spain has not officially designated the internal translation body or made any official announcement on the issue in the State's Official

Parlement européen', in D Hanf, K Malacek and E Muir (ed.), *Langues et construction européenne* (Brussels: Peter Lang, 2010), 87, at 91-94.

67 See N Nic Shuibhne in Chapter 5.

68 Administrative arrangement between the Kingdom of Spain and the Council of the European Union, 2006 OJ C40/2.

69 Administrative agreement between the European Commission and the Kingdom of Spain, 2006 OJ C73/14.

70 Administrative arrangement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Council of the European Union, 2008 OJ C194/7.

Journal (the Administrative arrangement between the Kingdom of Spain and the Court of Justice designates the internal translation body, but the arrangement has not been published), and as a result it is no surprise that very few Spanish nationals have written to the institutions and bodies in Catalan or Galician. (Incidentally, the administrative arrangements establish that they will apply from the time when the government informs the EU institution or body of the internal unit to which it has entrusted the translations). And the fact that the direct or indirect costs resulting from implementation of the administrative arrangements have to be borne by the Member State means that the procedure can hardly be considered a true mechanism of cooperation between the Member States and the EU. This is also a major disincentive for signatory States to promote the use of these arrangements by their citizens. So, in the case of the written communications to Union institutions and bodies, the Council Conclusion and the administrative arrangements are largely unworkable.

The Council Conclusion and the administrative arrangements allow governments of a Member State, if necessary, to ask the Council, and possibly other Institutions or bodies (European Parliament or Committee of the Regions), for permission to use one of the languages referred to in paragraph 1 in speeches by one of the Members of the Institution or body in question at a meeting (passive interpreting) As a result, the use of Catalan in the Council has occasionally been permitted. The Council Conclusion and administrative arrangements also allow the corresponding governments to translate into the languages concerned the acts adopted in codecision (currently, the ordinary legislative procedure). These translations must be made accessible on the Council's website and on that of the government in question (although at present there is no record of any having been made). The translations, of which any citizen of the Union may request a copy from the Council, should they exist, do not engage the responsibility of the Institutions of the Union and have no legal value.

The importance of the Council Conclusion lies, as in the case of Article 55(2) TEU, in the fact that it no longer treats the languages lacking institutional recognition — the regional and minority languages — as a homogeneous group. But in general its scope is extremely limited, at least as far as Catalan and Galician are concerned.

Of greater significance to the MSLs that lack institutional recognition is the novelty incorporated in virtue of the Treaty of Lisbon, by the last

subparagraph of Article 3(3) TEU and Article 22 of the Charter of Fundamental Rights of the European Union. Both provisions — as we saw in section 2 — establish that the EU shall respect its cultural and linguistic diversity. The expression 'linguistic diversity' contained in these two provisions covers all the languages and linguistic communities of the EU, including the languages of the immigrant groups as well. Therefore, the expression covers MSLs. In the following section I discuss some of the positive effects that these two provisions may have for MSLs without institutional recognition.

8 · General conclusions

So far, European integration has had little impact on the MSLCs whose languages enjoy institutional recognition in the EU. The only effect of note is that their members now feel a pressing need to learn a second language, in principle English, or one of the others that enjoy the greatest diffusion within the European institutions. This situation does not represent a real and effective threat for the MSLs which have institutional status in the EU: At most, it may partially displace them in certain ambits, but in fact this displacement is not exclusively the result of European integration.[71]

In contrast, as I have tried to demonstrate, European integration has been particularly harmful for the MSLCs whose languages lack institutional status in the EU. This is because the EU legal order places these languages almost at the same level as any regional or minority language, ignoring the many differences between them, and disregarding the fact that the MSLs without institutional status may have a great vitality and may even have more speakers than a quite number of official languages of the EU.

The problem lies in the fact that the EU applies a single criterion for determining the languages that are entitled to institutional status: languages that are the official languages of the Member State, in the terms we have mentioned. This criterion (except in the case of Irish) is essential to safeguard legal certainty. But it should be complemented by other criteria; other kinds of status should be created. In my view, the EU's linguistic regime requires a profound overhaul. For example, a clear distinction should be made between the regimens of the official languages and the working

71 For Higher Education, see X Arzoz in Chapter 8.

languages. As for the MSLs that lack institutional status, the EU should confer on them an *ad hoc* status equivalent or very similar to that of the languages of the Treaties. This was the status granted to Irish when Ireland became a Member of the European Economic Community, in 1973, until its acceptance as an official and working language, on 1 January 2007.[72]

Another important point is that EU secondary law should take more account of the MSLs that lack institutional recognition. In my view, rather than referring to the official languages *of* the EU or the official language(s) *of* the Member States, it should in some cases refer to the official languages *in* the EU and the official language(s) *in* the Member States. The objection that this increase in languages would raise barriers that are contrary to certain EU freedoms (free movement of goods, workers, establishment and the provision of services), does not seem to me to be necessarily correct. Traditionally the Court of Justice of the European Union has admitted restrictions on EU freedoms when a 'mandatory requirement' or an 'imperative requirement' (an 'overriding reason relating to the public interest') justifies it. Among the mandatory or imperative requirements in the general interest that justify language requirements, for example, the Court considers consumer protection,[73] the reliability of medical professionals' communication with their patients,[74] and the protection of public health.[75] However, since the citizens of the EU understand the official languages of the EU or of the Member States, it does not seem justified to extend the language requirements to the other official languages in the EU (that is, to the languages which enjoy official status in part of the territory of the Member States). In effect, the establishment of language requirements referring to the official languages of the EU or to the official languages of the Member States is sufficient to satisfy these overriding reasons of general interest.

However, it should be remembered that one of the 'overriding reasons in the public interest' is 'the objective pursued by a Member State of defending and promoting one or several of its official languages.' This is

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72 Council Regulation (EC) No 920/2005 of 13 June 2005, 2005 OJ L156/3, and Council Regulation (EC) No 1791/2006 of 20 November 2006, 2006 OJ L363/1.

73 Case C-33/97 *Colim NV v Bigg's Continent Noord NV* [1999] ECR I-3175, para. 44; Case C-51/93 *Meyhui NV v Schott Zwiesel Glaswerke AG* [1994] ECR I-3879, para. 21.

74 Case C-424/97 *Salomone Haim v Kassenzahnärztliche Vereinigung Nordrhein* [2000] ECR I-5123, para. 59.

75 Case C-169/99 *Hans Schwarzkopf GmbH & Co. KG v Zentrale zur Bekämpfung unlauteren Wettbewerbs eV* [2001] ECR I-5901, para. 40.

recognized by the Court of Justice[76] in order to justify restrictions on four EU freedoms (free movement of workers, establishment and the provision of services, and capital).[77] It is the overriding reason relating to the public interest of the objective of defending and promoting the language that justifies, in specific socioeconomic activities, the imposition of the use of the official languages in part of the territory of the Member States together with those of the EU or of the Member States. The Court refers to '*its* official languages' (emphasis added), which may be taken to mean the languages that enjoy official status in all the territory of the Member State. In the UTECA case, however, '*its* official languages' were taken to refer to the official languages *in* Spain; therefore, the overriding reasons in the public interest include the languages that enjoy official status in part of the territory of this Member State.

For the language requirements referring to the 'official languages *in* the EU or *in* the Member State' not to represent disproportionate restrictions, they should be established only in cases in which the languages concerned have a certain degree of vitality and a certain number of speakers. For this reason, the official languages in part of the territory of the Member State that should be included should be the ones which enjoy full official status *at all levels* (that is, in the State institutions in the region, and in the regional and local institutions). This criterion would include the two MSLs without institutional recognition in the EU — Catalan and Galician — and, in addition, Basque.

So, given that the expression 'official language or languages *of* the Member State' may mean in the broader sense 'official language or languages *in* the Member States', perhaps, as an alternative, we could interpret the expression as including the official languages in part of the territory of the Member States that enjoy full official status in their region — provided, of course, that the legislative act does not have the express intention of applying the restrictive meaning.

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76 Case C-222/07 *Unión de Televisiones Comerciales Asociadas (UTECA) v Administración General del Estado* [2009] ECR I-1407, para. 27 and 36.

77 See para. 24, in relation to para. 25, 27 and 33. A Milian i Massana, *Drets lingüistics per a tothom. Estudis de dret lingüistic* (Palma: Lleonard Muntaner Editors, 2010), 25-26. On the UTECA case, see I Urrutia, 'Approach of the European Court of Justice on the accommodation of the European language diversity in the internal market: Overcoming language barriers or fostering linguistic diversity?', *The Columbia Journal of European Law*, 18:2 (2012), 243, at 265-274; and I Urrutia Libarona in Chapter 9.

In preparing the legislative acts, the European institutions should be aware that the doctrine of the Court of Justice in the UTECA case opens the way for proportionate consideration of the MSLs that lack institutional status. Although that judgment examines a national legal norm, the overriding reason relating to the public interest applied in this case may also be applicable in order to justify linguistic provisions in the EU legislative acts. On the other hand, the last subparagraph of Article 3(3) TEU and the Article 22 of the Charter of Fundamental Rights of the European Union — both provisions subsequent to the UTECA judgment —[78] give firm support to the opinion of the Court of Justice; this opinion should be maintained and developed by the Court in the future, precisely on the basis of these two provisions,[79] which, as we recall, establish that the Union shall respect its cultural and linguistic diversity.[80]

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78 The provisions became effective on 1 December 2009, with the entry into force of the Treaty of Lisbon.

79 Prior to the entry into force of the Treaty of Lisbon, and also prior to the UTECA judgment, I wrote the following: '[…] we may ask, […] in conclusion, whether the Court of Justice of the European Communities (incidentally renamed the Court of Justice of the European Union in the Treaty of Lisbon) should not modify its focus with regard to the compatibility between the language requirements and the Community freedoms, once the new Treaty enters into force, and in view of the fact that respect for linguistic diversity will be one of the Union's aims or objectives. Specifically, we may wonder whether the Court will still maintain the criterion according to which the language requirements are in all cases suspected of contravening the rules of the common market, which means that, in order to be able to incorporate them, a justification must be found. The answer seems to be no. With the new Treaty, the objectives of the establishment of an internal market and the respect for the richness of linguistic diversity will remain at a similar level — both objectives will feature in Article 3(3) of the Treaty on European Union (using the new numbering system set out in the tables of correspondence referred to in Art. 5 of the Treaty of Lisbon) — a circumstance which should oblige the Court to abandon the weighting mode used to date, since the conflicting interests will be of the same value.' (Translation from the original). Milian i Massana (2008) note 38 *supra*, at 66.

80 Article 22 of the Charter is not entirely novel, since an identical provision already figured in the Charter proclaimed on 7 December 2000. The text of the current Charter corresponds to that of the Charter of 7 December 2000, as adapted at Strasbourg on 12 December 2007. What I would like to stress here is that, since the entry into force of the Treaty of Lisbon, the Charter has had the same legal value as the Treaties [Article 6(1) TEU)], thus binding the institutions, bodies, offices and agencies of the Union, and the Member States only when they are implementing Union law [Article 51(1) of the Charter]. Previously its legal value was unclear, as was the extent to which the Charter was binding for the EU institutions or for the Member States. However, some of the measures were probably adopted under the influence of Article 22 of the Charter. This may be true, for example, of Decision 1720/2006/EC of the European Parliament and of the Council of 15 November 2006 establishing an action programme in the field of lifelong learning. The UTECA judgment itself, although it does not refer directly to Article 22, expressly states that 'linguistic diversity is a fundamental element of cultural diver-

In addition, the two provisions appear to oblige the EU institutions to take more account of the languages without institutional status in the EU in their legislative acts — especially, in virtue of the principle of proportionality (a general principle of law of the EU legal order), the MSLs that lack institutional recognition. It is not necessarily a question of an obligation to take positive measures; it remains an open question 'whether Article 22 of the Charter puts the EU under an obligation to support linguistic diversity actively'.[81] Nor is it clear that Article 3(3) TEU permits positive obligations. However, the call to avoid, as far as possible, the restrictions that the EU law imposes indirectly on languages without institutional recognition seems to be in keeping with the spirit of Article 22. This is in accordance with the negative scope of protection of the cited Article and, without any doubt, would not go beyond the powers of the Union. Taking more consideration of the MSLs that lack institutional status would also be in accordance with the consequence which, as we saw in section 7, should be drawn from Declaration No 16, on Article 55(2), annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon.

sity', quoting paragraph 14 of the preamble of the Council Decision 2006/515/EC of 18 May 2006 (para. 33).

81 X Arzoz, 'The protection of linguistic diversity through Article 22 of the Charter of Fundamental Rights' in X Arzoz (ed.), *Respecting Linguistic Diversity in the European Union* (Amsterdam/Philadelphia: John Benjamins Publishing Company, 2008), 145, at 161. The author recalls, nonetheless, that '[t]he main obstacle to the establishment of a positive obligations on the part of the EU does not derive from the wording of Article 22.' (at 162). The principal difficulty resides in Article 51(2) of the Charter, since, according to the author, 'the possibility of taking positive measures is dependent on the existence of powers on the part of the Union to adopt them.' (at 162).

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GLOBALIZATION AND LANGUAGES: NEW CHALLENGES FOR QUÉBEC'S LANGUAGE POLICY

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SUMMARY: 1. Introduction. 2. Human rights and minority rights in international law as constraints for Québec's language policy. 2.1. The scope of the 'linguistic freedom' deriving from general human rights guaranteed by international instruments. 2.1.1. The current consensus, illustrated by the Ballantyne case: the linguistic freedom deriving from general human rights exists only for the private use of languages. 2.1.2. The challenge to the current consensus: can general human rights be interpreted as imposing certain linguistic obligations on the State as regards the official use of languages? 2.1.2.1. The position based on the concept of indirect ('adverse effect') discrimination. 2.1.2.2. The opinion of the majority members of the UN Human Rights Committee in the Diergaardt case. 2.1.2.3. The concept of 'linguistic accommodation' as a possible foundation for imposing certain linguistic obligations on the State as regards the official use of languages. 2.2. Special linguistic rights recognized in international human rights instruments to which Québec and Canada are parties. 2.2.1. The language of legislation and regulations, justice and public administration. 2.2.2. The language of public education. 3. International Trade Agreements as Constraints for Québec's (and Canada's) Language policy. 3.1. Potential impact of the rules of NAFTA on Québec's language policy. 3.1.1. Provisions relating to the trade of goods. 3.1.2. Provisions relating to the trade in services. 3.1.3. Provisions relating to cultural industries. 3.2. The rules governing the use of lan-

guages in the dispute settlement provisions of NAFTA. 3.3. Measures suggested in order to protect the language policy of Québec and, more generally, the position of French in North America against the potentially negative impact of economic globalization and the continental economic integration of North America.

1 · Introduction

Over the last four decades, the government of Québec has legislated in order to defend and promote the status of the French language as the language of the majority population in Québec, in spite of the fact that it is a language spoken only by a small minority in Canada and in North America.[1] The government has adopted a language policy principally contained in a statute adopted in 1977, titled the *Charter of the French language*, but more commonly known as 'Bill 101'.[2] Bill 101 contains measures that can be summed up as follows.[3]

First, the use of the English language in the workings of governmental provincial institutions was to be reduced, in so far as such a reduction was compatible with the constitutional obligations imposed on Québec in this area. However, as far as Québec is concerned, the Canadian Constitution only requires bilingualism in parliament, legislation and the judiciary, not in the executive and administrative branches.[4] Thus, for example, in the

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1 In Québec, French is the mother tongue of 80.2% of the population and English that of 7.9%, some 11.9% having another mother tongue. In the whole of Canada, French is the mother tongue of 22.1% of the population and English of 58%; 19.9% have another mother tongue. Nearly 90% of the French-speaking Canadian population reside today in Québec. According to the latest censuses, the share of the French-speaking population is declining in the other provinces. Apart from New Brunswick, where they constitute 31% of the population, the presence of French-speakers has become marginal in all other provinces: in Newfoundland, Saskatchewan, Alberta and British-Columbia, French-speakers represent 1% or less; in Prince Edward Island, Nova Scotia and Manitoba, they barely reach 3%; in Ontario their share of the population has decreased to less than 4%. On the linguistic policy of Québec, as well as the policies of the other provinces and of the Canadian federal government, see J Woehrling, 'Politiques et législations linguistiques au Canada: divergences et convergences entre le Québec, les provinces anglophones et les autorités fédérales', in A-M Le Pourhiet (ed.), *Langue(s) et constitution(s)* (Paris: Economica — Presses Universitaires d'Aix-Marseille, 2004), 113.

2 *Charte de la langue française (Charter of the French Language)*, L.Q. 1977, c. 5; L.R.Q., c. C-11.

3 For a more thorough examination of the content of the *Charter of the French Language*, see the contribution of Professor André Braën in the present volume.

4 J Woehrling, 'La Constitution du Canada, la législation linguistique du Québec et les droits

absence of any constitutional protection of bilingualism at the municipal level, Bill 101 provides that Québec municipalities have the possibility — but not the obligation — of functioning bilingually (in English and French) only where the English-speaking residents form the majority of the local population. In all other cases, municipalities must function in French only.

Secondly, Québec makes it compulsory for all immigrants, even those who come from Anglophone countries, to send their children to public or state-subsidized private schools where the language of instruction is French. The same obligation is imposed on Francophone parents. The only parents who have the right to send their children to public or subsidized private schools where the language of instruction is English are those who have themselves received their primary education in English either in Québec or elsewhere in Canada.[5] In other respects, all parents have the right to send their children to an unsubsidized private English-speaking school.[6]

Finally, Québec has also legislated to impose the use of French in certain areas of private economic relations like employer-employees relations, contracts, the internal operation of companies with fifty or more employees, and public signage and commercial advertising.

Not surprisingly, Québec's language policy has come in for a great deal of criticism, which explains why it has often been challenged before the courts — not only by members of the English-speaking minority, but also by many immigrants and by a number of the members of the

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de la minorité anglo-québécoise' in N Levrat (ed.), *Minorités et organisation de l'État* (Bruxelles: Bruylant, 1998), 561; J Woehrling, 'L'évolution du cadre juridique et conceptuel de la législation linguistique du Québec' in A Stefanescu and P Georgeault (eds.), *Le français au Québec:les nouveaux défis* (Québec-Montréal: Conseil supérieur de la langue française — Fides, 2005), 253.

5 Before the adoption of the Canadian *Charter of Rights and Freedoms* in 1982, Bill 101 provided that only parents who had themselves received their primary education in English *in Québec* could send their children to public English-speaking schools in Québec. Section 23 of the *Canadian Charter* had the effect of extending this right to those who had received their primary school education in English *elsewhere in Canada*. For this reason, the government of Québec, formed at that time by the Parti québécois, opposed the adoption of section 23, but to no avail.

6 In addition, the Supreme Court of Canada has interpreted section 23(2) of the *Canadian Charter* in such a way that, on the basis of attendance by *one* of their children of a non-subsidized private Anglophone school, and on the condition that such attendance constitutes a 'genuine educational pathway', parents may then send *all* of their children to a public Anglophone school. See *Nguyen* v. *Québec (Éducation, Loisir et Sport)*, [2009] 3 S.C.R. 208.

French-speaking majority itself, especially as regards the access rules to English-speaking public schools. A large number of immigrants, as well as a certain number of French-speaking parents, would like to send their children to these schools so that they become fluent in English, for obvious social and economic reasons. It must also be noted that those who challenge the provisions applying to private economic relations, for example to commercial advertising, do not invoke the special linguistic rights contained in the Constitution, which apply only to the *official* use of languages and public education, but rather appeal to the universal human rights (rights and freedoms of the person), which are recognized in the *Canadian Charter of Rights and Freedoms*[7] as well as in the *Charter of Human Rights and Freedoms*[8] (Québec's Bill of Rights), or in the international instruments on human rights to which Canada and Québec are parties.

The main objective of Québec's language policy is to protect the position of French against competition from English. Economic and cultural globalization will affect the position of French insofar as it will increase (both domestically and internationally), the use, prestige and attraction of English. Thus, globalization will inevitably weaken the position of French relative to English in Québec and Canada. And any sign of a weakening of the position of French relative to English will prompt requests from part of the French-speaking public opinion, for the adoption of new, more stringent, measures for the protection of French. Such measures will inevitably further decrease linguistic freedom by imposing new requirements for the use of French and by limiting that of English. Indeed, the following measures are already advocated in Québec as necessary in order to reinforce Bill 101:

— First, it is proposed to extend to the post-secondary (pre-university) level of public education the obligation, for all immigrants — and for Francophones — to attend a French-speaking rather than an English-speaking educational institution. At the present time this obligation only applies at the primary and secondary education level, the choice between the two systems still being left to the individual at the collegiate and university level.

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7 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*.
8 *Charter of Human Rights and Freedoms*, L.Q. 1975, c. 6; L.R.Q., c. C-12.

— Secondly, it is proposed to extend to companies with fewer than 50 employees the obligation to use French in their daily operations. Currently, this obligation applies only to companies with 50 employees or more.

— Finally, it is also proposed to extend the obligation of all immigrants and Francophone parents to send their children to a French-speaking school with regard to *non-subsidized private schools*. At the present time, this obligation applies only with regard to public schools and private schools subsidized by the Québec government.[9]

If these measures were adopted, they would immediately be challenged as contrary to the rights and freedoms guaranteed by the Canadian Constitution as well as by the international conventions on human rights and the rights of minorities to which Canada and Québec are parties. In the following text, I will examine the constraints that exist, for the language policy of Québec (or for any similar language policy), as a result of the rules of international human rights law applicable to Québec and Canada.

In the second part, I will also examine the constraints imposed on the language policy of Québec by the rules relating to international trade and the economic integration of North America.

2 · Human rights and minority rights in international law as constraints for Québec's language policy

To analyse the impact of international human rights instruments on Québec's language policy in greater detail, we should begin by establishing two important analytical distinctions. The first distinction is between special (or specific) linguistic rights, relating expressly to the use of languages, and the more general (universal) human rights which do not have an express (or direct) linguistic content but which are likely to be interpreted as conferring a certain indirect and implicit linguistic protection. The second distinction that needs to be made is between the protection applying to the use of languages in private matters (private interpersonal relations), and the rights existing in relation to the official use of languages (in the relation between individuals and the State).

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9 This measure is considered necessary to neutralize the effects of the ruling of the Supreme Court of Canada in the case of *Nguyen* v. *Québec*; see supra note 6.

Special linguistic rights as distinct from general human rights with an indirect and implicit linguistic content

In international law, as well as in the constitutional law of liberal democracies, there are two categories of rights and freedoms that are likely to have an impact on domestic language policies.

— On the one hand, special rights recognized to the benefit of certain categories of minorities and intended to protect, among other things, their right to use their language, mainly with respect to their private interpersonal relations, but sometimes also with respect to their relations with public authorities (for example, section 27 of the *International Covenant on Civil and Political Rights*).

— On the other hand, general human rights and freedoms, not explicitly or directly addressed at the use of languages, but likely to be interpreted and implemented as protecting indirectly and implicitly certain linguistic freedoms, almost exclusively in the sphere of private interpersonal relations. As an example, freedom of expression has been interpreted as containing implicitly the freedom to use the language of one's choice in certain situations.

As we will see, for the time being, the guarantees regarding the *official use* of languages contained in the international instruments applicable to Québec and Canada are rather modest (these guarantees derive mainly from article 27 of the *International Covenant*). Conversely, the linguistic import of fundamental freedoms and of the right to equality is the subject of an evolving and broadening interpretation. Moreover, certain decisions of the UN Human Rights Committee seem to indicate the beginning of an evolution away from well-established principles: the Committee appears disposed to limit the freedom, traditionally recognized to States, to refuse to function in languages other than their official languages.

Private and official use of language

In the international law of human rights, as well as in the constitutional law of liberal democracies two areas are traditionally distinguished in the use of languages as regards the legitimacy of constraining or coercive State interventions: the private use of languages, in which the greatest possible

freedom should be allowed, and the official use of languages, in which a State can legitimately impose one or more languages.

The private use of languages encompasses all cases where the language is not employed in the relations between individuals and State organs or representatives. It includes intimate situations or public usage. The publication of books and newspapers, theatre and cinema performances, political conferences and meetings, all commercial and economic life, according to this point of view, constitute so many private uses of the language. In this vast field of the private sphere, individuals must be free to employ the language of their choice; this linguistic freedom flows implicitly from fundamental freedoms — in particular, the freedom of expression — and from the right to equality. It is thus not necessary to expressly guarantee such a freedom in a particular constitutional or legislative provision. In other words, the free choice of language in the private sphere forms a necessary dimension of fundamental freedoms and the right to equality, and an essential condition of their realization. Furthermore, it must be noted that the exercise of this linguistic freedom by individuals in this private sphere does not require the State to award them any benefit or lend them any material assistance, but requires only that it abstain from restricting their free conduct. This 'linguistic freedom', as an implicit part of certain fundamental freedoms and the right to equality, is being recognized more and more by the courts, at both the domestic and the international level.

However, as with any other right or freedom, this 'implicit' linguistic freedom is not absolute. It can be limited in reasonable and justifiable ways. In this respect, it is useful to make a further distinction between *internal* private use and *external* private use. *Internal* private use refers to the relations within the family, between friends, in social life. In this area linguistic freedom should be absolute by virtue of the freedom of expression, personal freedom and the right to respect for private life. *External* private use refers to the language that people use when they express themselves in the public sphere or address themselves to the general public. It includes in particular all private economic life, for example, public signage and commercial advertising or the labelling of consumer products. In this field, the State can regulate the use of languages insofar as it pursues a legitimate aim in the public interest, for example to protect consumers or workers, by means that respect the principle of proportionality.

If we turn now to the *official* use of languages, pertaining to the relations between private individuals and the State, its agencies and represent-

atives, no right of an individual to the choice of language can be considered as originating from fundamental freedoms or the right to equality.[10] On the contrary, in the sphere of the official use of languages, the State may impose the use of one (or more) particular language(s). If it were otherwise, it would mean that the State were obliged to offer its services in all the languages spoken in its territory, which would obviously be impossible. Moreover, in order for individuals to exercise a right to choose the language in their relationship with the State, it is necessary that the State put at their disposal bilingual or multilingual services, so as to create the conditions necessary to the exercising of this right. However, fundamental freedoms and the right to equality are traditionally characterized as 'negative' rights, which require only that the State abstain from creating inequalities or preventing individuals from freely acting, but do not oblige it to provide them with the means necessary to the enjoyment of the rights and freedoms.

This by no means rules out the possibility that a certain right of individuals to choose the language of their relationships with the State may be guaranteed by particular provisions and expressed in a law or a constitution, or an international instrument, which will then contain 'special' linguistic protections. This is precisely the case of the Canadian constitutional provisions that relate to the use of English and French as official languages. However, such special linguistic rights must be expressly provided for; they cannot be regarded as originating implicitly from fundamental freedoms or the right to equality.

Furthermore, special linguistic protection will normally be provided only to 'national' or historical minorities present in the country for a very long time, in some cases since its inception, and not to minorities resulting from immigration. Thus, in Canada, the status of official language is conferred on the English and French languages at the federal level and in the three (out of ten) provinces with official bilingualism (Québec, Manitoba and New Brunswick). In two of the three territories (North West Territories and Nunavut), a similar status is also given, in addition to

10 There is, however, an exception to this principle. In the case where the right to an interpreter for those charged with a criminal offence and who do not understand or speak the language used in court, or who are deaf, is not recognized expressly, such a right can be regarded as implicitly contained in the basic right to a fair trial. The same applies to the right of everyone to be informed in a language that he or she understands, of the nature and cause of the accusation against him or her (which can be derived from the right to freedom and security).

French and English, to a number of aboriginal languages. However, no such recognition exists with respect to the languages of the immigrant communities, even if they are more widely spoken in certain parts of the country than French or the languages of the First nations. In most (probably in all) multinational countries where particular linguistic rights are granted to one or more national minorities, the same rights are not extended to the communities resulting from immigration. First, for practical reasons: a State could not function effectively in a great number of languages. Second, because the State almost always fears that the recognition of rights of a linguistic or cultural nature to immigrants will prevent or delay their integration.

The case of national minorities is different. They regard themselves as distinct national communities inside the State, as historical communities having their own social institutions, occupying a traditional territory and sharing a distinct language and culture. For minorities resulting from immigration, what matters is their being able to preserve and express their distinct linguistic and cultural character within the context of family and community life and, to a certain extent, in the economic sphere. For these purposes, it is usually enough for them to invoke the linguistic freedom applying in the private use of languages. Conversely, national minorities want to be able to also use their language in the sphere of public institutions, which requires that they be granted special linguistic rights.

Finally, it must be noted that when such special linguistic rights are recognized in favor of national minorities, it is not only because the need to protect them is acknowledged, but also out of a concern towards safeguarding national unity and the territorial integrity of the State. Indeed, if the claims of national minorities are not satisfied by special linguistic and cultural measures, they very often lead to autonomist or even separatist claims.

2.1 · The scope of the 'linguistic freedom' deriving from general human rights guaranteed by international instruments

As we will see, in the current state of the law, 'linguistic freedom' of this kind remains insufficient for the linguistic minorities because it is traditionally regarded as applying only to the private use of languages, not to their official use. However, this restrictive point of view is sometimes called into question.

2.1.1 · The current consensus, illustrated by the Ballantyne case: the linguistic freedom deriving from general human rights exists only for the private use of languages

When it was adopted in 1977, Québec's Bill 101 imposed, subject to certain exceptions, the exclusive use of French for public signage, commercial advertising and corporate names. In 1988, in the *Ford* case, the Supreme Court of Canada considered that this requirement was a restriction on freedom of expression and created indirect discrimination against those whose usual language was other than French.[11] Next, the Court considered as *justified* the measures *requiring the presence of French*, but it also concluded that the *exclusion of other languages* amounted to a *non-justifiable restriction* of the guaranteed rights and freedoms. Moreover, the Court suggested that a regime allowing languages other than French, even if it required the 'marked predominance' of French, would be justifiable and constitutionally acceptable.

A few years later, in the *Ballantyne* case, the United Nations Human Rights Committee came to the same conclusion regarding the infringement upon freedom of expression, this time by applying section 19 of the *International Covenant on Civil and Political Rights*.[12] Following these decisions of the Canadian Supreme Court and of the UN Committee, the government of Québec adopted a new regime in which public signs, commercial advertising and commercial names could, henceforth, be made in French and in other languages, provided that the text in French is 'markedly predominant'.

In the *Ballantyne* case, after finding an infringement upon freedom of expression, the members of the UN Committee, however, by a majority, were also of the opinion that the provisions of the *Charter of the French Language* imposing the exclusive use of French were contrary neither to article 26 of the *Covenant* (the right to equality before the law), because the rule regarding the exclusive use of French applied equally to all, whether French- or English-speaking, nor to article 27 (rights of persons belonging to ethnic, religious or linguistic minorities), insofar as this last provision applies only to minorities 'within ratifying States', and not to minorities

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11 *Ford* v. *A.G. Québec*, [1988] 2 S.C.R. 712.

12 *Ballantyne, Davidson, McIntyre* v. *Canada*, Communications Nos. 359/1989 and 385/1989, U.N. Doc. CCPR/C/47/D/359/1989 and 385/1989/Rev.1 (1993).

'within a province', i.e., minorities established in a component federal or regional entity of a ratifying State. A group may constitute a majority in a province but still be a minority in a State (this being the case of the French-speakers in Québec) and thus be entitled to the benefits of article 27. However, in the opinion of the majority members of the Committee, English-speaking citizens of Canada living in Québec, although constituting a numerical minority within the province, cannot be considered a linguistic minority in the sense of article 27, because they belong to the English-speaking majority of Canada.

The reasoning which led the majority members of the Committee to reject the arguments based on articles 26 and 27 of the *International Covenant* is not very convincing and the Committee could very well change its opinion in the future. If it does, this would increase the vulnerability of the *Charter of the French language* (and other similar linguistic policies) with regard to the *Covenant*.

In order to reject the claim based on the right to equality and the prohibition of discrimination, the majority in the Committee considered that requiring that the language of public signs and commercial advertising be exclusively in French did not amount to discrimination between the various linguistic groups, since it applied to all persons irrespective of their usual or preferred language. This means that, in the opinion of the majority members of the Committee, a rule of general application imposing the exclusive use of a given language on all persons constitutes equal treatment. However, such a vision seems to contradict the views that the Committee itself expressed in its General Comment on non-discrimination, which defines discrimination as 'any distinction, exclusion, restriction or preference which is based on any ground [such as language] and which has the purpose *or effect* of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms'.[13] This definition implies that the Committee recognizes 'adverse effect' or *indirect* discrimination, i.e. discrimination caused by an apparently neutral rule, applied in the same way to everyone, but which causes adverse effects on a group because of one of the prohibited grounds of discrimination. As we have seen before, in the *Ford* case, the Supreme Court of Canada was of the opinion that a provision imposing on everyone the exclusive use of

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13 Human Rights Committee, *General Comment 18, Non-Discrimination*, U.N. Doc. HRI/GEN/1/Rev.1 at 26 (1994), article 7.

French in commercial advertising amounted to indirect discrimination, based on language, against those whose language was other than French. The analysis of anti-discrimination norms as prohibiting not only direct but also indirect (adverse effect) discrimination is widely accepted today.

As regards the rejection by the Committee of the arguments based on article 27 of the *Covenant*, which protects in particular the right of persons belonging to a linguistic minority, in common with the other members of their group, to use their own language, the question is more complex (article 27, which contains special minority protection, will be examined more closely below). The Committee ruled, by a majority, that article 27 applies only to groups forming a minority on the national level and not to groups which, although constituting minorities in a given area, belong to the majority on the national level. However, this majority position within the Committee was the object of vigorous dissidence from four of its members[14] and has also been criticized by a number of academic commentators, who consider that the most important consideration should be the fact that a group in a situation of numerical inferiority is politically and legally subject to decisions that can be taken with regard to its interests by another group, which forms the majority in the jurisdiction concerned. A similar position was adopted by the Venice Commission of the Council of Europe in connection with the situation of linguistic groups in Belgium.[15] Thus, the question cannot be regarded as being conclusively settled.

To complete this examination of the *Ballantyne* case, it must be noted that the Human Rights Committee reiterated in it a position that is well established in international law, namely that States, while they must respect a certain linguistic freedom in the *private use* of languages, may also legitimately impose one or more languages for *official purposes*. Thus, the Committee declared: ' [a] State may choose one or more official languages, but it may not exclude, outside the spheres of public life, the freedom to express oneself in a language of one's choice' (par. 11.4), which means (at least by implication) that the State is not obliged to grant official language status to minority languages nor, which would amount to the same thing, to use such languages in its relations with private individuals. In these lines, the Com-

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14 *Ballantyne, Davidson and McIntyre v. Canada*, cited previously, individual opinion of Mrs. Elizabeth Evatt, co-signed by Messrs. Nisuke Ando, Marco Tulio Bruni Celli and Vojin Dimitrijevic (concurring and elaborating).

15 See: J Woehrling, 'Les trois dimensions de la protection des minorités en droit constitutionnel comparé', *Revue de droit de l'Université de Sherbrooke*, nr 34 (2003-04), 93, at 102 - 104.

mittee draws the distinction, which I developed previously, between the official use of languages (in 'the spheres of public life'), for which the State can impose one or more designated languages and prohibit others, and the private use of languages, for which it must respect the freedom of individuals to express themselves in the language of their choice.

However, in order to remain legitimate, the distinction between languages that are given official status and those without such a status must be based on rational and objective criteria. The numerical importance of the various linguistic communities living in the bounds of the State, the distinction between established national minorities and minorities resulting from more recent immigration, the historical role played by certain groups in the creation of the State, may all constitute such objective and rational criteria.

Thus, in the *Ballantyne* case, the Human Rights Committee can be considered as giving expression to the traditional consensus holding that the *linguistic freedom* deriving from human rights exists only for the private use of languages. We will now see that this traditional consensus is subject to criticisms and that it is perhaps even undergoing a change.

2.1.2 · The challenge to the current consensus: can general human rights be interpreted as imposing certain linguistic obligations on the State as regards the official use of languages*?*

2.1.2.1 · The position based on the concept of indirect ('adverse effect') discrimination

Is it possible, on the sole basis of the prohibition of discrimination based on language, to question the current consensus and to impose upon the State the obligation to use languages other than its official languages in some of its functions, like justice or public education? This position is adopted in academic writings and by international organisms.[16] Their argument is based on the concept of indirect discrimination (or 'adverse effect

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16 See, for example: F De Varennes, *Language Minorities and Human Rights* (The Hague: Martinus Nijhoff Publishers, 1996), chapter 4; B De Witte, 'Droits fondamentaux et protection de la diversité linguistique' in P Pupier and J Woehrling (eds.), *Langue et droit* (Montréal: Wilson & Lafleur, 1989), 85. See also the 'Oslo Recommendations Concerning the Language Rights of National Minorities' of the High Commissioner for National Minorities of the Organization for Security and Co-operation in Europe; February 1998 (www.osce.org).

discrimination'), which I have examined previously:[17] using only the official language (which is usually the language of the majority) in the functioning of the State does not constitute equal treatment for minorities whose language is not so recognized, because it puts them at a disadvantage due to their distinct character. The policy of offering public services only in the official (majority) language puts those who speak a different language at a disadvantage and, thus, creates a form of indirect (adverse effect) discrimination. To avoid this, public authorities should be obliged to use also languages other than the official language (or languages), at least when these non-official languages are spoken by a sufficient number of people and when granting such rights to the minority does not come into conflict with a preeminent public interest. Indeed, those who defend this position agree that the State can legitimately take account of financial and practical considerations, as well as of the need for the existence of a common language in order to foster social integration and solidarity. Taking into account these different factors, the rights recognized to linguistic minorities as regards the official use of their language could depend on the numerical importance and the geographical concentration of the members of the minority. There should be a balance between, on the one hand, the rights of the minorities, and, on the other hand, practical and financial considerations for the State, as well as the need for a common language in order to foster national unity and social integration.

We will now see that in a case that was considered after the *Ballantyne* case, a majority of the members of the UN Human Rights Committee seems to have adopted a position similar to the one I have just presented. But, as I will try to show, the reasoning used by the majority appears weak and it has been the subject of strong criticism within the Committee.

2.1.2.2 · The opinion of the majority members of the UN Human Rights Committee in the Diergaardt *case*

In *Diergaardt v. Namibia* of September 6, 2000,[18] a majority of members of the Committee was of opinion that an administrative circular of the

17 There is indirect discrimination when the uniform application of an apparently neutral standard involves advantages for the majority, but adverse effects for a minority group, for reasons relating to the characteristics that distinguish this group from the majority.

18 Communication No. 760/1997, Doc. N.U. CCPR/C/69/D/760/1997.

government of Namibia, prohibiting civil servants from using a language other than English in their official communications with citizens, even on the telephone, amounted to discrimination contrary to article 26 of the *Covenant*. According to the Constitution of Namibia, English is the only official language. The majority opinion is explained in the following passage:

> The Committee notes that the authors have shown that the State party has instructed civil servants not to reply to the authors' written or oral communications with the authorities in the Afrikaans language, even when they are perfectly capable of doing so. These instructions barring the use of Afrikaans do not relate merely to the issuing of public documents but even to telephone conversations. In the absence of any response from the State party the Committee must give due weight to the allegation of the authors that the circular in question is intentionally targeted against the possibility to use Afrikaans when dealing with public authorities. Consequently, the Committee finds that the authors, as Afrikaans speakers, are victims of a violation of article 26 of the Covenant (par. 10.10).

Thus, the majority opinion seems to imply that a State commits discrimination when it refuses to communicate with private citizens in languages other than its declared official language. However, it should be noted that three factors were underlined in the majority opinion, which limit in a significant way the importance of the conclusion reached as to the existence of an indirect discrimination. First, the prohibition was aimed not only at *written*, but also at *oral* communication; second, the State did not offer any justification for the impugned measures; and finally, in the absence of such a justification, the majority members were inclined to believe the applicants when they alleged that the circular was intentionally targeted at prohibiting Afrikaans in particular, rather than applying to all languages not having official status.

Moreover, the opinion of the majority members as to the violation of article 26 was the subject of strongly argued objections by six members of the Committee (one of which was Mr. Max Yalden, a former Canadian *Official Languages Commissioner*). The dissenting members emphasized that a State has the right to choose one or more official languages and to require that the communications between the citizens and the State be done only in this or these language(s). In their opinion, no right to communicate with State authorities in a language other than the official language or languages

of the State can be derived from article 26 (the right to equality) or article 19 (freedom of expression) of the *Covenant*.

To conclude, the majority opinion in the *Diergaardt* case is difficult to reconcile with the observations of the Committee in the *Ballantyne* case. It is superficially argued and thus not very convincing. Even more, it seems to rest on an erroneous assessment of the facts, some of the dissenting members underlining that the impugned circular could in no way be interpreted as being aimed more at Afrikaans than at all other non-official languages. The dissenting opinions appear to better express the current state of the law and the doctrinal consensus on the matter. As one of the critics stated: '[o]nce a State party has adopted any particular language or languages as the official language or languages, it would be legitimate for the State party to prohibit the use of any other language for official purposes [...]'.[19]

Nevertheless, the majority opinion in the *Diergaardt* case converges with the position adopted by some authors and presented as 'best practice' by international advisory bodies, and if it attracted a consensus in the future, it would no longer be legitimate for the State to limit its communications with citizens only to the language or languages it has declared as official. The provisions of Bill 101 making French the only official language of Québec (or, for that matter, the provisions of the Canadian Constitution making French and English the only official languages of Canada) would then be vulnerable to a challenge based on these new principles.

2.1.2.3 · The concept of 'linguistic accommodation' as a possible foundation for imposing certain linguistic obligations on the State as regards the official use of languages

One important drawback in the reasoning adopted by the majority in *Diergaardt*, and of the similar positions presented by some authors, is that the obligation of the State to use minority languages with regard to official purposes is analysed as being founded entirely and only on the prohibition of discrimination. Thus, it offers no useful guidelines as to which fields in particular, and for which aspects of its activity, the State should function in languages other than its official languages. In consequence, this reasoning

19 Dissenting opinion of P.N. Bhagwati, Lord Colville and Maxwell Yalden, para. 5. Also see the objections of M. Abdalfattah Amor, M. Nisuke Ando and M. Rajsoomer Lallah.

implies that such an obligation would apply in a general way, for all the activities of the State, ranging from the most important to the most mundane. However, such a conclusion seems unreasonable if one thinks of the costs and complications involved in requiring the State apparatus to function in multiple languages.

A solution to this difficulty would be to consider that the State has the obligation to function in languages other than its official languages only when the refusal to do so would entail not only a form of indirect discrimination, but also the restriction of another right or freedom, considered as important or even fundamental. The classic example of such a situation is that of a person charged or tried for a criminal offence and who does not understand the language of the procedure, or who is deaf. Such a person is entitled to the assistance of an interpreter and/or to translation services. Usually, the right to an interpreter is recognized expressly in national laws and constitutions as well as in international conventions on human rights. When it is not, as for example in the United States Constitution, it will be derived from the basic right to a fair trial. However, the fact that, in any country, the courts do not function in all the languages spoken by people likely to appear before them will not be regarded as entailing discrimination based on language.

The right to an interpreter, when it is considered as deriving from the right to a fair trial, appears to be based on the following principle: insofar as the ignorance of the official language prevents a person from enjoying a freedom or a right considered important enough, such as the right to a fair trial, the State has the obligation to make a 'linguistic accommodation', aimed at helping the person to overcome his or her handicap, and consisting, in this case, in the provision of an interpreter. The same reasoning can obviously be applied to State functions other than the judiciary function, as for instance the operation of the electoral system (by providing electoral materials and ballots in various languages), the provision of public health care (by providing interpreters in public hospitals), or the provision of public education. As regards this last instance, the Supreme Court of the United States, in *Lau v. Nichols*, ruled as follows: the right to a 'meaningful' education, without discrimination based on national origin, requires that children of Chinese ancestry who do not have a sufficient command of English, the language through which public education is dispensed in San Francisco public schools, should be provided with adequate instructional assistance. Such assistance can take the form of

English language proficiency courses or bilingual education (English and the mother tongue of the pupils) for a period of time.[20] To come to this conclusion, the Court referred, amongst other arguments, to the following guidelines published by the *Department of Health, Education, and Welfare* of the United States (HEW):

> Where inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students.

If the principle on which the right to an interpreter, seen as an implicit component of the right to a fair trial, can indeed be generalized, it is possible to argue that there exists a 'right to linguistic accommodation' as regards the official use of languages whenever the fact that the State functions only in its official language causes the infringement of a right that can be considered as important or fundamental, in addition to discrimination. From the perspective of the State, it obviously should be called an 'obligation (or duty) to accommodate'. This 'right to accommodation' has hybrid characteristics from the point of view of the distinction I made above between linguistic freedom on the one hand and special linguistic rights on the other. It is not simply a freedom, since it places a positive obligation on the State. It benefits everyone, irrespective of the language used, whether it is recognized or not as an official language. This right to linguistic accommodation does not need to be expressly acknowledged, since it implicitly derives from certain fundamental rights and freedoms; but it exists only insofar as the accommodation is necessary to avoid the violation of a right or freedom considered as sufficiently important, like the right to health care, the right to an meaningful education or the right to a fair trial. The concept of 'a right considered sufficiently important' will obviously

20 *Lau* v. *Nichols*, 414 U.S. 563; 94 S. Ct. 786 (1974). It must, however, be noted that the solution adopted in the *Lau* decision constitutes the exception rather than the rule in US case law. Indeed, in a more general way, the US courts refuse to recognize the existence of a linguistic duty to accommodate as regards access to governmental services. However, legislative and executive authorities, on the federal as well as on the state level, have adopted measures to implement such linguistic accommodations in a voluntary way (even if they were not under a constitutional obligation to do so).

require some clarification, by the courts through case law or by statute if legislation on the matter is indeed considered desirable.

As with any other right, the right to linguistic accommodation is not absolute. It can be limited in a reasonable way. Thus, such a right exists only insofar as the costs for the public authorities or the constraints on public interest it involves are not excessive, taking all circumstances into account. It must also be noted that the right to linguistic accommodation ceases to exist as soon as the accommodation is no longer necessary, because the obstacle to the full enjoyment of the right or freedom has disappeared. Thus, to take again the example of the situation in *Lau v. Nichols*, once the Chinese-ancestry children have become able to follow English schooling in a normal way, the need for the accommodation disappears.[21]

Finally, it should be noted that when a State imposes on immigrants the obligation to know or to learn its official language, as a condition of being granted permanent residence and/or obtaining citizenship, linguistic accommodation should be considered in return for the efforts that are required from the immigrants in order to achieve linguistic and cultural adaptation to the host country.[22]

2.2 · Special linguistic rights recognized in international human rights instruments to which Québec and Canada are parties

Article 27 of the *International Covenant on Civil and Political Rights* is the most important provision guaranteeing special rights for minorities that applies to Canada and Québec. Article 27 states:

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21 For an overview of the concept of 'linguistic accommodation', see J Woehrling, 'La Cour suprême du Canada et la réflexion sur la nature et les fondements des 'droits ', de la 'liberté' et de l''accommodement' linguistiques; presentation at the 12th international conference of the International Academy of Linguistic Rights ('Rights, Language and Multilingual States'); Bloemfontein (Free State - South Africa), 1-3 November 2010 (publication forthcoming). On the same subject, see also: A Patten, 'Survey Article: The Justification of Minority Language Rights', *Journal of Political Philosophy*, vol. 17:1 (2009), 102, at 107-110; W Kymlicka and A Patten, 'Language Rights and Political Theory ', *Annual Review of Applied Linguistics*, nr 23 (2003), 3, at 8 and 9.

22 See J Woehrling, 'Linguistic Requirements for Immigrants, Specifically With Regard to Languages that Enjoy Official Status in Part of the Territory', in A Milian i Massana (ed.), *Mundialització, lliure circulació i immigració, i l'exigència d'una llengua com a requisit* (Barcelona: Institut d'Estudis Autonòmics, 2008), 133, at 170.

> In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.[23]

Article 27 does not define the concept of minority. The following definition was proposed by Professor Capotorti in his *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, which he prepared in 1979 as Special Rapporteur for the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities:

> A group numerically inferior to the rest of the population of a state, in a non-dominant position, whose members — being nationals of the state — possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.[24]

The exact scope of the obligations existing under article 27 of the *Covenant* has long been the subject of a controversy between those who consider that this provision only *prohibits* actions of the State that would prevent minorities from enjoying their cultural life, practising and professing their religion, or employing their language, and those who, conversely, hold that article 27 obliges the State to *actively support* these activities by taking positive measures involving, for example, financial support. Since the 1980s, the second position has seemed to be gradually gaining acceptance, mainly as a result of the interpretation of article 27 by the General Assembly and the Human Rights Committee of the United Nations.

Article 27 has led to the adoption by the UN General Assembly of the *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*[25] in 1992 and to the adoption by the Unit-

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23 The substance of article 27 has also been included in article 30 of the *Convention on the Rights of the Child*. Thus, the rights envisaged in this provision were reaffirmed with regard to children belonging to a minority and were extended to aboriginal children.

24 F Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities* (New York: United Nations, l979), Doc. E/CN 4 Sub. 2/384/Rev. l, at 96.

25 *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, Resolution 47/135 of 18 December 1992; A/RES/47/135.

ed Nations Human Rights Committee of a *General Comment* in 1994.[26] These two instruments have no binding legal authority, but they do indicate in which direction the protection of minorities tends to evolve, and they can be used to interpret article 27 and the obligations that it imposes on States.

The *Declaration* insists on the States' obligation not only to abstain from any act that would harm the minorities, but also to adopt positive measures to enable them to really benefit from the rights recognized to them. This may include measures of material and financial assistance as well as measures of accommodation or adaptation.

As regards the rights of minorities in the field of education and instruction, the Declaration contains the following provisions:

> Article 4.3 States should take appropriate measures so that, wherever possible, persons belonging to minorities may have adequate opportunities to learn their mother tongue or to have instruction in their mother tongue.
>
> Article 4.4 States should, where appropriate, take measures in the field of education, in order to encourage knowledge of the history, traditions, language and culture of the minorities existing within their territory. Persons belonging to minorities should have adequate opportunities to gain knowledge of the society as a whole.

Like the *Declaration* adopted by the General Assembly, the *General Comment* of the Human Rights Committee regarding article 27 of the *Covenant* insists that the protection of minorities requires that the State take positive measures of protection and that the absence of discrimination is not sufficient to fulfil the obligations arising under article 27. Moreover, the Committee stresses that the special measures adopted to protect minorities, even if they do not apply to the remaining part of the population or do not apply in the same way to all minorities, do not constitute discrimination, provided that the criteria used for such distinctions are reasonable and objective. Lastly, it should be noted that, on an important point, the Committee deviates from the definition of the concept of 'minority' suggested by the Special Rapporteur Capotorti in 1979. Whereas according to this latter definition only the nationals of a State could benefit from the

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26 *General Comment nº 23; The Rights of Minorities (art. 27)*, Doc. N.U. C.C.P.R./C/21/Rev.1/Add.5, 8 April 1994.

rights guaranteed by article 27, the Committee considers that the State cannot restrict the exercise of the rights under article 27 only to its nationals, nor even to its permanent residents.

Taking into account the interpretations and clarifications concerning article 27 of the *Covenant* found in the *Declaration* of the General Assembly and in the *General Comment* of the Human Rights Committee, we will now examine the linguistic rights which can be regarded as guaranteed by the *Covenant* in the two fields in which minorities are likely to claim rights as regards the public (or official) use of languages: (a) the language of legislation and regulations, justice and public administration, and (b) the language of public education.

2.2.1 · The language of legislation and regulations, justice and public administration

As regards the language of legislation and regulations, justice and public administration, the formulation of article 27 of the *Covenant* seems to indicate that the use of a minority language is not guaranteed in the relationship with public authorities, to the extent that the provision speaks of the right to use it 'in community with the other members of their group'. Such an interpretation appears to be confirmed by the Human Rights Committee, in paragraph 5.3 of its *General Comment*, when it speaks of 'the right of individuals belonging to a linguistic minority to use their language *among themselves*, in private or in public' (emphasis added). To make use of a distinction discussed previously, article 27 appears to guarantee the right to use minority languages in the 'internal' as well as in the 'external' *private* sphere, but not for the *public* or *official* use of the language. Finally, this analysis is reinforced, with regards to the use of minority languages in the judicial process, by the 'Breton' cases examined by the UN Human Rights Committee, where the Committee refused to derive from article 27 any right to use minority languages in the domestic judicial process, examining the question strictly in the light of article 14(3)(f) of the *Covenant* and emphasizing that this provision confers the right to the free assistance of an interpreter only if the person charged with a criminal offence cannot understand or speak the language used in court, and, in any event, never confers the right to use the language of one's choice.[27]

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27 *Dominique Guesdon* c. *France* (no 219/1986, 25 July 1990); *Yves Cadoret* et *Hervé Le Bihan* c. *France* (no 22/1987 and 323/1988, 11 April 1991).

2.2.2 · The language of public education

There seems to be a consensus that article 27 of the *Covenant* does not oblige States to provide minorities with public schools where their language is taught or is used as the language of instruction. This provision is generally interpreted as obliging the State only to recognize that persons belonging to a minority have the right to learn the minority language or to receive teaching in this language within the framework of *private education*.[28]

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In conclusion, the language policy of Québec seems to be, for the time being, in general conformity with the rights guaranteed to linguistic minorities by the international human rights instruments by which Canada and Québec are bound, be it the linguistic liberty implicitly deriving from general human rights or the special linguistic rights recognized to minorities. However, it must also be noted that the trend in this field is in the direction of an increase in the recognized guarantees, and that, if certain tendencies examined before were confirmed, some elements of the Québec legislation might be considered as being not entirely compatible with the emerging international standards.

3 · International Trade Agreements as Constraints for Québec's (and Canada's) Language policy

It is well known that international trade agreements, the aim of which is the elimination of trade barriers, expose national linguistic policies to attack, insofar as these policies can be regarded as imposing obstacles to the exchange of goods and services. The fundamental rule of trade agreements is that of 'national treatment', which prohibits any difference of treatment between nationals and foreigners. It is true that

28 For the sake of brevity and because the space assigned to my text in the present volume does not permit a fuller development of this question, I limit myself to the conclusion of a much more thorough treatment of the same subject that can be found in Woehrling (2005) note 4 *supra*, at 315-340.

the provisions of a language policy which require the use or the knowledge (or, like in Québec, the predominance) of a particular language apply as well to nationals as to foreigners, but it could be argued that they involve an *indirect discrimination* against foreigners who do not know the prescribed language, insofar as they are thus more constraining for them.

The measures forming part of national linguistic policies that are most likely to have negative consequences on the free trade of goods and services are the following: measures relating to the labelling of consumer products and advertising; measures imposing linguistic requirements for the exercise of certain professions; measures limiting, for linguistic purposes, the importation of cultural goods or services; measures conditioning the granting of subsidies on the basis of linguistic requirements; measures granting preferences at the commercial level to certain foreign countries on the basis of linguistic considerations.[29]

Trade agreements usually include general exceptions relating to the protection of public health, or consumer protection, which are likely to justify linguistic requirements, for example as regards the labelling of consumer products or the exercise of certain professions, but on the condition that such requirements remain reasonable and proportionate to the pursued objectives. However, a language policy like that of Québec pursues goals well beyond the simple protection of public health or consumer protection. It is aimed at the protection and the promotion of the French language for political, social as well as symbolic reasons, and it

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29 I take this list from the following study: Y Bernier, ' La préservation de la diversité linguistique à l'heure de la mondialisation', *Les Cahiers de droit*, nr 42 (2001), 930. For a more general analysis concerning the potential effects of globalization on linguistic policies and the management of multilingualism, see: *Langue nationale et mondialisation:enjeux et défis pour le français* — Proceedings from the seminar organized in Québec-City by the Council of the French language of the French Community of Belgium, The Council of the French Language of France, and the Council of the French language of Québec, on 25, 26 and 27 October 1994, (Québec: Conseil de la langue française, 1995); *La gestion du plurilinguisme et des langues nationales dans un contexte de mondialisation* — Proceedings from the seminar organized in Québec-City, 30 November and 1 December 1998, (Québec: Conseil de la langue française, 1999); J Maurais and M A Morris (eds.), *Languages in a Globalizing World* (Cambridge: Cambridge University Press, 2003); Patricia M Goff, 'Invisible Borders: Economic Liberalization and National Identity', *International Studies Quarterly*, nr 44 (2000), 533; F Grin and J Rossiaud, 'Mondialisation, processus marchands et dynamique des langues', in S Abou (ed.), *Uniformisation ou différenciation des modèles culturels?* (Paris: AUPELF-UREF, Beirut: Presses de l'Université St-Joseph, 1999), 113.

is far from certain that such objectives would be regarded as acceptable justifications for the restriction of free trade.[30]

Canada has been a member of the World Trade Organization (WTO) since its inception in 1995. At the regional level, Canada is a member, with the United States and Mexico, of the North-American Free Trade Agreement (NAFTA), which followed the Free Trade Agreement (FTA), previously concluded between the United States and Canada.[31]

I will first examine the potential negative impact of NAFTA on Québec's (and, in some instances, on Canada's) language policy. I will then briefly mention the rules on the use of languages in the settlement of disputes within NAFTA, and I will conclude by reviewing some of the proposals made in order to protect Québec's language policy, and more generally the position of the French language, against the potentially negative effects of economic globalization and the continental economic integration of North America.

I shall also add that, in contrast to the situation in Europe, where European Union law has had a notable effect on the language policies of certain member States (France, for example), to my knowledge, no provision or element of Québec's language policy (or of the policy applied by the federal government of Canada) has yet been challenged under the rules of NAFTA or under the rules of the World Trade Organization. In

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30 In the 2005 UNESCO *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, the only provision that could be invoked to protect the right of a State to adopt linguistic measures is section 6.2(b): '6.1. Within the framework of its cultural policies and measures as defined in Article 4.6 and taking into account its own particular circumstances and needs, each Party may adopt measures aimed at protecting and promoting the diversity of cultural expressions within its territory. 6.2. Such measures may include the following: […] (b) measures that, in an appropriate manner, provide opportunities for domestic cultural activities, goods and services among all those available within the national territory for the creation, production, dissemination, distribution and enjoyment of such domestic cultural activities, goods and services, *including provisions relating to the language used for such activities, goods and services*' (emphasis added).

31 In fact, the main objective of the NAFTA treaty was to extend the application of the FTA to Mexico, while applying its provisions to certain new areas, for example transportation. The study that I have made of the impact of the FTA on the linguistic policy of Québec retains thus some relevance. See J Woehrling, 'Politique linguistique et libre-échange: l'incidence de l'Accord de libre-échange entre le Canada et les États-Unis sur la législation linguistique du Québec (à la lumière de l'expérience de la Communauté économique européenne)', in *Contextes de la politique linguistique québécoise - Analyses juridique, démographique, économique et culturelle présentées au séminaire du Conseil de la langue française, du 12 au 14 novembre 1992*, Dossiers du Conseil de la langue française, no 36 (Québec: Publications du Québec, 1993), 79.

consequence, the examination that follows is entirely theoretical and hypothetical.

3.1 · Potential impact of the rules of NAFTA on Québec's language policy

As regards the potential impact of NAFTA on linguistic measures, one must distinguish the provisions relating to the trade of goods, those relating to services and, finally, the measures relating to cultural industries.[32]

3.1.1 · Provisions relating to the trade of goods

Insofar as they could be regarded as harming the trade of goods, linguistic measures would be subject to the requirements of articles 301 (national treatment) and 309 (prohibition of quantitative restrictions) of NAFTA, which integrate the provisions of articles III and XI of the GATT of 1994. Professor Bernier notes that the rules of national treatment could be called upon, under the terms of both GATT and NAFTA, to challenge the quotas on movie screening established on the basis of language as well as the subsidies granted according to criteria including language, in order to support production and distribution in the film industry.

As for the prohibition on quantitative restrictions, it could be used to challenge, for example, measures relating to the dubbing of movies and those relating to the labelling of consumer products.

The authorities of both Québec and Canada have adopted regulations requiring the labelling of consumer products in one or both of the official languages, Canada imposing the use of the two official languages (French and English),[33] Québec requiring only the presence of French.[34]

Within the framework of NAFTA, the national linguistic measures likely to be challenged because of their restrictive effect on the trade of goods would qualify under the general exceptions envisaged by article 2101, which incorporates into NAFTA the general exceptions of article XX

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32 For this examination of the potential linguistic impact of NAFTA on national linguistic measures, I follow closely the analysis of Bernier, note 29 *supra*. See also R Roy and P Georgeault, *Français, diversité culturelle et diversité linguistique* (Québec: Conseil de la langue française, 2007).

33 *Consumer Packaging and Labeling Regulations*, C.R.C., c. 417.

34 *Charter of the French Language*, L.Q. 1977, c. 5; L.R.Q., c. C-11, art. 51, 52, 54 and 54.1.

of the GATT. This provision authorizes the adoption of measures 'necessary to protect human, animal or plant life or health', as well as those 'necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement […] and the prevention of deceptive practices'. The exception relating to the protection of human health and life appears to protect the linguistic requirements relating to the labelling of products and the information for consumers.[35]

3.1.2 · Provisions relating to the trade in services

Linguistic measures having a negative effect on cross-border trade in services would be subject to articles 1202 (national treatment) and 1203 (treatment of the most-favoured nation). They would benefit from the reservations registered by each party under the terms of article 1206. However, Canada did not adopt any reservations intended to include linguistic measures that have a negative effect on the trade in services.

With regard to professional services, insofar as annex 1210.5 engages the parties to work together in the development of mutually acceptable standards, it recognizes implicitly that the linguistic requirements relating to professional qualification and recognition *are not incompatible* with NAFTA.

3.1.3 · Provisions relating to cultural industries

Article 2106 of NAFTA refers to article 2005 of the Free Trade Agreement (FTA) between Canada and the United States. Article 2005.1 exempts cultural industries from the rules of free trade. These industries are defined

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35 According to Professor Bernier, this is supported, where labelling is concerned, by article 3 of the annex 311: 'Each Party shall permit the country of origin marking of a good of another Party to be indicated in English, French or Spanish, except that a Party may, as part of its general consumer information measures, require that an imported good be marked with its country of origin in the same manner as prescribed for goods of that Party'. As well, annex 913.5.a-4 tasks a sub-committee to adopt proposals on the labelling of textile products, by proposing, in particular, ' (a) pictograms and symbols to replace, where possible, required written information, as well as other methods to reduce the need for labels on textile and apparel goods in multiple languages'. Note also article 501.2 (Certificate of origin): '2. Each Party may require that a Certificate of Origin for a good imported into its territory be completed in a language required under its law'.

by article 2012 as including books, periodicals and newspapers, film and video recordings, audio and video musical recordings, broadcasting, television and cable distribution. Any measures concerning these industries, including linguistic measures, are thus protected.

3.2 · The rules governing the use of languages in the dispute settlement provisions of NAFTA

The only provision of the NAFTA main agreement relating to languages is article 2206, which states: 'The English, French and Spanish texts of this Agreement are equally authentic'.

On the other hand, more detailed provisions on the use of the languages are to be found in the rules and procedures of the bodies and organisms competent for litigation arising in the application of NAFTA. These provisions are very detailed and technical and their complete wording can be found on the NAFTA web site.[36] I shall only give here a very general overview of the applicable rules and procedures.

Article 1904 of NAFTA establishes a mechanism to provide an alternative to judicial review by domestic courts of final determinations in antidumping and countervailing duty cases, with review by independent binational panels. A panel is established when a Request for Panel Review is filed with the NAFTA Secretariat by an industry asking for a review of an investigating authority's decision involving imports from a NAFTA country. Rules of procedures 29 and 30 apply with respect to a panel review of a final determination made in Canada. Under Rule 29, '[e]ither English or French may be used by any person or panelist in any document or oral proceeding'. Rule 30 lists the many instances in which any order or decision including the reasons thereof, issued by a panel, shall be made available simultaneously in both English and French. Similar rules apply to the procedure before Article 1904 Extraordinary Challenge Committees with respect to an extraordinary challenge of a panel review of a final determination made in Canada.[37]

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36 http://www.nafta-sec-alena.org/.

37 Although Chapter 19 panel decisions are binding, there is one level of review of binational panel decisions that a NAFTA government may initiate in extraordinary circumstances. This is known as the Extraordinary Challenge Committee (ECC) procedure. The challenge is not an appeal of right but a safeguard to preserve the integrity of the panel process. If either government believes that a decision has been materially affected, either by a panel member having a

Article 1905 provides a mechanism for safeguarding the panel review system. Under this article, a three-member Special Committee may be established to review allegations of one Party that the application of another Party's domestic law has interfered with the proper functioning of the panel system. Under the rules of procedure for Article 1905 Special Committees, '[w]ritten and oral proceedings may be in either English, French or Spanish, or in any combination thereof' (rule 23) and '[u]nless the involved Parties otherwise agree, the reports, findings, determinations and decisions of a special committee shall be issued in an official language of the Responding Party and, if necessary, shall be promptly translated into an official language of the other involved Party' (rule 24) .[38]

Finally, the dispute settlement provisions of Chapter 20 are applicable to all disputes regarding the interpretation or application of NAFTA. The steps set out in Chapter 20 are intended to resolve disputes by agreement, if at all possible. The process begins with government-to-government (the Parties) consultations. If the dispute is not resolved, a Party may request a meeting of the NAFTA Free-Trade Commission (comprised of the Trade Ministers of the Parties). If the Commission is unable to resolve the dispute, a consulting Party may call for the establishment of a five-member arbitral panel. The following rules regarding translation and interpretation apply:

> 49. A participating Party shall, within a reasonable period of time before it delivers its initial written submission in a panel proceeding, advise its section of the Secretariat in writing of the language in which its written submissions will be made and in which it wishes to receive the written submissions of the other participating Parties. A section of the Secretariat that is so advised shall promptly notify the responsible section of the Secretariat which, in turn, shall promptly notify the other sections of the Secretariat, the other participating Parties and the panel.

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serious conflict of interest, or if the panel has departed from a fundamental rule of procedure or has exceeded its authority under the Agreement, either government may invoke review by a three-person, binational Extraordinary Challenge Committee, comprised of judges and former judges. ECC decisions, like Chapter 19 binational panel decisions, are binding as to the particular matter addressed.

38 Rule 48: 'Where the responsible Secretary is advised that written submissions or oral arguments in a special committee proceeding will be in more than one language or on the basis of a request of a special committee member, the responsible Secretary shall arrange for the translation of the written submission or for the provision of interpreters to provide simultaneous translation at the hearing, as the case may be'.

50. A participating Party shall, within a reasonable period of time before the date of a hearing, advise its section of the Secretariat in writing of the language in which it will make oral arguments or presentations at the hearing and in which it wishes to hear oral arguments and presentations. A section of the Secretariat that is so advised shall promptly notify the responsible section of the Secretariat which, in turn, shall promptly notify the other sections of the Secretariat, the other participating Parties and the panel.

51. In lieu of the procedure set out in rule 49 or 50, a Party may advise its section of the Secretariat of:
(a) the language in which it will make, and in which it wishes to receive, written submissions in all panel proceedings; or
(b) the language in which it will make, and in which it wishes to hear, oral arguments and presentations at hearings in all panel proceedings.
A section of the Secretariat that is so advised shall promptly notify the other sections of the Secretariat and the other Parties.

52. Where in accordance with the advice provided by each Party under rules 49 through 51, written submissions or oral arguments and presentations in a panel proceeding will be made in more than one language, or if a panelist requests, the responsible section of the Secretariat shall arrange for the translation of the written submissions and the panel reports or for the interpretation of arguments at any hearing, as the case may be.

53. Where the responsible section of the Secretariat is required to arrange for the translation of a written submission or report in one or more languages, it shall not provide for the delivery of that written submission as required by rule 8 or for the delivery of that report until all translated versions of that written submission or report have been prepared.

54. Any time period applicable to a panel proceeding shall be suspended for the period necessary to complete the translation of any written submissions.

55. The costs incurred to prepare a translation of a written submission shall be borne by the Party making the submission. The costs incurred to prepare a translation of a final report shall be borne equally by each sec-

tion of the Secretariat. The costs of all other translation and interpretation requirements in a panel proceeding shall be borne equally by the participating Parties in that proceeding.

56. Any Party may provide comments on a translated version of a document that is prepared in accordance with these rules.

3.3 · Measures suggested in order to protect the language policy of Québec and, more generally, the position of French in North America against the potentially negative impact of economic globalization and the continental economic integration of North America

Globalization and the continental economic integration of North America raise threats and dangers, at least potentially, for Québec's language policy. In addition, in a much more general sense, these same phenomena also present worrying aspects for the position of the French language in North America and in the Americas more generally, insofar as the future will probably see continental economic integration spreading to the whole of the American continent, as evidenced by discussions taking place to create a Free Trade Zone of the Americas (FTAA).

In North America, French speakers represent 3% of the total population, Spanish speakers between 25% and 30% and English speakers over 60%. In the whole of the Americas, French speakers amount to less than 1% (there are more speakers of Quechua than of French). The Spanish and Portuguese languages being to a good degree mutually understandable (at least in writing), it has been suggested that, rather to invest time and money in learning another Ibero-Romance language, Latin Americans decide to concentrate on English.[39] Furthermore, the teaching of French has already undergone a notable decline throughout Latin America. One author who has examined the situation makes the following assessment:

> […] it is difficult to see what arguments could convince Americans and Latin Americans (especially the Spanish speakers) to teach two foreign

39 J Maurais, 'Towards a new linguistic world order', in J Maurais and M A Morris (eds.), *Langages in a Globalizing World* (Cambridge: Cambridge University Press, 2003), 13, at 25.

> languages systematically: in particular French, which has little possibility of imposing itself as a first foreign language, except perhaps in English Canada. Elsewhere, it is not evident why French should become a second foreign language; if such is the case, it would only be for a small elite, as is the case today. One issue however appears certain: French speakers […] should be vigilant in order to assure the presence of their [language] in future institutions.[40]

In consequence, on a linguistic level, the economic integration of the Americas will probably be to the advantage of both the English and Spanish languages and to the disadvantage of French.

The Council of the French language of Québec (an advisory body to the Québec government in language policy matters), in an opinion released in 2001, made a number of recommendations to the government of Québec to try to develop multilingualism, and thus to counter the hegemony of English, within the framework of the economic integration of the Americas:[41] Here are some of these recommendations:

> Recommendation 1: That the Government of Québec request that the Canadian federal government have included, in the Plan of Action of the Summit of the Americas, the need to officialize and strengthen institutional and commercial multilingualism and to support the development of individual plurilingualism.
>
> […]
>
> Recommendation 4: That the Government of Québec, together with the federal government, urge the inter-American organizations to consolidate their multilingual nature by ensuring that:
> 1. All official documents and general interest documents are translated into each of the official languages;
> 2. The information on the Internet sites is made available in each of the official institutional languages;

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40 Maurais note 39 *supra*, at 26.

41 *Language Issues in the Integration of the Americas* (translation from *Les enjeux et les défis linguistiques de l'intégration des Amériques*), Opinion of the Conseil de la langue française to the Minister responsible for the application of the Charter of the French Language (Québec: Conseil de la langue française, 2001).

3. All the official languages are treated on an equal footing in the hiring of personnel;
4. Plurilingualism is fostered among their staff by providing language courses or traineeships;
5. It be made possible for any citizen to communicate with an inter-American organization in one of the official languages of that organization, and receive an answer in the same language.

[…]

Recommendation 8: That the Government of Québec support the creation of an Inter-American Network for the promotion of languages in the integrated Americas, to be devoted to enhancing the value and respect placed on language diversity within the process of integration of the Americas.

That the government of Québec, in collaboration with its partners in the Americas, establish an inter-American Bureau of Languages, with the mandate to monitor language development in the context of integration, and to propose measures favouring the respect, learning and dissemination of languages within the Americas.

In the year 2000, the government of Québec created the *Commission on the situation and future of the French language*, with the mandate to identify and analyse the principal factors likely to influence the situation and the future of French in Québec, and to present recommendations aimed at promoting the usage, the influence and the quality of the French language. In its report, presented in 2001, the Commission analyses in the following way the linguistic challenges related to the operation of NAFTA and the projected free trade area of the Americas (FTAA):

'[…] the majority of US citizens and, except for some exceptions, English Canadians are favorable to the use of English as a single international language. […] Consequently, they would be in favor of a free trade zone that would function only in English, just like global trade relations. […] Spanish is flourishing in America and in Brazil it is difficult to see how English could eclipse Portuguese. These countries live in total linguistic safety. Québec and Canada, which have greater awareness of the tendency of the United States toward economic hegemony, and thus linguistic

domination with regard to Québec, see things from a very different point of view and work together in favor of cultural and linguistic diversity through respecting national languages in international organizations'.[42]

Amongst the recommendations made by the Commission we find the following:

> Recommendation 105: That within the framework of the negotiations for the Free trade Area of the Americas, the government of Québec obtains the guarantee that all goods and services be labelled, packaged and accompanied by documentation in the four languages of the FTAA. [43]

> Recommendation 139: That, in the construction of the Free trade Area of Americas, the government of Québec insist with the federal government of Canada and with the States with Spanish and Portuguese languages, that the debates of the various forums and all communications, including commercial communications, are done in Spanish, Portuguese, English and French. [44]

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42 *Le français, une langue pour tout le monde — Une nouvelle approche stratégique et citoyenne*, Report of the Commission on the situation and future of the French language in Québec (Gouvernement du Québec, 2001), at 170.

43 *Le français, une langue pour tout le monde* note 42 *supra*, at 242-243.

44 *Le français, une langue pour tout le monde* note 42 *supra*, at 248.

PART 3

SECTORS

8

THE TRANSFORMATION OF HIGHER EDUCATION AND MEDIUM-SIZED LANGUAGE COMMUNITIES

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SUMMARY: 1. Introduction. 2. Higher Education in Transformation: Internationalization, Europeanization, Commodization. 3. The International Framework of the Transformation of Higher Education. 3.1. Higher education in international trade law. 3.2. European initiatives in the field of higher education. 3.2.1. The European Higher Education Area. 3.2.2. The contribution of the Council of Europe. 3.2.3. The contribution of the European Union. 4. Globalization and Commodization of Higher Education: Effects on the Medium of Instruction. 4.1. Market-oriented higher education: opportunities and risks for medium-sized language communities. 4.2. The expansion of English as a language of higher education in Europe. 4.3. New higher education language policies?. 4.3.1. *Laissez-faire* language policy in Denmark and Norway. 4.3.2. Between nationalism and internationalization: Malaysia. 4.3.3. Towards a balanced language policy in higher education: the Basque Country. 4.3.4. From monolingualism to pragmatism in higher education language policy: Belgium. 5. The Dominance of English as a Language of Science: Effects on Medium-Sized Languages. 6. Conclusions.

1 · Introduction

This paper is devoted to the implications of the transformation of higher education for medium-sized language communities. Medium-sized lan-

guages are neither minority languages nor languages spoken by significant numbers of people, but are usable in all areas of society. Though they may be the national and official language of a state or a substate entity, they are not among the dominant languages in the wider international context and have a limited value in the global economy. Conventionally, they have between one million and twenty million speakers. Around twenty languages fall within this definition in Europe (Dutch, Romanian, Hungarian, Greek, Czech, Bulgarian, Swedish, Catalan, Slovak, Danish, Finnish, Galician, Lithuanian, Slovenian, Latvian, Estonian, to name some of them); and other examples can be found outside Europe (Hebrew, Afrikaans, Bahasa Malaysia, Amharic, Kazakh, and so on).[1]

The transformation of higher education does not specifically concern the use and status of medium-sized languages. However, it is clear that some of the main trends, such as internationalization, economization and increased competition, will have an impact on their international and domestic status. The first section of this paper will briefly outline the context of the transformation of higher education. The second section will explore the changing legal framework of higher education in international and European law, which can affect higher education language use indirectly. The third section will discuss the impact of the emergence of English as a medium of instruction in higher education on medium-sized language communities, exploring the reactions — governmental, institutional and social — in some national contexts. The fourth section will analyse the effects of the dominance of English as a language of science on medium-sized languages. Finally, some conclusions will be drawn.

There are definite limits to the scope and depth of analysis this paper can bring to the complex issue of higher education and medium-sized languages, especially given the diversity of demographic, political and economic characteristics of the states and substate entities in which medium-sized languages are spoken by the majority of the population (from the Netherlands and Sweden to Latvia and Albania).[2] In substate entities such as Catalonia and Wales, the national language must compete at home with

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1 It is not clear whether minority languages and state languages of developing, postcolonial states fall within the category of medium-sized languages. I tend to believe that only minority languages in Stage 1 on Fishman's 'Graded Intergenerational Disruption Scale', i.e., languages that have 'some use in higher level educational, occupational, government and media realms', would qualify as medium-sized languages.

2 For European legislation on higher education, see http://www.cepes.ro/services/he_laws.htm

the common language of the state; a factor which, in the field of higher education, is both an opportunity and a risk when the common language of the state is also an international language, such as English or Spanish. Similarly, in some states the majority language coexists in higher education with a second national language, which is also the language of a neighbour state: for instance, Finnish and Swedish in Finland,[3] Dutch and French in Belgium.[4] The focus of the paper will be on the impact on languages whose societies have traditionally had the human infrastructure and the financial resources to deliver higher education in the relevant language to individuals, whether state-wide languages or not.

2 · Higher Education in Transformation: Internationalization, Europeanization, Commodization

Higher education is in transformation. This transformation is visible in many regions of the world, especially in Europe. The Bologna convergence process has advanced significantly in the last decade, and it is viewed with interest and even imitated outside Europe.

The transformation involves the organization, funding, and structure of studies, as well as curricula and doctoral formation. In the history of modern higher education, reforms are not new: they have been a recurring phenomenon in domestic politics. However, the present reform wave seems to be deeper and broader. Some German commentators even compare the ongoing transformation with the foundation of modern higher education by Humboldt at the beginning of the 19th century.[5] From a general comparative perspective some general differences between the current and the previous reforms may, however, be stressed:

First, the reforms of the past were driven primarily by domestic policy objectives, even if less developed countries always tended to imitate the

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3 M Suksi, 'Implementing linguistic rights through legal education in Finnish and Swedish in Finland', in X Arzoz (ed.), *Legal Education in Bilingual Contexts: Group Rights, State Policies and Globalisation* (Leiden: Martinus Nijhoff, 2012), at 101-132.

4 S Weerts, 'Linguistic Law of Higher Education in Belgium: New Trends for Bilingual Education, but Which One?', in X Arzoz (ed.), *Legal Education in Bilingual Contexts: Group Rights, State Policies and Globalisation* (Leiden: Martinus Nijhoff, 2012), at 51-75.

5 See R Hendler, 'Die Universität im Zeichen von Ökonomisierung und Internationalisierung', in *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer*, vol. 65 (2006), 238, at 239.

educational models of more developed countries. The ongoing transformation of higher education in Europe takes place within multilevel governance (European Union, Council of Europe, etc.) in which responsibility for education still lies with national authorities, and in which many measures are carried out by the states in open coordination among them. It is 'the viability of the nation-state as the highest level of coordinating access to knowledge, as the frame within which knowledge is valuated and as the prime vehicle for institutionalizing the way in which knowledge is both generated and transmitted' which has been increasingly questioned over the past decade.[6]

Second, the objectives are new: internationalization, adaptability, and competitiveness. The internationalization agenda concerns all fields of higher education, and involves many aspects: recruitment of students and researchers, cross-border provision of services, competitiveness in the global market, and so on. The search for quality or, in the new jargon, excellence, is the theoretical goal of all reforms, past and current, but the understanding and the context of quality/excellence has evolved: whereas previously excellence was measured or understood in terms of social, cultural and scientific development, today it is understood more and more in economic terms as well. Knight states that 'academic standards are still important, but perhaps there is a perceptible shift from an emphasis on a high quality academic experience for students and teachers to one where high academic standards are part of marketing campaigns for branding purposes in order to compete domestically and internationally'.[7] It is the contribution of higher education to the competitiveness of individuals (the consumers of education services), of higher education institutions (the providers of education services) and of nations (regulatory frameworks and economies) that matters more and more. In policy documents concerning public universities the economic concepts of services, consumers, service providers, delivery systems and regulators emerge and replace the public law terminology of public service, students, public law institutions and public functions, as happened before in the energy or telecommunications

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6 G Neave, 'The European Dimension in Higher Education: An Excursion into the Modern Use of Historical Analogues', in J Huisman, P Maasen and G Neave (eds.), *Higher Education and the Nation State — The International Dimension of Higher Education* (Bingley, UK: Emerald, 2007), 13, at 26.

7 J Knight, 'Internationalization: Concepts, Complexities and Challenges', in J J F Forest and P G Altbach (eds.), *International Handbook of Higher Education* (Berlin: Springer, 2007), 207, at 218.

sectors. Higher education institutions and national economies must be internationally competitive and must attract talented students, researchers and professionals, while graduates are expected to acquire not merely knowledge, but above all relevant skills for the labour market (the so-called 'transferable skills'). This involves a redefinition of useful knowledge and an emphasis on the 'value sciences'. As Neave observes,[8]

> in the global economy 'it is no longer the humanities or the cultural sciences that have universal value. On the contrary, their national or territorial relatedness placed them in the position of being specific to the identity, circumstances and condition of a particular national or linguistic community. It would appear rather that the new universalism is to be found in those fields of study and technique that bear application — and employability — irrespective of the particular cultural and historic setting in which they are exercised. If the Nation-State resided in secular knowledge, the new super-ordinate community is engaged in erecting itself around knowledge as an interchangeable technicity'.

For many countries, higher education is now an important export sector: it is not surprising that the trend towards internationalization is most pronounced in the five so-called 'Main English-Speaking Destination Countries': Australia, Canada, New Zealand, the United Kingdom and the United States.[9] Even if higher education seems to follow the classic pattern of internationalization familiar to business, it is clear that internationalization is not only facilitated but driven by the growing hegemony of English as the world's common language: there is a direct link between the degree of internationalization of a country's higher education sector and the English-speaking character of that country. The economization of higher education services is also exemplified by the growing commercial education industry which can be seen to complement, cooperate or compete with the non-commercial public and private education sector. For instance, the London School of Economics founded the 'LSE Enterprise' with the aim of helping its academics to work on a commercial basis with external clients in the fields of policy analysis, commercial research, private briefing meet-

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8 Neave note 6 *supra*, at 53.

9 N M Healey, 'Is higher education in *really* 'internationalising'?', *Higher Education*, vol. 55 (2008), 333.

ings and training government officials. LSE Enterprise makes a direct contribution of its profits to the LSE and enhances the total remuneration of the LSE's academics: in 2009/2010, it made a direct contribution of £1.66 million to the LSE, while total salaries of LSE academics amounted to £2.16 million and those of external academics to £1.32 million.[10] New providers of education services include education and customized training companies, media companies, open and virtual universities, corporate universities created by big firms as well as professional associations and organizations. New providers tend to use new delivery methods and new types of programmes. The Observatory on Borderless Higher Education in the UK has developed a Global Education Index which lists companies that provide education and training programmes or services and are listed on stock exchanges: in 2007 there were more than fifty.[11]

Third, reforms were originally conditioned, and in some countries even driven, by the need to restrain or control the allocation of resources for higher education. Although the demand for higher education continues to grow, the spending capacity of the welfare state is not unlimited, and priorities must be established. There is 'a shift in perspective of central administration away from acting in a redistributive capacity to becoming a strategic coordinator of initiatives undertaking by individual universities, increasingly seen as 'self-regulating'.[12] On the one hand, the government aims to foster service quality and to control the effectiveness of public expenditure. A part of the funding that public universities receive from the state is bound up with achieving objectives. By virtue of what is known as 'contract-funding', a part of public resources is conditional upon the achievement of quantifiable public policy goals enumerated in the 'contract' or the delivery of services by the university to the local community. On the other side, public universities are insistently told that they need to search for alternative resources in the private sector ('financial diversification'): by increasing their research and knowledge transference contracts with private firms, by generating revenue through commercial and entrepreneurial activities, by seeking the sponsorship of big firms and, when no other alternative is left, even by increasing tuition fees.

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10 LSE Enterprise, *Annual report 2009/2010* (London 2010).
11 Knight note 7 *supra*, at 224.
12 Neave note 6 *supra*, at 51.

The recent financial crisis (2007/2012) has created additional financial difficulties for higher education. In UK, the funding for higher education will be reduced in 40% until the academic year 2014/2015; Greece and Italy have imposed reductions of 30% and 20% respectively, and in Latvia the budget has been cut by 48% in 2009 and 18% in 2010. Universities in other European states have faced budget cuts of up to 10%. These cuts can only be compensated through a significant rise of tuition fees. On 9 December 2010, the British parliament approved the raising of the tuition fees ceiling from £3,290 (approx. 3,700 euros) to £9,000 (approx. 10,750 euros) in public universities of England, with standard fees rising to £6,000.[13] This may be a signal for a general increase in tuition fees in other countries.

3 · The International Framework of the Transformation of Higher Education

The existing literature tends to focus on areas of international or domestic law which directly affect language policy. In this section, we will consider areas of international law or cooperation which indirectly affect higher education language use.

3.1 · Higher education in international trade law

The economic legal relevance of higher education is shown by the fact that the most comprehensive economic legal regulation of higher education is contained in the law of the World Trade Organization (WTO), namely in the General Agreement on Trade in Services (GATS). Both legally and technically, GATS is a complex agreement: administered by the WTO which is made up of 153 member states, it is the first ever set of multilateral rules covering international trade in services. The aim of GATS is to promote trade by eliminating or reducing measures that inhibit the cross-border flow of services.[14] This extends also to education, including primary, secondary, higher, adult and other education, in the four ways in which

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13 Source: Spanish newspaper *El País*, 10/12/2010, at 14; 17/01/2011, at 38.

14 J Knight, *Trade in Higher Education Services: The Implications of GATS* (London: The Observatory on Borderless Higher Education, 2002); P Sauvé, 'Commerce, éducation et AGCS: les tenants et les aboutissants', *Politiques et gestion de l'enseignement supérieur*, vol. 14:3 (2002), 51.

a service can be traded (known as 'modes of supply'): cross border supply, consumption abroad, commercial presence, and presence of natural persons. The inclusion of higher education within GATS reflects the relevance of higher education in the economy market. It is estimated that in 1999 the global trade in postsecondary education was a 35 billion dollar business.[15]

GATS involves two kinds of obligations: on the hand, some general or unconditional obligations, such as the most favoured nation treatment (one's trading partners must be treated equally), transparency, and a mechanism of dispute settlement;[16] on the other, conditional obligations attached to national schedules, i.e., each country determines the type and extent of its commitment for each sector. An example is the degree to which market access is granted to foreign providers in each sector; when market access has been granted to foreign suppliers, equal treatment for foreign and domestic providers is required. It is a progressive liberalization: states are supposed to cover more and more sectors and remove more and more trade limitations and, in consequence, update their commitments.[17] Even if they are reticent about liberalizing higher education, as is the case in most developing countries, they may be obliged to apply ambitious liberalization packages. The WTO's mechanisms and instruments of influence to try to drive the behaviour of member countries towards the application of free trade policies in education and all other service and commodity sectors are harmonization, imposition, standardization and dissemination of policies.[18]

There is some controversy about the extent of education services subject to GATS. Firstly, Art. I (3)(b) excludes 'services supplied in the exercise of governmental authority' from the operation of the Agreement: according to Art. I(3)(c), 'a service supplied in the exercise of governmental authority' means 'any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers'. Since there is no more elaboration on what 'exercise of governmental authority' means, this ambiguity or non-definition leads each state to interpret the exemption clause according to its interests. Second, education, overall, is one of the least committed sectors. Only 44 of the 144 WTO Members have made commitments in education, and only 21 of these have included

15 Knight note 7 *supra*, at 217.
16 See GATS, Part II.
17 See GATS, Part IV.
18 See A Verger, *WTO/GATS and the Global Politics of Higher Education* (New York/London: Routledge, 2009), at 201.

commitments to higher education: Australia, Czech Republic, Jamaica, Liechtenstein, Norway, Sierra Leone, Switzerland, Congo, European Union, Japan, Mexico, Panama, Slovak Republic, Trinidad and Tobago, Costa Rica, Hungary, Lesotho, New Zealand, Poland, Slovenia, and Turkey. Only four countries have to date submitted a negotiating proposal outlining their interest and issues in the education sector. These countries, in order of presentation of their negotiating proposals, are: United States, New Zealand, Australia, and Japan.[19] Within the states that have made commitments, there are a variety of positions: importers, exporters, and sceptics about the liberalization agenda. Some states want to send the signal that they are interested in attracting foreign suppliers, in opening their market and providing a favourable framework. In contrast, the European Union has adopted the position that higher education in the EU member states involves the 'exercise of governmental authority'. This position appears to be more political than legal, for it does not reflect the existing level of access to the market of higher education within the EU. At the other extreme, the United States, New Zealand and Australia, which already possess a large share of the higher education global market, are very interested in the 'for-profit' internationalization of higher education.[20]

Once the process of removing barriers has advanced to some extent and liberalized trade has increased, sooner or later the need for a regulatory framework for recognition, quality assurance and accreditation will be evident. GATS promotes liberalization of trade, but does not fill the regulatory gaps that will emerge. Both national and international regulatory frameworks will be required. UNESCO has contributed to the international recognition of diplomas and qualifications. Nevertheless, at present, regional initiatives (the European states, the Latin American and Iberian states,[21] and the Asian-

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19 Source: UNESCO web site, section 'Education — University Mobility and Quality'. http://portal.unesco.org/education/es/ev.php-URL_ID=21758&URL_DO=DO_TOPIC&URL_SECTION=201.html
On the extent of commitments see the OECD/CERI background document, 'Current Commitments under the GATS in Educational Services', prepared for the OECD/US Forum on Trade in Educational Services, Washington, DC, U.S.A., 23-24 May 2002.

20 Knight note 13 *supra*, at 11-12.

21 A process of convergence, mobility and accreditation between Latin American and Iberian states was launched in Guadalajara (Mexico) on 31 May 2010 at the Second Universia Meeting of University Chancellors, with one thousand representatives from Latin-American and Iberian states. The Guadalajara Agenda aims at a convergence similar to that of the Bologna process within ten years. This means that Spain and Portugal can take part simultaneously in two global spaces of higher education. There are fourteen million people enrolled in higher education in the

Pacific area[22]) constitute the most advanced or promising attempts to develop and coordinate regulatory frameworks for recognition, quality assurance and accreditation. In the following section, we briefly present some initiatives underway in the European region.

3.2 · European initiatives in the field of higher education

The European regulatory and coordination measures of higher education comprise a variety of initiatives that are not adopted within the same institutional framework. The responsibility for some of them lies with the Council of Europe, others are carried out within the framework of the European Union, but most of them are the result of the open coordination among states.

3.2.1 · The European Higher Education Area

The European Higher Education Area has been developed in an apparently cooperative manner by 45 states. The foundation stones of the Bologna process were laid down by states acting outside the EU institutional framework.[23] As of 2010, the deadline for implementing the Bologna process, the main outputs of the Europeanization of higher education are: the development and incorporation of a common measure unit (the European Credit Transfer Scheme, ECTS) which includes diverse forms of learning with a view to allowing a relative comparability of higher education sys-

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Latin-American and Iberian states. This huge market for Spanish-medium higher education will bring to bear extra pressures upon Catalan, Basque and Galician universities to offer more Spanish-medium master and doctoral courses.

22 The Organization called University Mobility in Asia and the Pacific (UMAP) was founded in 1993. It is a voluntary association of government and non-government representatives of the higher education sector in the region. Its principal programme is similar to the Erasmus programme in Europe. There are thirty-one eligible countries, territories and administrative regions for student exchange, including Australia, Canada, New Zealand, China, Russia and the US. See www.umap.org

23 K De Wit, 'The Consequences of European Integration for Higher Education', *Higher Education Policy*, vol. 16 (2016), 161; K De Wit and J C Verhoeven 'The Higher Education Policy of the European Union: With or Against the Member States?', in J Huisman, P Maasen and G Neave (eds.), *Higher Education and the Nation State — The International Dimension of Higher Education* (Bingley, UK: Emerald, 2007), 175; S Garben, 'The Bologna Process: from a European Law Perspective', *European Law Journal* vol. 16:2 (2010), 186, and *EU Higher Education Law. The Bologna Process and Harmonization by Stealth* (London: Kluwer Law International, 2011).

tems, the adoption of a common structure of higher education cycles around the Anglo-American model of bachelor, master and doctoral degrees, with a minimum of three years study within the first cycle (3+2+3 or 4+1+3) with the aim of fostering compatibility and transportability of degrees obtained in other states, increased mobility of students through cooperative networks between individual institutions, and the creation of national institutions for quality assurance through accreditation and audit of the different elements of the national higher education systems.[24]

It is generally recognized that the conformation of the European Space of Higher Education has a language-related dimension.[25] However, there are no European policy guidelines or recommendations on this issue. To my knowledge, no European institution, including the European Union and the Council of Europe, has ever recommended European states to modify national legislation prohibiting or impeding the use of foreign languages in higher education. Therefore, language policy in higher education lies entirely within the responsibility of states.

Although driven by the European states, the two large regional organizations within Europe, the Council of Europe and the European Union, have assisted in the implementation of the Bologna Process.

3.2.2 · The contribution of the Council of Europe

The Council of Europe, made up of 47 member states, devotes itself to political cooperation in Europe. The Council of Europe has produced a number of conventions on the recognition of diplomas and periods of university study. The last convention on the issue, the Lisbon Convention on the Recognition of Qualifications Concerning Higher Education in the European Region (1997), was prepared under the auspices of the Council of Europe and of UNESCO.[26] This Convention has been ratified by the 47 member states as well as by seven non-member states (Australia, Belarus, Israel, Kazakhstan, Kyrgyz Republic, and New Zealand). The Council of Europe and UNESCO have also jointly adopted the Code of Practice on

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24 M A Bermejo Castrillejo, '¿Realidad o ficción? El proceso de convergencia de las enseñanzas jurídicas dentro del marco del proyecto de creación de un Espacio Superior de Educación Superior', *Cuadernos del Instituto Antonio de Nebrija*, vol. 9 (2006), 237, at 295-296.

25 S Bergan (ed.), *Les politiques linguistiques dans l'enseignement supérieur* (Strasbourg: Council of Europe Publishing, 2003), at 10.

26 European Treaty Series, No. 165.

Transnational Education. The Council of Europe gives advice and assistance to countries that have recently acceded to the Bologna process.

3.2.3 · The contribution of the European Union

The European Union lacks the legal competence to harmonize the laws and regulations of the member states in the field of higher education. It can adopt either incentive measures or recommendations.[27] The Union has adopted incentive measures to foster mobility of students and teachers and networking between higher education institutions. These programmes, based on voluntary cooperation between higher education institutions, have proved very popular and have had a lasting impact.[28] The EU has also fostered further European cooperation in quality assurance of higher education. The last act adopted within the EU encourages national authorities, the higher education sector and quality assurance and accreditation agencies to set up a 'European Register of Quality Assurance Agencies'. Member states must enable their higher education institutions to choose one of the quality assurance or accreditation agencies on the European Register that meets their needs and profile, provided that this is compatible with their national legislation or permitted by their national authorities; they should also allow them to work towards a complementary assessment by another agency in the European Register, for example to enhance their international reputation.[29]

4 · Globalization and Commodization of Higher Education: Effects on the Medium of Instruction

Some authors estimate the number of languages used in higher education to be slightly over 100.[30] Windows offers automatic orthographic cor-

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27 Art. 165 of the Treaty on the Functioning of the European Union.

28 On personal and societal outcomes, see V Papatsiba, 'Student mobility in Europe: An academic, cultural or mental journey? Some conceptual and empirical findings', *International Relations - International Perspectives on Higher Education Research*, vol. 3 (2005), 29.

29 The most recently adopted legislation is the Recommendation of the European Parliament and the Council of 15 February 2006 on further European cooperation in quality assurance in higher education (2006/143/EC), OJ 2006 L 64/60.

30 J Laponce, *Loi de Babel et autres régularités des rapports entre langue et politique* (Québec: Presses Universitaires de Laval, 2006), at 27.

rection of texts in approximately 135 languages, dialectal/alphabetical variations aside. This figure gives an approximate number of the languages which are not only standardized themselves, but are also equipped with modern technologies that can assist students and researchers in the production of correctly written texts. This level of linguistic formalism and correctness seems indispensable today for higher education.

4.1 · Market-oriented higher education: opportunities and risks for medium-sized language communities

The consequences of the 'market' vision of higher education on the use of minority languages as media of teaching and learning are controversial.[31] First, the responsibility for providing higher education shifts away from the state and towards the market. State language policy has often restricted the use of minority languages. However, if education is conceptualized as a commodity to be traded on global markets, it is up to the provider to decide what kind of service should be offered and how. If barriers to the provision of, say, English-medium higher education are removed, the same should apply to other foreign suppliers by virtue of the most favoured nation treatment. And if the offer in the local market is insufficient, cross-border services from kin-states might cater for the local linguistic minority. Cross-border cooperation facilitated by the European integration process can provide opportunities on one side of a historical frontier to complement and complete the provision and the range of specialities absent in the other.[32] For instance, the Slovenian linguistic community divided in three neighbouring nation-states (Slovenia, Italy and Austria) but concentrated in the same historical region[33] could benefit from the four modes of supply included in GATS: cross-border supply (distance education, e-learning, virtual universities), consumption abroad (students who go to Slovenia to study),[34] commercial presence (opening of local branches or satellite campuses, twinning partnerships, etc.), and the presence of in-

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31 X Arzoz, 'Legal Education in Bilingual Contexts: A Conceptual, Historical and Comparative Introduction', in X Arzoz (ed.), *Legal Education in Bilingual Contexts: Group Rights, State Policies and Globalisation* (Leiden: Martinus Nijhoff, 2012), 3, at 30-33.

32 Neave note 6 *supra*, at 56.

33 See T Bahovec and T Domej (eds.), *Das österreichisch - italienisch - slovenische Dreiländereck* (Klagenfurt/Celovec: Mohorjeva Hermagoras, 2006).

34 This possibility already derives from the freedom of movement of EU citizens within the Union.

dividuals (professors, teachers, researchers working abroad). The same could apply to other border regions[35] or cross-border linguistic communities of demographic relevance, such as Hungarian speakers in Slovakia and Rumania. Since some of the European minority languages are at the same time state languages of kin-states, the liberalization of trade in education services may contribute to the elimination of trade barriers, state language policy obstacles and, therefore, to the increasing cross-border use of some medium-sized languages.

Second, one might also consider that cross-border higher education services will create new opportunities, since modern technologies (e-learning, virtual universities, distance universities, etc.) will help to create and provide new and more diversified services in ever more languages.[36] In some areas (business, IT technologies, adult education, popular science, etc.), for-profit universities and education companies will standardize their products in order to offer them in as many languages as is profitable, as is now the case with many cultural products (books, DVDs, television programmes, films, apps for smart phones and tablets, etc.). Consumers will have access to a wider range of education services in many languages, just as they can choose from among hundreds of cable or online television programmes in many languages.

However, as regards traditional higher education (i.e. physical colleges and campuses), the trend appears to be rather the reduction, not the expansion, of languages of tuition. In spite of punctual beneficial aspects, the impression seems to be that, in general, the rise of 'for-profit' higher education[37] will be detrimental to the use of minority languages,[38] and the same conclusions seem to apply to medium-sized languages. The conceptualiza-

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35 T Kozma and I Radácsi, 'Should We Become More International or More Regional? Aspects of Minority Higher Education in Europe', *Higher Education in Europe*, vol. XXV:1 (2000), 41.

36 Open universities have existed since the 19th century in Britain, and tuition by correspondence has a certain pedigree. British universities catered for individuals in Britain and overseas. On the University of London as an archetypical global institution, see M Tight, 'Re-writing history: The University of London as a global institution in the nineteenth, twentieth and twenty-first centuries', *International Relations - International Perspectives on Higher Education Research*, vol. 3 (2005), 289.

37 R S Ruch, *Higher Ed, Inc - The Rise of the For-Profit University* (Baltimore: John Hopkins University Press, 2001); K Kinser, *From Main Street to Wall Street - The Transformation of For-Profit Higher Education* (San Francisco: Jossey-Bass, 2006); D W Breneman, B Pusser and S E Turner, *Earnings from Learning - The Rise of For-Profit Universities* (New York: State University of New York Press, 2006).

38 Arzoz note 31 *supra*, at 31-33.

tion of the aims of higher education will shift away from obtaining personal and social development benefits to the purely economic aspects: university degrees as the way to achieve a better job and a higher standard of living. In particular if higher education is traded on a high price, consumers will seek to optimize the money they are paying. Increasing mobility of students and more competition between higher education institutions to catch students will be the consequence. Since international skills and degrees will be very much appreciated and rewarded by the job market, the demand for education in international or world languages will increase, above all if increasing opportunities are afforded to the liberalization of trade in higher education.

In fact there exists an emerging trend of linguistically determined bifurcation of higher education in states in which higher education has been liberalized, i.e., where traditional barriers to the establishment of local or foreign private higher education institutions have been removed. In Malaysia the bifurcation of higher education led to public universities which use Bahasa Malaysia (the national and official language) and private universities which, through the liberalization of higher education, were able to use English as the language of education.[39] This bifurcation of public/private universities along the language of instruction also characterizes many other Asian states.

Interestingly, while the European Union has 23 official languages, the official language of ASEAN is English. The expansion of English-medium universities across Asia is also driven by the expansion of English as a lingua franca in that region,[40] which for its part is a consequence of the economic development of the continent. In an important document issued by the Chinese Ministry of Education in 2001, English-Chinese bilingual education was listed as one of the 12 recommendations for the purpose of improving the overall quality of universities and colleges, as well as to meet 'the challenge of economic globalization and technological revolution'. In the post-WTO era, China needs large numbers of professionals who are as at home in English as they are in Chinese, and bilingual teaching is seen as a means to that objective. In Chinese universities, 5% to 10%

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39 S K Gill, 'Medium-of-Instruction Policy in Higher Education in Malaysia: Nationalism Versus Internationalization', in J W Tollefson and A Tsu (eds.), *Medium of Instruction Policies: Which Agenda? Whose Agenda?* (Mahwah, NJ: Lawrence Erlbaum Associates, 2004), 135.

40 A Kirkpatrick, *English as a Lingua Franca in ASEAN: A multilingual Model* (Hong Kong: Hong Kong University Press, 2010).

of all subjects must be taught in English. However, bilingual programmes are not merely about the introduction of English as the language of instruction: jointly sponsored by major Chinese and English-speaking western universities, bilingual programmes feature the wholesale adoption of the teaching syllabus, textbooks, and evaluation systems of the western partner universities.[41]

4.2 · The expansion of English as a language of higher education in Europe

Irrespective of the liberalization agenda of GATS and the specific commitments made by states, the fact is that the use of English as the medium of instruction in some courses or programmes is already one of the core internationalization strategies that many universities from non-English speaking countries are fostering.[42] The trend towards more programmes through the exclusive medium of English is on the rise.[43] The main argument marshalled in favour of English-medium education in non-English-speaking universities is the following: teaching all or partially in English not only attracts undergraduate and graduate students from other countries, but also improves the formation of local students aspiring to an international business or academic career. Despite the criticisms of this argument,[44] I find it persuasive enough, at least with regard to medium-sized language communities. First, it is a fact that there is an ever-growing international demand for English-medium higher education from developing countries and emerging economies. In a global economy can a national industry renounce having a share of that business? Second, this does not imply that

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41 L Yu, 'English-Chinese Bilingual Education in China', in J Cummins and N H Hornberger (eds.), *Encyclopedia of Language and Education* (Berlin: Springer, 2nd ed., 2008), 175, at 177-179.

42 H Murray and S Dingwall, 'The Dominance of English at European Universities — Switzerland and Sweden Compared', in U Ammon (ed.), The Dominance of English as a Language of Science (Berlin: Mouton de Gruyter, 2001), 85; R de Cilia and T Schweiger, 'English as a Language of Instruction at Austrian Universities', *ibidem*, 363; U Dürsmüller, 'The Presence of English at Swiss Universities', *ibidem*, 389; T Vogel, 'Internationalization, Interculturality, and the Role of Foreign Languages in Higher Education', *Higher Education in Europe*, vol. XXVI:3 (2001), 381.

43 F Maiworm and B Wächter, *English-Taught Programmes in European Higher Education* (Bonn: Lemmens Medien, 2008).

44 F Grin, 'Managing languages in academia: Pointers from education economics and language economics', Paper presented at the Conference *Professionalising Multilingualism in Higher Education*, Luxembourg, 4 February 2010, at 11 et seq.

foreign students are usually better than local ones. Very specific programmes are conceived and aimed at an international audience, not for the regional or national community (e.g., a European master in marine environment and resources such as the one taught exclusively in English at the University of the Basque Country). Third, languages of wider communication other than English may still attract a good number of foreign students to their systems of higher education for various reasons, some of them similar to those which bolster the appeal of the English language. France and Germany may still be the destination of many students who are keen to experience the local higher education entirely through the medium of the local language — whether by dint of their own initiative or stimulated by those states' generous scholarships systems. Germany, France and Russia, like the UK and the US, have used scholarships and funding regimes to encourage foreign students to their university system for geo-political ends. On the other hand, very few foreign students will learn a medium-sized language such as Slovenian, Danish, Norwegian, Czech, Swedish, Finnish or Greek with a view to studying or working later in one of those states: the only chance of universities of medium-sized language communities to share in international student mobility is to offer programmes through the exclusive or principal medium of English. Fourth, the impact of tuition fees must be taken into account as demand- and supply-side drivers. Not all students with a good proficiency of English can afford to study in an English-speaking country such as the US or the UK. By contrast, European universities from medium-sized language communities are mostly public-funded, charge low fees and, in any case, are obliged to treat EU citizens in the same way as their nationals. In fact, European universities may be willing to increase their supply of English-medium programmes if they are allowed by the government to charge market fees for non-EU students (known as international tuition fees).

In the field of English-medium higher education in non-English-speaking states, we find a wide range of possibilities and practices. English may be a supplementary or the exclusive medium of instruction, optional or compulsory, at undergraduate or at graduate levels, and so on. English can also be used to develop a different approach to the discipline being taught. At the young University of Maastricht (the Netherlands), the European Law School has two sections or language tracks: Dutch and English. The teaching in English is only a part of the innovative methods implemented at Maastricht. The English language track of the European Law School

teaches law from a European and comparative perspective, entirely through the medium of English. One third of the students are Dutch nationals, a third German citizens and the other third come from other countries.[45] Other Dutch public universities also offer English-medium instruction.[46]

In the Nordic countries and the Netherlands, the incorporation of English into the education system, including higher education and vocational training, is impressive. It must be noted that, since they speak small languages, Nordic countries have always understood that their students had to know languages of wider communication. In Norway, until the end of the 1970s the knowledge of three foreign languages (English, German and French) was a sine qua non requirement to enter university: a part of the programme could be written in German.[47] Nobody seemed to complain about the loss of the national language. Nowadays, this is unimaginable: English is the only common language for all students, and it is assumed that all have proficiency in English. For other European states, the level of proficiency of students, even university graduates, is lower. The cause and the effect of it is that only optional subjects and master courses are taught in English at the university. In general, it depends on decisions taken by each higher education institution and even by each school and faculty.

4.3 · New higher education language policies?

To analyse the higher education language policy of all medium-sized language communities in detail would go beyond the space assigned to this paper. It seems more appropriate to analyse some national contexts to explore the governmental, institutional and social reactions to the linguistic implications of globalization for higher education. The governmental reactions can be categorized into two main trends: a laissez-faire language policy on the one hand, and active promotion of the introduction of inter-

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45 N Kornet, 'English-Medium Legal Eeducation in Continental Europe: Maastricht University's European Law School — Experiences and Challenges', in X Arzoz (ed.), *Legal Education in Bilingual Contexts: Local Realities, Global Issues* (Leiden: Martinus Nijhoff, 2012), 313.

46 For the Technical University of Delft, see R G Klaassen, *The International University Curriculum: Challenges in English-medium Engineering Education*. Unpublished Ph.D. thesis, Technical University of Delft, The Netherlands, 2001. http://repository.tudelft.nl/view/ir/uuid%3Adea78484-b8c2-40d0-9677-6a508878e3d9/

47 K Koch Christensen, 'Les politiques linguistiques dans l'enseignement supérieur — L'exemple de la Norvège', in S Bergan (ed.), *Les politiques linguistiques dans l'enseignement supérieur* (Strasbourg: Council of Europe Publishing, 2003), 37, at 38.

national languages in higher education on the other. In general, the principle of instruction exclusively through the national and official language(s) is *de iure* or *de facto* derogated to seek pragmatic solutions that combine the interest in enhancing the state's competitiveness and the employability of its nationals with the need to protect national identity and culture. As a result, universities' language choices constitute elements of language policy, whether a university is publicly or privately-funded.[48] The next sections show that the particular configuration of higher education language policies may vary widely, with varying consequences for social conflict.

4.3.1 · Laissez-faire *language policy in Denmark and Norway*

Denmark is one of the nine European countries where the status of the official language as the principal language of state has not been ratified by law. There is no need for an explicit language policy in Denmark, since Danish has been traditionally considered as firmly consolidated as the sole official written and spoken language in the country. As a result of the laissez-faire language policy, the language situation is largely left to self-regulation, where market forces rule in the context of globalization.[49] However, as Sinner puts it, 'Denmark has suddenly woken up to the unpleasant after-effects of globalization and the laissez-faire language policy'.[50] In the last decade two reports on the language situation has been published in Denmark, *Sprog på spil* (Language at stake) in 2003 and *Sprog til tiden* (Language in time) in 2008. The central concern of both reports has been the increasing use of English at the expense of Danish, particularly in the field of education and research.[51] English is most Danes' second language, and it is perceived as a symbol of status, higher social class and better opportunities on the labour market.[52] The conclusion in both reports is the same: there is no practical need for legislative protection of the Danish language, and so the introduction of a

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48 Grin note 44 *supra*, at 4.

49 M Sinner, 'Hangovers of globalization — A case study of laissez-faire language policy in Denmark', *Language Problems and Language Planning*, vol. 34:1 (2010), 43, at 43-44.

50 Sinner note 49 *supra*, at 44.

51 Sinner note 49 *supra*, at 44.

52 As a matter of fact, the Danes show the highest proportion of individuals among EU member states stating that their skills in English are very good: 46%, slightly above Maltese (41%) and Cypriots (40%) (Eurobarometer 243).

general Language Act is unnecessary. Nevertheless, the second of these reports comes to the conclusion that the language use at universities is the only area where language regulation by law might be needed to guarantee the continued use of Danish. According to Siiner, this conclusion met great opposition among universities such as the Technical University of Denmark and the Faculty of Life Sciences at Copenhagen University, which offer a large selection of English tutored programmes at the Masters level and attract hundreds of international students every year, and which saw the possible new regulation as a serious barrier to competing in the international market.[53]

It should be noted that the second report was commissioned by the government as a response to a proposal for a parliamentary resolution submitted by the right-wing populist Danish People's Party on 6 December 2006. The aim of the resolution was 'to order the Government to draw up a Danish Language Act that would safeguard the future of Danish as a complete and unified language, at a time when Danish is increasingly influenced by, and under pressure from, English, especially in the academic sector'. The proposal made by the Danish People's Party was part of the party's programme to protect Danish culture, including language, against influences from other cultures and languages, and it was preceded by a successful amendment of language policies for naturalization.[54] At the beginning of 2009, the party failed to raise a non-governmental majority in the Danish Parliament aimed at forcing the Government to amend the University Act in order to ensure that all teaching and research at Danish universities should be carried out in Danish.[55]

The general attitude to globalization in Denmark, both within society and government, seems to be positive. Globalization will create more jobs and give better opportunities for education, and for this purpose knowledge of English is indispensable for individuals and for the country to compete in the world market. The public discussion uses the term *parallelsproglighed* (parallel competence in the Danish and English languages) to stress that competence in the English language is a necessity.[56] This term also expresses the implicit higher education language

53 Sinner note 49 *supra*, at 52.
54 Sinner note 49 *supra*, at 53.
55 Sinner note 49 *supra*, at 53.
56 Sinner note 49 *supra*, at 54-55.

policy. In fact, a *Centre for Internationalization and Parallel Language Use* was created in 2008 at the University of Copenhagen (Denmark's largest university), in order to articulate the University's aim for further internationalization and for a language policy based on the use of Danish and English as parallel languages. The Centre website defines the principle of parallel language use applied at the University of Copenhagen as 'a situation in which two languages are considered equal in a particular domain, and where the choice of what is deemed most appropriate and efficient in a specific situation'.[57] The implicit understanding of the principle seems to be that courses and seminars are taught in Danish, unless there are students, researchers or academic visitors from other countries. The Centre fosters four areas of research: parallel language in practice, foreign and second language acquisition and teaching, language policy decisions at the university and their consequences, including the status of the Danish language as a language of science, and language and the quality of learning outcome.

In Norway, there is also a positive attitude towards the use of English in higher education. In fact, new higher education legislation (2003/2005) has abolished the provision that tuition in higher education should normally be conducted in Norwegian, whatever was meant by the term 'normally'.[58] This derogation implies a sort of delegation: higher education institutions will be now responsible for the wide range of consequences that their language choices can have. It is interesting to note that, while the ministry of education promotes English-medium instruction, the public body that appears to be worried about this development is the ministry of culture, the department responsible for language policy, since it fears that the use of English may lead to the loss of linguistic domains and to a sort of diglossia. Bearing in mind that an increasing number of university textbooks are written in English, it has been argued that the production of quality university textbooks in good Norwegian is crucial to maintain the national language's full capacity in all linguistic domains.[59]

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57 http://cip.ku.dk/english/about_parallel_language_use/

58 Higher Education Act (2003); Act Relating to Universities and University Colleges (2005). http://www.cepes.ro/services/he_laws.htm

59 Koch Christensen note 47 *supra*, at 40.

4.3.2 · Between nationalism and internationalization: Malaysia

Malaysia is a multiethnic, multiracial country. English was the language of colonial administration and the education system. At the time of independence from British rule, Malays constituted 49.78% of the total population, Chinese 37.1% and Indians 11.0%.[60] After independence, Malaysia made efforts to establish national identity and to achieve unity through a national language. Malay, the language of the indigenous people later renamed Bahasa Malaysia, was adopted as the lingua franca and as the official language. Unlike other postcolonial countries such as Singapore, India and Hong Kong, English retained its official language status for only ten years after independence. Starting in 1958 at primary school level, Bahasa Malaysia was gradually introduced as the medium of instruction at all levels of education over a period of 26 years. Efforts and resources were devoted to the development of Bahasa Malaysia in the fields of science and technology. The replacement of English by Bahasa Malaysia as the official language and the main medium of instruction raised the status of the language, and helped the nation to build its national identity. From being the medium of instruction in schools, English become a compulsory school subject that students needed to take but not to pass.[61]

The University of Malaya, the oldest university in Malaysia, was established in the 1960s with English as the medium of instruction. After the school system moved from English to Bahasa Malaysia, the University had to change as well. In 1965, it began with two parallel streams, Bahasa Malaysia for arts subjects and English for science and technology. Gradually, the bilingual system became a completely monolingual system, using only Bahasa Malaysia. All public universities established from 1967 onwards were required to use the national language only as the medium of instruction. By 1983, all subjects, including the sciences, were taught in Bahasa Malaysia in all public universities.[62]

In 1993, the Malaysian government decided to allow the use of English in science, engineering and medicine in public universities.[63] The govern-

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60 Gill note 39 *supra*, at 137.

61 Gill note 39 *supra*; S K Gill, 'Language Policy in Malaysia: Reversing Direction', *Language Policy*, vol. 4:3 (2005), 241.

62 Gill note 39 *supra*, at 142.

63 A similarly pragmatic but drastic decision was taken by the Malaysian government ten years later. In 2003, the government approved a change in language policy in non-university educa-

ment argued that the move was necessary for Malaysia to remain competitive at an international level and because the pace of translation could not keep up with the generation of knowledge and information in the field of science and technology. There was also an extended feeling among Malaysians, including political and entrepreneurial leaders, that undergraduates educated in Bahasa Malaysia had difficulties understanding academic texts in English.[64] However, patriotic Malay intellectuals opposed such plans and the public universities did not give support to the government's initiative. They managed to maintain the status quo.

The Malaysian government had still another card to play: the liberalization of higher education. According to Gill,[65] this liberalization was driven by two factors. The first one was the Asian economic crisis of the late 1990s, which led the government to seek options to mitigate the country's outflow of foreign currency: one way of doing this was to encourage Malaysian students to study locally while at the same time attracting foreign students. The second factor was the need to increase the number of knowledge workers to enhance the country's international competitiveness. The idea was to convert Malaysia into a regional educational hub. The government allowed the private sector to participate in the provision of tertiary education. Foreign universities were allowed to set up offshore branches in Malaysia, local colleges could develop educational partnerships with foreign universities to provide higher education, and local corporations were mandated to establish private universities. By virtue of this legislation, 616 private colleges adopted a transnational model of education through twinning programmes with universities from Australia, the United States and the United Kingdom; three public utility corporations established engineering universities, and

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tion: English would be the language of instruction for mathematics and the sciences. The change applied to both national schools that use Bahasa Malaysia and Chinese and Tamil medium schools. This time, the change was contested mainly by the linguistic minorities, in particular by the Chinese, which for two centuries have managed their own system of mother tongue education through private schools. The introduction of English as a medium of instruction for two main subjects considerably reduces the use of the minority language in the provision of education in Chinese and Tamil medium private schools. See S K Gill, 'Shift in language policy in Malaysia — Unravelling reasons for change, conflict and compromise in mother-tongue education', in A Carli and U Ammon (eds.), *Linguistic inequality in scientific communication today* (= *AILA Review*, vol. 20) (Amsterdam: John Benjamins, 2007), 106.

64 Gill note 39 supra, at 144.

65 Gill note 39 *supra*, at 140-141.

three foreign universities (from Australia and the United Kingdom) established branch campuses in Malaysia.

The liberalization could not be complete without a change in language policy. In 1996, legislative amendments allowed for the use of English as a medium of instruction for technical areas in postsecondary courses as well as for courses that were provided through twinning arrangements with overseas institutions as well as offshore campuses. In any case, the legislation stipulates that the national language is a compulsory subject in private education institutions.

As a result, a bifurcation of higher education emerged, whereby public institutions of higher education retained the national and official language as the medium of instruction, and private institutions of higher education were given the freedom to use English. As Gill observes, 'despite the strong feelings of traditional nationalism still found in certain quarters, the positioning of the English language in Malaysia has come almost perfect circle, back to the status that it previously enjoyed, equal to the national language'.[66] It can be said that the bifurcation was a compromise that the Malaysian government forged in order to balance the economic interests of the nation with the nationalist sentiments of intellectuals.[67]

However, the bifurcation of higher education has serious social and political consequences. First, private universities are more expensive than public universities, and students enrolled in private universities are usually from middle-class families, whereas public universities cater for students from working-class families. Second, the majority of the students in the public universities are Malays, whereas the majority of students in private universities are Chinese. As a result, undergraduates are divided not only along socioeconomic lines but also along ethnic lines.[68] Graduates from private universities, because of their fluency in English and the marketability of their courses, are in greater demand in the private sector which is becoming gradually the main employer of graduates from universities, while graduates from public universities only find jobs in the government sector. The bifurcation will increase the disparity between the economic achievement of the various ethnic groups in the country.

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66 Gill note 39 *supra*, at 147.

67 A Tsui and J W Tollefson, 'Introduction', in J W Tollefson and A Tsu (eds.), *Medium of Instruction Policies: Which Agenda? Whose Agenda?* (Mahwah, NJ: Lawrence Erlbaum Associates, 2004), at 12.

68 Gill note 39 *supra*, at 147.

4.3.3 · Towards a balanced language policy in higher education: the Basque Country

In Spain, the incorporation of international languages to the repertoire of languages of instruction has been encouraged in the past years by regional governments and by university administrators through additional funding for higher education institutions or through incentive measures on behalf of teachers. Catalan and Basque public universities have their own multilingualism plans. Many of these measures are taken on a piecemeal basis, with no articulation in public policy. The Catalan legislation still approaches the issue from a rather defensive perspective.[69] Language legislation allows the Catalan universities to deviate from strict language law norms with regard to 'activities related to international commitments.[70] Even though the later Catalan Universities Act provides for the establishment of 'programmes to promote the knowledge of third languages which may include both the use of these languages in academic activities of the university and a number of specific subjects to each programme' (Art. 6(6)), it also foresees measures to 'secure that the admission and the incorporation of new members in the university community do not alter the teaching language uses and the process of linguistic normalization of the universities' (Art. 6 (5)). The underlying assumption is that internationalization and even intra-state mobility of students and researchers may constitute a risk for the vitality and security of the Catalan language: this gives the impression of a lack of confidence in the capacity of a seven million speaker-strong language community to integrate non-Catalan-speaking university students into the Catalan language community.

In the Basque Country, a rudimentary higher education language policy is articulated in legislation.[71] It is rudimentary in the sense that it only hints at a direction and gives leeway to implement those guidelines. For the future, the Basque legislation states that 'when implementing new degrees funded by public resources, groups will be established taking the Basque language as a preferential criterion'; in other words, it will always be required that a

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69 X Arzoz, 'Universidad y pluralismo lingüístico', in J V González García (ed.), *Comentario a la Ley Orgánica de Universidades* (Madrid: Civitas, 2009), 1124, at 1147-1149.

70 Art. 22 (4) of the Language Policy Act (1998).

71 X Arzoz, 'Basque-Medium Legal Education in the Basque Country', in X Arzoz (ed), *Legal Education in Bilingual Contexts: Group Rights, State Policies and Globalisation* (Leiden: Martinus Nijhoff, 2012), 135.

Basque group will also be created.[72] A subsequent decree has further established more specific objectives according to the different kind of studies and subjects: a) the University of the Basque Country 'will adopt measures to ensure that in all degree studies main and compulsory subjects may be taken in Basque and in Spanish'; b) 'with regard to optional and freely elective subjects multilingualism will be fostered, and the offer of subjects in Basque will be at least as broad as the one in other languages'; c) 'when degrees are enacted in line with the European Higher Education Area, the offer of postgraduate studies in Basque as a whole must be equivalent to that in Spanish'.[73]

The philosophy that emerges from the Basque provisions mentioned above aims at combining equal parity of status of Basque and Spanish in the main and compulsory subjects at undergraduate level, with a balanced trilingual approach (Spanish, Basque, and English) for optional subjects of grade degrees and for postgraduate studies. English should not be introduced to the detriment of Basque. This is the higher education language policy of an entity that is committed to the equal parity of status of both official languages of the territory.

4.3.4 · From monolingualism to pragmatism in higher education language policy: Belgium

Since 1830, the language of instruction at Belgian universities has been the object of many changes, until the consolidation of a complex model of linguistic federalism.[74] At the beginning of the Belgian state, Belgian universities operated only in French. Later on, some of them started to teach some subjects also in Dutch. During the 1930s, the University of Ghent adopted Dutch as the administrative language and the language of education, and the Universities of Brussels and Louvain started to offer education in French and Dutch in separate streams. Finally, the ongoing linguistic conflict led to the establishment of the linguistic territorial principle and the creation of monolingual territories outside Brussels, with the consequence that universities had to follow the official language of the corresponding territory and that the existing two private bilingual universities had to split into two different insti-

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72 Art. 46 (3) of the Basque University System Act (Act 3/2004).

73 Art. 23 of Decree 40/2008 of 4 March 2008 on the legal regime of teaching and research staff at the University of the Basque Country (BOPV of 18 March 2008, Nr. 55).

74 See Weerts note 4 *supra*.

tutions (the Free University of Brussels was divided into the ULB and the VUB, and the Catholic University of Louvain into the UCL and the KUL).

However, this strict constitutional model of linguistic diversity management has been significantly affected by the Bologna process. It should be stressed that the Bologna process is a voluntary process driven by states and that it does not engage with the language of instruction. Both the French and Flemish Communities have adopted legal acts in order to re-structure and adapt higher education to the European Higher Education Area.[75] Those legal acts refer to the administrative language and the language of instruction. On the one hand, the French-speaking institutions are required to use French, and the Flemish universities Dutch. On the other hand, even if both legal acts assert the official language of each territory as the language of instruction and evaluation of higher education, they lay the foundations for a much nuanced linguistic policy in the field of higher education. It is interesting to explore the content of the Flemish decree, since Dutch is a medium-sized language and the Dutch-speaking community has always been very concerned with the vitality and the security of its language vis-à-vis French.

In principle, bachelor and master degrees must be taught in Dutch, although courses can be organized in another language under certain limits: in the bachelor degree, non-Dutch courses cannot exceed ten per cent of the credits, and in the master degree the use of another language cannot extend to all courses. A series of additional exceptions widen enormously the range of options open to university managers: instruction through another language is possible in several circumstances, if (a) the object of the studies is a language, (b) parts of the programme are taught by a guest lecturer speaking a different language, (c) the programme being taught is a programme in cooperation with universities located outside the Flemish Community (either in Belgium or outside), and (d) there are serious indications that conclude that the use of another language in tuition would constitute a 'capital gain' or would respond to a 'particular' need. The second and third exceptions (b and c) are relatively easy to fulfil by university managers willing to increase the courses or programmes offered in other languages. To use the fourth exception (d), a particular motivation has to be provided to the Min-

75 Decree of 14 April 2003 of the Flemish Community concerning the restructuring the higher education in Flanders; Decree of 31 March 2004 of the French Community defining higher education, facilitating its integration into the European Higher Education Area and refinancing universities. All information on the Belgian case has been drawn from Weerts note 4 *supra*.

istry of Education, and the university managers are obliged to preserve the overall pre-eminence of Dutch at the university. Finally, a fifth exception (e) refers to programmes of bachelor and master degrees that are designed for foreign students: courses can be completely taught in another language, provided that there is an equivalent Dutch-medium programme within the Flemish Community.

The new legal framework constitutes a real change in the paradigm that has dominated the organization of higher education, i.e. the principle of the exclusive use of Dutch.[76] The pre-eminence and vitality of the Dutch language is preserved while flexibility concerning the inclusion of other languages in higher education is allowed, either for some courses or for complete programmes. In any case, institutional and individual guarantees aim at the preservation of the pre-eminent role of Dutch in Flemish higher education whilst respecting the wish of Flemish citizens to study the subject of their preference in Dutch and to be evaluated in Dutch.

It is interesting to note that the Belgian Constitutional Court has regarded those changes from a pragmatic perspective. As Weerts puts it, there would be no constitutional 'obligation' for the Belgian communities to 'defend' their linguistic identity along the principle of linguistic territoriality.[77] The Court stresses that changes in the legislation on higher education were dictated by the concern of the government to guarantee a full participation of the Flemish Community in international research and education exchanges in a European and global context. [78]

Similar shifts from strictly monolingual to more flexible arrangements seem to be taking place in other states as well. Article 49 of the Lithuanian Law on higher education and research No XI-242 (2009) foresees that the medium of instruction on state higher education institutions shall be Lithuanian. Nevertheless, other languages may be used in teaching if: 1) the content of a study programme is linked to another language; 2) lectures are delivered or other academic events are headed by teaching staff members from foreign states; 3) studies are carried out pursuant to joint study programmes or study programmes on completion of which a double qualification degree is awarded and a part of these programmes is carried out in

76 Weerts note 4 *supra*, at 69.

77 Weerts note 4 *supra*, at 71.

78 Ruling of the Constitutional Court concerning the reform of higher education in the Flemish Community, point B.13.2.

other countries, non-state higher education institutions in which a medium of instruction is a language other than the Lithuanian language, or conform to the cases set out in paragraph 1 or 2 of this Article; 4) studies are carried out in pursuance of study programmes intended for studies of foreign nationals or in the case of study exchange.

5 · The Dominance of English as a Language of Science: Effects on Medium-Sized Languages

How many languages are effectively used in scientific communication? Different approaches apply different measures in this regard. On the one hand, one can consider the number of languages used in international social sciences conferences, which is estimated to number not more than fifty.[79] This figure may include languages that are used only occasionally or only within certain discipline (for instance, history). Another much more used criterion is high ranking international periodical publications. The number of languages used in those publications is dramatically reduced. Most of the science of the last two centuries has been done or published in the major international languages: English, French, German, Russian, Japanese, and Chinese. And, in any case, the trend is towards the reduction of the languages of scientific communication to one: English. Only the lack of knowledge of English in many Russian and in most Chinese academics has preserved to this day a significant amount of scientific publications in Russian and Chinese, but these will probably diminish as new generations gain proficiency in English for scientific purposes and will have financial resources and access to international journals, research facilities and contacts with research centres.[80]

The dominant status of English as the language of science has been explored in many recent studies.[81] Nevertheless, there is some debate about

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79 Laponce note 30 *supra*, at 9.

80 Large numbers of Russian higher education lecturers are coming up for retirement. This will open the way for a new generation that will have a better proficiency of English and will be part of the international academic community. See A S Rezaev, 'Diversification in Russian higher education: profiles, foundations and outlooks', in *Higher Education in a Global Society: Achieving Diversity, Equity and Excellence* (XXX: 2006), 107; T Kryuchkova, 'English as a Language of Science in Russia', in U Ammon (ed.), *The Dominance of English as a Language of Science: Effects on Other Languages and Language Communities* (Berlin: Mouton de Gruyter, 2001), 405.

81 U Ammon (ed.), *The Dominance of English as a Language of Science: Effects on Other Languages and Language Communities* (Berlin: Mouton de Gruyter, 2001); U Ammon and G

the extent of that dominance. Critical researchers argue that citation indexes show a significant bias in favour of English and Anglophone countries, and that the Francophone states, Hispanic America and Spain, and Brazil maintain solid and massive academic communication in French, Spanish and Portuguese respectively, especially in the social sciences and humanities.[82] Brazil alone produces 5,986 scientific and technical journals,[83] and the data base and at the same time scientific repository of the Hispanic world that are called *Dialnet* documents, collects and classifies the scientific production of 5,755 periodical publications, predominantly in the social sciences and humanities. In any case, both scholarly works that exaggerate and that confine English dominance take the perspective of international languages (or 'supercentral languages' in the terms of De Swann's hierarchical model). Explicitly or implicitly, it is assumed that 'central' languages (in De Swann's terms) or medium-sized languages (in the terms used in this volume) have little or no international dimension and, therefore, do not qualify as a vehicle of science. Is this true? The answer depends on what we understand as scientific communication. If the concept only includes *international* scientific communication, the medium-sized languages are not considered useful for international communication and, therefore, not for scientific communication either. Nevertheless, there are some relevant niches for medium-sized languages at the intra-national level of science, in publications and talks aimed at the non-specialist public and in academic teaching: these niches are broader in the field of the social sciences and humanities and narrower in technology and science.

In most medium-sized language communities, Spanish, French or any other international language are not an alternative to English. Only in bilingual autonomous communities of Spain is the use of Spanish still dominant within the social sciences and humanities, to the extent that the Catalan language competes with both a hypercentral (English) and a supercentral lan-

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McConnell, *English as an Academic Language in Europe* (Frankfurt: Peter Lang, 2002); D Crystal, *English as a Global Language* (Cambridge: Cambridge University Press, 2nd edition, 2003); R Phillipson, *English-Only Europe? Challenging Language Policy* (London: Routledge, 2003); A Carli and U Ammon (eds.), *Linguistic inequality in scientific communication today* (= *AILA Review*, vol. 20) (Amsterdam: John Benjamins, 2007).

82 R E Hamel, 'The dominance of English in the international scientific periodical literature and the future of language use in science', in A Carli and U Ammon (eds.), *Linguistic inequality in scientific communication today* (= *AILA Review*, vol. 20) (Amsterdam: John Benjamins, 2007), 53, at 62.

83 Hamel note 82 *supra*, at 63.

guage (Spanish). The exclusive focus on publishing in English in many European states assumes that writing for an 'international' journal implies better quality than in a national one. This obviously varies from scientific field to scientific field. Legal studies, humanities and social sciences may be less concerned than sciences and technology. Actually, academics from societies that speak medium-sized languages are more familiar with publishing 'internationally' or in foreign languages than their colleagues using major languages exclusively (German, French, Italian, Russian, etc.). In relatively small academic communities, studying and publishing abroad were *a condition sine qua non* for an academic and professional career. What has changed is, first, the restriction of the language of sciences to only one language and second, that publication in English is no longer a matter of personal prestige and development and promotion, but of necessity.

Sometimes the use of English in scientific publications is not merely ruled by market forces, but directly or indirectly promoted by public policies adopted within medium-sized language communities:

— A case of direct promotion. In Norway, a system of performance pay for university staff was introduced in the 1990s: a book written in a 'international language' triggers a bonus of 15,000 crowns, whereas one in Norwegian gests 7,000; an article in English in a refereed journal is rewarded by a bonus of 7,000 crowns, one in Norwegian 1,000.[84] This can be viewed from different perspectives: for some, it would be detrimental to and discriminatory against the local culture and studies, while for others even this level of reward would appear disproportionate to the market value of the Norwegian language: two books in Norwegian would be almost worth a book in English or in French.

— A case of indirect promotion. The emergence of new assessment and accreditation criteria and procedures in Europe automatically increases the estimation of research published in English and lowers that of publications in national languages, especially in regional or minority languages. This trend will undoubtedly increase, since EU member states are now encouraged to enable their higher education institutions to choose among quality assurance or accreditation agencies in the European Register, for instance, in order to enhance their international reputation.[85] If state assessment and

84 Phillipson note 80 *supra*, at 81.

85 See supra footnote 11 and surrounding text.

accreditation agencies are of the opinion that little value accrues to research made in national or regional language(s),[86] what should be expected from an agency from another EU member state?

How should medium-sized language communities approach the preservation, vitality, updating and presence of their languages in the field of science? What kind of language policy should be adopted? There is no general answer, given that there are many differences among medium-sized language communities.

First, some medium-sized language communities find it more and more difficult to keep up with the proliferation of knowledge in English, even if they are standardized: to translate scientific works published in English into, say, Bahasa Malaysia, would require a person with three skills, skills in the two languages and skill in the subject that is to be translated. Some medium-sized language communities have few people qualified or even willing to do this. This was the main reason publicly given in 2003 by Malaysia's former Prime Minister to justify the introduction of English as the language of instruction of mathematics and science in schools.[87] The situation of many medium-sized language communities seems similar. If those more skilled members within the language community are employed in scientific translations, the language community loses their talent to conduct autonomous creative research and to contribute to the language community's enrichment.

Second, it would be an unrealistic goal to expect or to demand from researchers that they publish only or mostly in the national language just for the sake of its cultivation, development and preservation. This would go counter to the 'knowledge society' objective prevailing in most developed states. If researchers working in the country's universities and institutions publish in English, they are making a contribution to the development of the country's society of knowledge. In fact, states and universities

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86 For Spain, see from the perspective of Basque, Catalan and Galician medium research, see respectively Arzoz note 71 *supra*; E Pons, 'Bilingual Legal Education in Catalonia', in X Arzoz (ed.), *Legal Education in Bilingual Contexts: Group Rights, State Policies and Globalisation* (Leiden: Martinus Nijhoff, 2012), 167; A Nogueira López, 'Living on Borrowed Time: Bilingual Law Teaching in Galicia or the Urgent Need to Recover Prestige', in X Arzoz (ed.), *Legal Education in Bilingual Contexts: Group Rights, State Policies and Globalisation* (Leiden: Martinus Nijhoff, 2012), 193.

87 Gill note 62 *supra*, at 108-109.

must take into consideration the linguistic inequality existing in scientific communication today and provide for financial resources for the establishment of editorial support services (already existing in some developed countries) to assist non-Anglophone researchers with their English publications; they should not establish disincentives with regard to publishing in English.

A balance between the two goals can be achieved. The language community's researchers must not be penalized: they should do research and publish in the language they consider most effective both for communication and for their personal performance. Alternatively, the language community must preserve the vitality and presence of their languages in the field of science. This should be a public goal, for which language planning must be adopted. A formulation of that public goal can be read in the Swedish Language Act (2009). This Act, which is the country's first language legislation, is based on current language policy: it contains provisions for the Swedish language, its minority languages and sign language. The Act confirms Swedish as 'the principal language in Sweden', that is, 'the common language in society that everyone resident in Sweden is to have access to and that is to be usable in all areas of society'. Further, it proclaims that 'the public sector has a particularly responsibility for the use and development of Swedish'. In particular 'government agencies have a special responsibility for ensuring that Swedish terminology in their various areas expertise is accessible, and that it is used and developed'. These two provisions would imply a special commitment of the public sector to the preservation of Swedish as a language of science and higher education, but without excluding the use of international languages.

6 · Conclusions

The importance of the ongoing transformation of higher education for public policy cannot be underestimated. Neither can the importance of having clear, articulated rationales concerning the transformation of higher education (internationalization, Europeanization, commoditization) be overstated. The response of medium-sized language communities to new global opportunities and risks must be elaborated and reflected in policy and planning. Medium-sized language communities have to make adjustments to their higher education language policies, which were designed to protect

national identity and forge nation building, in order to integrate with the rest of the world and secure economic competitiveness and survival.

The status of medium-sized languages in higher education is a question that requires further evaluation, research and policy analysis to address and guide the long-term impact and implications of internationalization, Europeanization and commoditization of higher education. As Tollefson and Tsui observe, 'although decisions about medium of instruction are often justified with pedagogical rationales, medium-of-instruction policies are not formed in isolation, but rather emerge in the context of powerful social and political forces, including globalization, migration and demographic changes, political conflict, changes in government, shifts in the structure of local economies, and local competition'.[88]

The central pedagogical/linguistic question is: What are the consequences of instruction in various combinations of students' native language(s) and languages of wider communication? But the most relevant and often neglected point is a political one: politics in general terms also includes social, cultural and economic elements. The political perspective highlights the crucial role of the state both in securing the country's economic survival and in protecting its national identity and culture. It requires a proper examination of the consequences of language choices in higher education on the basis of sound information. The goal is to find a reasonable equilibrium between the legitimate interest in the state's international competitiveness and the employability of its citizens and the need for maintaining and developing the mother tongue's full capacity of expression in as many linguistic domains as possible.

Despite the emergence of new for-profit providers of higher education services, the role of the government in regulating, funding, planning, evaluating and even providing higher education is not likely to change in Europe, and public universities will continue contributing to the social, cultural and scientific development of society. Nevertheless, supranational and market forms of co-ordination are emerging in addition to the traditional co-ordination of higher education by national governments.

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88 J W Tollefson and A B M Tsui, 'Contexts of Medium-of-Instruction Policy', in J W Tollefson and A Tsu (eds.), *Medium of Instruction Policies: Which Agenda? Whose Agenda?* (Mahwah, NJ: Lawrence Erlbaum Associates, 2004), 283, at 283.

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THE EUROPEAN LEGAL FRAMEWORK FOR PROTECTING THE MEDIUM-SIZED LANGUAGE COMMUNITIES IN THE MEDIA: A COMPARATIVE LEGAL ANALYSIS

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SUMMARY: 1. Introduction. 2. International Framework for Developing Linguistic Determinations in the Audiovisual Sector. 2.1. Freedom of Information and Language Policy in Media. 2.2. Linguistic Pluralism as a Limit for Language Policy. 3. The European Union. 3.1. Positive integration: Audiovisual Media Services Directive and Languages (between economic regulation and cultural policy). 3.1.1. The Country of Origin Principle and the Procedure against Circumvention of Language Requirements. 3.1.2. Cultural content quotas and languages. 3.2. Negative integration. 4. National Language Policy. 4.1. The case of a sole official medium-sized language in the whole territory of the State. 4.2. The case of a sole official medium-sized language in part of the State. 4.3. The case of a joint official medium-sized language in part of the State. 4.4. The case of official medium-sized languages and recognition of linguistic minorities. 4.5. Other cases in which the use of languages is compulsory. 5. Final reflections.

1 · Introduction

The theoretical framework under study in this article lies at the point where the following two coordinates intersect: on the one hand, the audio-

visual sector, and on the other, medium-sized languages or linguistic communities. The first coordinate is characterized by a progressive opening up of the sector to the free market through the free circulation of audiovisual media. States have traditionally been concerned with this sector, because broadcasting regulation has been used as a means to promote national identity. Television, radio (and also the cinema) have been used since their beginnings as instruments at the service of a collective identity, guaranteeing the cohesion of the country and counterbalancing social, cultural and linguistic differentiations.[1] National mass media systems emerged as instruments for creating public opinion and as a factor in the social, cultural and linguistic integration of the political community. The promotion and defence of national languages played a major role in the original regulation of the mass media.

The situation changed due to the technological innovations of the 1980s, which enabled broadcasts to cross frontiers and audiovisual services to circulate between states. The abolition of monopolies, the emergence of new players and rapid technological development have fundamentally altered the media environment. Television broadcasting was traditionally a reserved activity. Since its inception, it has mostly been provided by public undertakings under a monopoly regime. The industry which, until relatively recently had been exclusively dependent on States, took on a supranational dimension that conditions States' ability to act, and was also witness to a process of internal deregulation.

Regulations issued by the Council of Europe and the European Union are the legal framework of reference in Europe. The European Convention on Transfrontier Television entered in force on 1 May 1993 after its ratification by seven States.[2] The Television without Frontiers Directive was adopted on 3 October 1989 by the Council of Ministers of the European Community.[3] It was amended several times[4] and was finally codified as

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1 See M-E Price, *Television, the Public Sphere and National Identity* (Oxford: Oxford University Press, 1995) at 5; see also J.G. Blumler and W. Hoffmann-Riem, 'New Roles for Public Service Television' in J.G. Blumler (ed.), *Television and the Public Interest: Vulnerable Values in West European Broadcasting* (London: Sage, 1992) at 210.

2 ETS No 132 amended according to the provisions of the Protocol (ETS No. 171) which entered into force, on 1 March 2002.

3 The original title of the act was 'Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities' (OJ L 298, 17.10.1989, p. 23-30).

4 See Directive 97/36/EC of the European Parliament and of the Council, amending Council Di-

Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (the Audiovisual Media Services Directive).[5] Despite the similarities between the two instruments, each one serves a different objective. The European Convention on Transfrontier Television is part of the Council of Europe's traditional cultural policy that seeks to promote the free flow of information.[6] The Audiovisual Media Services Directive has more of a free market orientation, aiming to guarantee the free movement of audiovisual services in the internal market. As we shall see, although the language of the broadcasting is not regulated by the Directive, the Directive does condition internal (domestic) regulations on media language insofar as they may affect the free movement of audiovisual services.

The situation can also be examined from the opposite perspective. An excessively economics-based, liberal view of the freedom of movement of audiovisual services can affect States' cultural competences and linguistic diversity.[7] Freedom of the market is not neutral from the linguistic perspective, as it favours mass consumption cultural industries to the detriment of others; hence the proposal to guarantee the preservation of the values of identity and cultural and linguistic diversity within an increasingly globalized audiovisual environment. The preservation of cultural and linguistic diversity became increasingly important in the European Union and internationally, until it finally came of age with the UNESCO Convention on the protection and promotion of the diversity of cultural expressions,[8] whose *raison d'être* has a lot to do with the tension that we

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rective 89/552/EEC (OJ L 202, 30.7.1997, p. 60); Directive 2007/65/EC of the European Parliament and of the Council (OJ L 332, 18.12.2007, p. 27).

5 OJ L 95 15.4.2010, p. 1-24.

6 See K Karaca, *Guarding the watchdog: The Council of Europe and the Media* (Strasbourg: Council of Europe Publishing, 2003) at 10 ff.

7 See A Milian- Massana, *Globalización y requisitos lingüísticos: una perspectiva jurídica. Supraestatalidad, libre circulación, inmigración y requisitos lingüísticos* (Barcelona: Atelier, 2008) at 39 ff.

8 UNESCO Convention on the protection and promotion of the diversity of cultural expressions (20 October 2005, entered into force 18 March 2007). The EU is party to the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions. As one way of protecting its own cultural diversity and promoting local productions, the EU has secured an exemption from the free-trade rules of the World Trade Organization. Known as the 'cultural exception', this entitles its member countries to place limits on imports of cultural items like

have been discussing here. In this work we attempt to identify the characteristics of this tension and highlight the parameters of balance.

The second coordinate of this study concerns medium-sized languages or medium-sized language communities (MSLC). The medium-sized languages category has not been assumed or developed by the regulations but relates to the size of the linguistic community (in terms of demography, they are placed in an intermediate position between the world's largest and smallest languages). Regulating the use of language in television and the cinema through, in some cases, linguistic obligations in broadcasting and distribution, language quotas, requirements to produce programmes in national languages and providing funding for audiovisual works in national languages are instruments that are commonly used to defend medium-sized language communities. One of the working hypotheses we develop is whether the basis for this type of legislative measures to protect languages can be found in the status of the languages, or rather in the specific contact relationships between languages. That is, in the globalized, interrelated cinema and audiovisual market, it seems that what drives protective legislation is not so much the formal legal status of languages as their characteristics (that is, whether they have sufficient critical mass to develop a sufficiently dynamic market) and in particular, the relative position of languages in relation to the languages in their surrounding environment (international or state languages) with which they are in contact or in conflict. This perspective also raises issues for reflection: for example, issues concerned with guaranteeing internal linguistic pluralism, that is, the influence of the rights of members of linguistic minorities (and of regional and minority languages) as an integral part of the system of human rights protection.

We shall begin by analysing the linguistic characteristics of the human right to freedom of expression, examining the margins for developing linguistic policy for the media sector. Then we shall refer to linguistic diversity as the limit to audiovisual linguistic policy. Finally, we analyse the different dimensions of the EU legal framework, to conclude with a comparative analysis of the legislative measures that have been taken to defend some medium-sized languages in Europe.

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films. Nevertheless the scope of the Convention when interpreting trade obligations under the WTO is far from clear (see Graber 'The New UNESCO Convention on Cultural Diversity: A counterbalance to the WTO?' *Journal of International Economic Law* nr 9 (2006), at 553).

2 · International Framework for Developing Linguistic Determinations in the Audiovisual Sector

2.1 · Freedom of Information and Language Policy in Media

We shall begin by analysing the extent to which human rights determine linguistic policies for protecting medium-sized languages in the media sector. In the sphere of the Council of Europe, freedom of expression plays a central role as the basis and foundation for developing a democratic and participatory framework for citizens. The basic reference is Article 10 of the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR), which guarantees freedom of expression and has been characterized by the European Court of Human Rights (ECtHR) as '[o]ne of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment.'[9] This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. The Convention configures freedom of expression as a public freedom that covers two perspectives, one active (freedom of opinion and to transmit information) and the other passive (to receive information), and emphasizes the transfrontier scope of this freedom. In this latter respect, States are under an obligation to abstain or not hinder the freedom to receive and communicate information, as a positive obligation to act intended to ensure the free transfrontier flow of information.[10] The transfrontier perspective has been developed by the European Convention on Transfrontier Television.[11]

Freedom of expression is configured broadly but it is a relative right, rather than an absolute one, whose scope must be balanced so that this freedom can coexist with other values and rights that also deserve protection. Freedom of expression must be guaranteed by public powers, but that does not mean that it is an unlimited freedom or that any public interven-

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9 See ECtHR, *Arslan v. Turkey* judgment of 8 July 1999, para 44; *Zana v. Turkey* judgment of 25 November 1997, paragraph 51.

10 See I Lazcano, 'Art. 10. Libertad de Expresión' in Iñaki Lasagabaster (ed.), *Convenio Europeo de Derechos Humanos* (Madrid: Thomson- Civitas, 2010) at 513; see also F Sudre, *Droit européen et international des droits de l'homme* (Paris: PUF, 9 ed, 2008) at 530.

11 European Treaty Series no 132, amended according to the provisions of the Protocol (ETS No. 171) which entered into force on 1 March 2002.

tion that might limit or condition 'the freedom of language' is forbidden. Article 10 ECHR does not provide absolute protection for linguistic freedom, particularly in the public sphere.[12]

Firstly, it must be remembered that the Convention itself contemplated the possibility of preliminary control over audiovisual broadcasting activities. Article 10(1) ECHR provides that freedom of expression shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises. As we shall see below, licensing schemes are often used to introduce linguistic requirements in the audiovisual sphere[13] and also in cinema. Furthermore, the second provision of article 10 states that the exercise of this freedom may be subject to formalities, conditions or restrictions if they are prescribed by law and necessary in a democratic society for the protection of one of a listed number of public interests.[14] The cultural or linguistic identity of States is not listed. However, linguistic rules and regulations/prescriptions are often found in national laws on broadcasting which, although they could be seen as limiting or determining the right to freedom of expression, can hardly be classified *per se* as being in breach of international human rights standards.[15]

The ECtHR has not had the opportunity to directly decide whether linguistic obligations established by public powers are compatible with freedom of expression and to what extent. However, in the *Lentia* case (where the plaintiffs were demanding recognition of broadcasting rights in a minority language in the Austrian region of Carinthia) the Court affirmed States' wide margin of appreciation when establishing licensing regimes. The ECtHR established that, aside of technical aspects '[t]he grant or refusal of a licence may also be made conditional on other con-

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12 See Ergec, *Protection européenne et international des droits de l'homme* (Brussels: Bruylant, 2 ed. 2006) at. 230; I Urrutia-Libarona, 'Los requisitos lingüísticos en la actividad socioeconómica y en el mundo del audiovisual' in Antoni Milian (ed), *Mundialització, lliure circulació i immigració, i l'exigència d'una llengua com a requisit* (Barcelona: Institut d'Estudis Autonòmics, 2008) at 171 et seq.

13 This is the case in France, Poland, Romania, Italy, Bulgaria, Austria, Georgia, Norway, Azerbaijan, Denmark, Czech Republic, Ireland, Macedonia, Switzerland and Estonia among others.

14 See article 10(2) ECHR. State controls may be exercised only within certain formal and material limits, and in addition must be in accordance with other principles, such as the non-discrimination guaranteed by article 14 of the ECHR.

15 Following B de Witte, 'The European Content Requirement in the EC Television Directive-Five Years After' *Yearbook of Media and Entertainment Law*, 1995, at 117, the justification for rules aimed at protecting and guaranteeing the cultural identity should be sought in the notion of 'rights of others' which is among the public interests mentioned in Article 10(2) ECHR.

siderations, including such matters as the nature and objectives of a proposed station, its potential audience at national, regional or local level, the rights and needs of a specific audience and the obligations deriving from international legal instruments.'[16] In conclusion '[t]his may lead to interferences whose aims will be legitimate under the third sentence of paragraph 1, even though they do not correspond to any of the aims set out in paragraph 2.'[17] The compatibility of such interferences with the Convention must nevertheless be assessed in the light of the other requirements of paragraph 2.

Following the ECtHR for restrictions or limitations to be understood as justified, they must be 'necessary'. This requirement is analysed on the basis of the existence of a 'pressing social need' whose scope is evaluated by the Contracting States with a certain margin of appreciation in assessing whether such a need exists.[18] Justifications based on cultural and linguistic pluralism has been taken as a basis for restrictions on freedom of expression. The Commission has stated that '[t]he particular political circumstances in Switzerland ... necessitate the application of sensitive political criteria such as cultural and linguistic pluralism, balance between lowland and mountain regions and a balanced federal policy'.[19] On another occasion, also concerning Switzerland, the ECtHR analysed whether a measure that restricted the granting of licences because the television channel was exclusively devoted to automobiles matters was necessary or not. The Swiss government alleged the particular political and cultural structure of Switzerland, and the ECtHR accepted the reasoning of the State based on cultural and linguistic justifications '[w]hich are of considerable importance for a federal State. Such factors, encouraging in particular pluralism

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16 ECtHR, *Informationsverein Lentia and Others v. Austria* paragraph 32. The Court found in this case a violation of the right to freedom of expression as regards the applicants' complaints, in that they had been unable to set up radio and television stations due to the Austrian broadcasting monopoly, but declared it unnecessary to review the discrimination claim under Article 14.

17 *Ibid*. The Court held that the Austrian broadcasting monopoly was not necessary to guarantee impartiality, balance and diversity in broadcasting.

18 See inter alia *Handyside v. the United Kingdom*, 7 December 1976, Series A no. 24, p. 23, paragraph 49; *Lingens v. Austria*, 8 July 1986, Series A no. 103, p. 26, paragraph 41; and *Jersild v. Denmark*, 23 September 1994, Series A no. 298, p. 26, paragraph 37; *Hertel v. Switzerland*, judgment of 25 August 1998, *Reports* 1998-VI, pp. 2329-30, § 46; *Pedersen and Baadsgaard v. Denmark* [GC], no. 49017/99, §§ 68-71, ECtHR 2004-XI; *Steel and Morris v. the United Kingdom*, no. 68416/01, § 87, ECtHR 2005-II.

19 See *Verein Alternatives Lokalradio v. Switzerland*, Application No. 10746/84, Decision of the European Commission of Human Rights of 16 October 1986, DR 49, at pp. 126-127.

in broadcasting, may legitimately be taken into account when authorizing radio and television broadcasts.'[20]

Secondly, restrictions on the freedom of expression due to linguistic reasons must be proportionate. In this regard the European Commission of Human Rights in its decision on admissibility in the Case of *Verein Alternatives Lokalradio Bern*,[21] citing the *Handyside* judgment, stated that a licensing system must respect the requirements of pluralism, tolerance and broadmindedness. The Commission explained that this includes the language of the broadcast, stating that the '[r]efusal to grant a broadcasting licence may raise a problem under Article 10, in conjunction with Article 14 of the Convention in specific circumstances. Such a problem would arise, for example, if the refusal to grant a licence resulted directly in a considerable proportion of the inhabitants of the area concerned being deprived of broadcasts in their mother tongue.'[22] In paragraph 32 of the *Lentia* Case, the Court enumerated the following considerations for appropriate licensing: '[t]he nature and objectives of a proposed station, its potential audience at national, regional or local level, the rights and needs of the specific audience and the obligations derived from international legal instruments'. In other Judgment the Court found that the size of the target audience and their ease of access to alternative broadcasts (e.g., through cable television) are relevant factors in determining the proportionality of restrictions.[23] In the *Verein Alternatives* Case, the Commission specified that political circumstances — 'such as cultural and linguistic pluralism… and a balanced federalist policy' — may also be taken into account when assessing proportionality of regulation.

In short, proportionality must be analysed on a case-by-case basis taking into account not only the language measure itself (i.e. language quota or broadcasting duties) but also the demographic situation and the situation of language contact upon which the language measure is established.

Restrictions on freedom of expression on the grounds of language and cultural identity of States could be justified by the application of article 10 of the Convention. Nevertheless, the ECHR case-law has also

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20 *Demuth v. Switzerland* no 38743/97, judgment of 5 November 2002, paragraph 44.

21 European Commission of Human Rights *Verein Alternatives Lokalradio Bern v. Switzerland*, App. No. 10746/84 (16 October 1986).

22 *Ibid*.

23 ECtHR *Tele 1 Privatfernsehgesellschaft MBH v. Austria* judgment of 21 September 2000, App. No. 32240/96, paragraphs 39-40.

highlighted the importance of pluralism in the audiovisual media as a basis of a democratic society.[24] The domestic law and practice must guarantee that the system provides a pluralistic service.[25] The Court has focused on the material aspect of pluralism (opposing the concentration and control of audiovisual media) but has not referred specifically to the linguistic aspect.

Furthermore, the Court has awarded greater scope to the right to receive information than to the right to broadcast through audiovisual media, insofar as only the latter can be subject to a licensing regime. Concerning the right to receive information, in the *Khurshid Mustafa* case the Court affirmed the particular importance of the right to receive (transfrontier) information for people (an immigrant family in that case) that '[w]ish to maintain contact with the culture and language of their country of origin.'[26]

The case-law of the ECHR shows that freedom of media is not only an individual manifestation of the right of freedom of expression; freedom of the media is also conceived as a means to promote the freedom of information. On that basis the Court has taken into account the social, cultural and political aspects of the media. From that social or collective perspective, States can establish requirements, limits and conditions with the aim of

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24 ECtHR *Manole and others v. Moldova* Application no. 13936/02, 17 September 2009, paragraphs 95-102.

25 See Recommendation (1999) 1 of the Committee of Ministers to Member States on measures to promote media pluralism (Adopted by the Committee of Ministers on 19 January 1999, at the 656th meeting of the Ministers' Deputies). This Recommendation provides for the first time the definition of media pluralism, but the references on language are limited to the support schemas ('Member States could consider the possibility of introducing, with a view to enhancing media pluralism and diversity, direct or indirect financial support schemes for both the print and broadcast media, in particular at the regional and local levels. Subsidies for media entities printing or broadcasting in a minority language could also be considered.'). See also Recommendation (2007) 2 of the Committee of Ministers to Member States on media pluralism and diversity of media content. The document encourages the States to make space for other media, as well '[f]or example community, local, minority or social media'. The Recommendation recognizes '[t]he crucial contribution of the media in fostering public debate, political pluralism and awareness of diverse opinions, notably by providing different groups in society — including cultural, linguistic, ethnic, religious or other minorities — with an opportunity to receive and impart information, to express themselves and to exchange ideas'; among the measures promoting content diversity, the Recommendation includes the following '[s]upport measures for media entities printing or broadcasting in a minority language should also be considered.' (at II.4).

26 ECtHR *Khurshid Mustafa and Tarzibachi v. Sweden*, Application no. 23883/06, 16 December 2008, paragraph 44.

guaranteeing pluralism. Linguistic requirements are perfectly in keeping with that aim. Restrictions on the freedom of communication on grounds of the cultural and linguistic identity of the States could be justified by the application of article 10 ECHR, however, it must be compatible and proportionate to linguistic diversity itself, which will operate as a negative limit referred to below.

2.2 · Linguistic Pluralism as a Limit for Language Policy

The principle of the free flow of information, and the importance of the broadcasting for the development of culture and the free formation of opinions in conditions safeguarding pluralism and equality of opportunity among all democratic groups and political parties, are two of the main principles of the European Convention on Transfrontier Television (ECTT).[27] Article 10 of the ECTT is entitled 'cultural objectives' but its content is limited to promoting and favouring the European works in the transmission time. Contracting States are under an obligation to '[e]nsure, where practicable and by appropriate means, that a broadcaster within its jurisdiction reserves for European works a majority proportion of its transmission time.'[28] Broadcasters' cultural responsibilities are developed no further than the reference to a content quota. What qualifies as European work is neither based upon a particular expression of national or European identity nor does it require a reflection of cultural and linguistic diversity. The article does not refer to language, which is only mentioned in paragraph 3, affirming that the States 'undertake to look together for the most appropriate instruments and procedures to support, without discrimination between broadcasters, the activity and development of European production, particularly in countries with a low audiovisual production capacity or restricted language area.'[29] Promoting linguistic pluralism could form part of the content quota, but the regulation is really referring to the material (or substantial) aspect (European production) when it speaks of 'cultural objectives'. As we will see later on, the Audiovisual Media Services Directive of the EU follows the same 'material' criteria.

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27 ETS no 132, amended by Protocol (ETS No. 171) which entered into force, on 1 March 2002 (hereinafter ECTT).
28 Article 10(1) ECTT.
29 Article 10(3) ECTT.

The two most important Council of Europe texts that help to focus the operation of the principle of linguistic pluralism in audiovisual media are the Framework Convention for the Protection of national Minorities (FCNM) and the European Charter for Regional or Minority Languages (ECRML).[30]

The Framework Convention states in Article 6(1) that Parties shall '[p]romote mutual respect and understanding and co-operation' among persons, '[i]rrespective of linguistic identity', through, inter alia, the media. Article 9 is the operative provision. It reads as follows:

> 1. The Parties undertake to recognize that the right to freedom of expression of every person belonging to a national minority includes freedom to hold opinions and to receive and impart information and ideas in the minority language, without interference by public authorities and regardless of frontiers. The Parties shall ensure, within the framework of their legal systems, that persons belonging to a national minority are not discriminated against in their access to the media.
> 2. Paragraph 1 shall not prevent Parties from requiring the licensing, without discrimination and based on objective criteria, of sound radio and television broadcasting, or cinema enterprises.
> 3. The Parties shall not hinder the creation and the use of printed media by persons belonging to national minorities. In the legal framework of sound radio and television broadcasting, they shall ensure, as far as possible, and taking into account the provisions of paragraph 1, that persons belonging to national minorities are granted the possibility of creating and using their own media.
> 4. In the framework of their legal systems, the Parties shall adopt adequate measures in order to facilitate access to the media for persons belonging to national minorities and in order to promote tolerance and permit cultural pluralism.

This article focuses on the issue from the perspective of non-discrimination. As regards the scope of provision (provision from public authorities) it only confirms access to the media without discrimination; and

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30 The Council of Europe Framework Convention on the Value of Cultural Heritage for Society (Faro, 27.X.2005, ETS nº 1999) includes measures for promoting the protection of cultural heritage via the information society. Article 14 requires State Parties to encourage initiatives which promote the quality of contents and endeavour to secure diversity of languages and cultures in the information society.

with regard to the aspect of freedom of media, the article does not dispense with the need for licences, but notes that they must be granted according to the principle of equality. Similarly, the duty to guarantee the possibility of creating and using their own media is subject to two limitations: States may provide that such use be undertaken within the legal framework of their broadcasting laws, and this opportunity must be ensured 'as far as possible'.

The main issues that have been considered in relation to the implementation of this article have centred on the adoption of legislation *prescribing quotas* for broadcasting time to promote the use of the state language in radio and television which have had an adverse effect on programmes in minority languages. In this regard the Advisory Committee on the Framework Convention has noted that '[l]anguage quotas to promote the use of the state language in radio and television broadcasting… raises issues of compatibility with the Framework Convention... The Advisory Committee takes the view that measures to promote the use of the state language should rather be principally pursued through incentive-based, voluntary methods since the imposition of rigid translation or dubbing requirements cause undue difficulties for persons belonging to national minorities.'[31] The key element here is to determine, in the light of all relevant circumstances, the cut-off point at which a prescription favouring the use of one language begins to become a restriction on the use of others.[32] The requirement to use a given language (to the exclusion of others) in licensing procedures has also proved problematic,[33] as has the need for subtitling or dubbing audiovisual and

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31 Advisory Committee on the Framework Convention for the Protection of National Minorities. *Second Opinion on Ukraine* adopted on 30 May 2008 (Strasbourg, 30 March 2011) ACFC/OP/II(2008)004, paragraph 21.

32 In this regard 'the Advisory Committee considers that, bearing in mind its implications for persons belonging to national minorities and the fact that excessive quotas may impair the implementation of the rights contained in Article 9 of Framework Convention, this practice needs to be implemented with caution. Furthermore, it would need to be rooted in a more precise legislative basis than what is contained in the above-quoted provision […]'Advisory Committee, *Opinion on Ukraine*, 1 March 2002, paragraph 46.

33 See Advisory Committee, *Opinion on the Russian Federation*, 13 September 2002, paragraph 76 'While recognizing that the Russian Federation can legitimately demand broadcasting licensing of broadcasting enterprises and that the need to promote the state language can be one of the factors to be taken into account in that context, the said article appears to be overly restrictive as it implies an overall exclusion of the use of the languages of national minorities in federal radio and TV broadcasting. The Advisory Committee considers that

cinematographic productions in minority languages into official national languages.[34]

The European Charter for Regional or Minority Languages deals with media in article 11. The Explanatory Report to the European Charter takes as a point of departure the following two factors: on the one hand it confirms the importance of the media for the future and the development of regional or minority languages, stating that '[t]he time and space which regional or minority languages can secure in the media is vital for their safeguard' (Explanatory Report, paragraph 107) and on the other hand, it is based on the importance of the quantitative element in the audiovisual market, an aspect that does not favour regional or minority languages: '[t]he progress of technology is leading to the weakening of the cultural influence of less widely-spoken languages… for the major media, especially television, the size of the audience is generally the decisive factor.'[35] The opening up of the audiovisual services market vis-à-vis the importance of the media for the future of regional and minority languages are basic arguments for encouraging the political and legal intervention in this field.

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such an a priori exclusion is not compatible with Article 9 of the Framework Convention, bearing in mind, inter alia, the size of the population concerned and the fact that a large number of persons belonging to national minorities are dispersed and reside within several subjects of the federation.' See also the above mentioned (note 31 *supra*) second opinion *on Ukraine*, paragraph 23.

34 The Advisory Committee agrees that it is often advisable, and fully in the spirit of the Framework Convention, to accompany minority language broadcasting with sub-titles in the state language. However, the Advisory Committee considers that, as far as private broadcasting is concerned, this goal should be principally pursued through incentive-based, voluntary methods, and that the imposition of a rigid translation requirement mars the implementation of Article 9 of the Framework Convention by causing undue difficulties for persons belonging to a national minority in their efforts to create their own media. See Advisory Committee, *Opinion on Estonia*, adopted on 14 September 2001, paragraph 38. See T McGonagle, 'Commentary: Access of persons belonging to national minorities to the media' in *Filling the frame: Five years of monitoring the Framework Convention for the Protection of National Minorities* (Strasbourg: Council of Europe Publishing, 2004), at 144-159.

35 See the Explanatory Report of the European Charter for Regional or Minority Languages, para 107. The high cost of television production points to the crucial importance of creating economies of scale in order to put the industry on a stronger footing and increase opportunities for disseminating the language. From this point of view cross-border cooperation and the freedom to receive broadcasts from neighbour countries constitute essential factors for regional or minority languages. See E Pons-Parera, 'Article 14. Transfrontier exchanges' in Alba Nogueira, Eduardo Ruiz, Iñigo Urrutia (eds), *Shaping Language Rights. Commentary on the European Charter for Regional or Minority Languages in light of the Committee of Experts' evaluation* (Strasbourg: Council of Europe Publishing, 2012) at 493.

Article 11 of the ECRML focuses on regulation from three perspectives: public action to encourage use of regional or minority languages in media (paragraph 1), preventing restrictions on access to foreign media in a language identical or closely related to a regional or minority language (paragraph 2), and catering by media regulatory bodies for the interests of speakers of regional or minority languages (paragraph 3).[36] Paragraph 1 establishes various obligations that States can choose from. This paragraph includes linguistic guarantees when radio and television carry out a public service mission (1.a), and also linguistic obligations when radio and television are not attached to a public service mission (1.b and c). Subparagraph d) of paragraph 1 refers to the obligation of the State to encourage and/or facilitate the production and distribution of audio and audiovisual works in the regional or minority language.

Paragraph 2 of article 11 deals with the reception of broadcasts in a cross-border context. In this regard, the principle is that the State undertakes to guarantee freedom of direct reception of radio and television broadcasts from neighbouring countries in a language used in identical or similar form to a regional or minority language, and not to oppose the retransmission of radio and television broadcasts from neighbouring countries in such a language. This provision not only requires states to eliminate obstacles deliberately placed in the way of the freedom to receive communication media, but also the need for positive action by the authorities to make this possible.[37] The main aim of the provision is to increase the availability of radio and television programmes in regional or minority languages by making it possible for programmes in such languages to be received from other territories.[38] Such other territories or 'neighbouring countries' include both States

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36 For an in-depth analysis see J-M Woehrling, *The European Charter for Regional or Minority Languages. A critical Commentary* (Strasbourg: Council of Europe Publishing, 2005) at 200-214.

37 The Explanatory Report to the Charter expands the scope of the undertaking to guarantee freedom of reception relating not only to obstacles deliberately placed in the way of the reception of programmes broadcast from neighboring countries but also to passive obstacles resulting from the failure of the competent authorities to take any action to make such reception possible (para 111). In this regard, see the Committee of Experts' Report on *Application of the Charter in Denmark* (3rd monitoring cycle), 2 March 2011, paragraph 75.

38 See R Dunbar and T Moring, *The European Charter for Regional or Minority Languages and the Media* (Strasbourg: Council of Europe Publishing, 2008) at 69-70.

and regional authorities with powers relating to the media as subjects bound by these provisions.[39]

The freedom to receive radio and television broadcasts in a cross-border context is also subject to limits. Article 11(2) concludes by providing that the exercise of the above-mentioned freedom, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary. The limitation is identical to that which applies in respect of the right to freedom of expression, set out in Article 10 of the European Convention on Human Rights. However, with respect to television, paragraph 112 of the Explanatory Report provides that for those States which are parties to the European Convention on Transfrontier Television, the circumstances and conditions under which the freedoms guaranteed by Article 11, paragraph 2, of the Charter can be restricted will be determined by this Convention, in particular by the principle of non-restriction of the retransmission in their territories of programme services which comply with the terms of the Convention on Transfrontier Television.[40]

In relation to the guarantee of transfrontier broadcasting, the Committee of Experts held that a decision adopted by the National Television and Radio Council according to which foreign programmes distributed in Ukraine via cable networks must have their programmes dubbed or translated into Ukrainian '[i]s not in conformity with the present undertaking'.[41] The obligation to dub or translate was considered to be an obstacle unduly limiting the reception of regional or minority language programmes from neighbouring countries.

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39 See Pons i Parera note 35 *supra* at 495.

40 The free reception of transfrontier broadcasting is an aspect of the right of persons belonging to national minorities to establish and maintain free and peaceful contacts across frontiers particularly with those with whom they share an ethnic, cultural, linguistic or religious identity, or common cultural heritage, as stipulated in Article 17 of the Framework Convention.

41 Committee of Experts, *Opinion on the Application of the Charter in Ukraine* (1st monitoring cycle) 7 July 2010, paragraph 562.

Another issue which the Committee of Experts has had to deal with is whether the legal requirement to use the state language in certain percentage could be considered compatible with the Charter language guarantees. According to the Committee of Experts '[a]n overall exclusion of the use of national minority languages in the nation-wide public service and private broadcasting sectors is not compatible with Article 11 of the Charter';[42] and even '[t]he proportion of [75%, subsequently increased to 80, then to 85%] of programmes and broadcasts that must be in the Ukrainian language was clearly inappropriate for minority language broadcasting, bearing in mind that the proportion of persons speaking regional or minority languages represent more than 50% of the population in several regions.'[43] The Committee of Experts encouraged the authorities to revise the regulations on the broadcasting in regional or minority languages covered by the Charter, although the recommendations were not prescriptive as to how those regulations should be revised.

The Committee of Experts has also been critical of other forms of regulation to protect the position of the state language which disadvantages minority language broadcasters.[44] In its second report on Slovakia, the Committee of Experts noted a requirement that all private broadcasters which broadcast programmes in a regional or minority language must provide subtitles in Slovak, placing such broadcasters at a competitive disadvantage. They concluded that the Slovak undertaking was not fulfilled,[45] and in a box comment the Committee encouraged the authorities to remove the existing restrictive requirements for private broadcasters.

In the field of cinema, the Committee of Experts has stressed that there is reason for concern that the requirement to dub, post-synchronize or sub-title every foreign film into Ukrainian may prove disproportionate for those films which are produced in Russian and in other minority languages, bearing in mind that the notion of 'film distribution' not only covers the showing of films in special premises like cinemas, but also television broadcasting channels.

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42 *Op*. cit. note 41 *supra*, at paragraph 448.

43 *Op*. cit. note 41 *supra*, at paragraph 451.

44 The Committee of Experts' position coincides with principles tabled by the OSCE *Guidelines on the use of Minority Languages in the Broadcast Media* (OSCE, 2003)

45 Committee of Experts, *Opinion on the Application of the Charter in Slovakia* (2nd monitoring cycle) 18 November 2009, paragraphs 130-1, 257-9, 379-81, 510-1, 646-7, and 807-8.

3 · The European Union

The law of the European Union affects the field of domestic language policies through three techniques which delimit Member States' room for manoeuvre: firstly, the prescriptions in the EU legislation concerning audiovisual media services, mainly in the Audiovisual Media Services Directive (positive integration); secondly, the impact on languages of the integration of the audiovisual market founded on the application of free movement and the removal of national barriers (negative integration), and lastly the general prohibition of state aid under EU law and the alignment of the national economic assistance schemes for films and other audiovisual works with the competition rules.

3.1 · Positive integration: Audiovisual Media Services Directive and Languages (between economic regulation and cultural policy)

The European Union has only recently begun to intervene in the audiovisual sphere. On the basis of the cultural and constitutional role of the media, this sector has been developed outside the market and the founding principles of the European Community. In the early 1980s the advent of cable and satellite technology led to a gradual internationalization of broadcasting services.[46] The proliferation of TV broadcasters and the exposure to competition from the traditional broadcasting public service monopolies of Member States marked the beginning of the Community's audiovisual media policy.

The European Court of Justice played an important role in expanding the scope of Community action, holding that the transmission of television and radio signals should be regarded as the provision of services.[47] The Court of Justice pointed out that there were frontiers in the Community audiovisual market although '[i]n the absence of any harmonization of the

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46 See R Negrine and S Papathanassopoulos, *The internationalization of Television* (London: Pinter, 1990) and I Schwartz, 'Broadcasting and the EEC Treaty' *European Law Review* vol 7 (1986), at 10.

47 Case 155/73 *Guiseppe Sacchi*, [1974] ECR 409. See also Case 62/79 *Coditel v. Ciné Vog Films* [1980] ECR 881, in which the Court held that the impediments to the cross-border transmission of television services could be justified by the general interest. See also Case 52/79 *Procureur du Roi v. Marc J V C Debauve and others* [1980] ECR 860, and Case 262/81 *Coditel v. Ciné Vog Films* (Coditel II) [1982] ECR 3381.

relevant rules'[48] such national restrictions fell within the residual power of each Member State to regulate television services. The Commission's audiovisual policy was in fact directed at establishing minimum bases in order to complete the internal market in an economically flourishing sector. The objective was to facilitate the provision of television services from one European country towards others.

Despite the fact that the broadcasting was not one of the original regulatory domains of the Community,[49] a Directive liberalizing transfrontier television was proposed, including some partial harmonization which ensures the conditions necessary for the consolidation of the single market.[50] The Directive on Television Without Frontiers was finally passed in 1989[51] providing that no Member State may restrict reception or retransmission of a broadcast from another Member State for reasons falling within the areas coordinated by the Directive. The TWF Directive was amended in 1997[52] guaranteeing that events of major importance to society may not be broadcast in such a way as to deprive a substantial proportion of the public in that Member State of the possibility of following these events by live coverage or deferred coverage on free television.[53] A second amendment to the TWF Directive adopted the Audiovisual Media Services Directive

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48 Case 52/79 *Procureur du Roi v. Marc J V C Debauve and others*, note 47 *supra*, paragraph 15.

49 The Treaty of the European Union, adopted in Maastricht in 1992, first introduced an explicit reference to the audiovisual sector within the new Title on 'culture' of the TEC (see article 151.2 TEC — now 167.2 TFEU). The TFEU is also concerned with the audiovisual sector in article 207.4 requiring that the Council shall act unanimously for the negotiation and conclusion of agreements in the field, among others, 'of trade in cultural and audiovisual services, where these agreements risk prejudicing the Union's cultural and linguistic diversity.' For a critical view of Article 167 TFEU (ex 151 CE) as the legal basis for the AMSD, see I Katsirea, *Public Broadcasting and European Law* (The Netherlands: Kluwer, 2008) at 291. See also the Protocol on the System of Public Broadcasting annexed to the Treaty of Amsterdam (OJ [1997] C 340/109), confirming the importance attached by the Member States to the role of public broadcasting, which is linked to the democratic, social and cultural needs of each society as well as to the need to safeguard plurality in the mass media.

50 See Television Without Frontiers: Green Paper on the Establishment of the Common Market for Broadcasting, Especially by Cable and Satellite, COM(85)300; the next year the Commission presented the White Paper on Completing the Internal Market COM(85)310, proposing a directive liberalizing transfrontier television. See B de Witte note 15 *supra*, at 101-105; see D A-L Levy, *Europe's Digital revolution: Broadcasting and Regulation, the EU and the Nation State* (London: Routledge, 1999) at 41.

51 Council Directive 89/552/EEC of 3 October 1989, note 3 *supra*.

52 Directive 97/36/EC of the European Parliament and the Council of 30 June 1997 amending Council Directive 89/552/EEC, note 4 *supra*.

53 See Case T-68/08 *FIFA v Commission* [2011].

(AMSD),[54] extending the scope of the Directive to all content services, irrespective of the technology that delivers them. The new Directive defines the notion of 'audiovisual media services' by making a distinction between television broadcast or linear services and on-demand or non-linear services. The former category covers 'audiovisual media service provided by a media service provider for simultaneous viewing of programmes on the basis of a programme schedule' (art 1.e AMSD), whereas the latter refers to an audiovisual media service 'provided by a media service provider for the viewing of programmes at the moment chosen by the user and at his individual request on the basis of a catalogue of programmes selected by the media service provider' (art 1.g AMSD). As regards the local content requirements, non-linear services are subject to a much less rigorous regime than the one applicable to linear services even though Member States may establish stricter rules.[55] We will see below that this is the case in some countries.

The development of the EU media policy shows that the primary rationale for this policy was economic, whereas the cultural dimension (cited in recitals 5, 6 and 7 of the AMSD) was first and foremost conceived as a protective measure. The content-oriented measures, such as the 'European-quota rules' intended to promote the distribution of European television programmes and independent productions, were introduced as the result of a political bargaining.[56] It was inspired by the will to take legislative action at Community level in order to counteract the dominance of American audio-visual productions in the European market.

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54 Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (OJ L 332, 18.12.2007, p. 27-45). A codified version of the AMSD was adopted by the Council on 15 February 2010 and published in the Official Journal. This mainly changes the numbering of the Articles and provides a consolidated set of Recitals. See Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (the Audiovisual Media Services Directive) (OJ L 95, 15.4.2010).

55 Article 13(1) AMSD.

56 See de Witte note 15 *supra*, at 104, reflecting on the consensus reached between single-market supporters, who called for the adoption of the Directive in order to liberalize the market for broadcasting, and cultural and industrial policy-makers, who made the quota a condition for agreeing to the text of the Directive; this led to the inclusion of European television programme content requirements in the Directive which was eventually adopted in 1989.

Economic considerations were the primary rationale for this policy; nevertheless, the attention given by the EU to *cultural and linguistic diversity* reflects the gradual increase in the recognition of its importance.[57] After the Lisbon Treaty, the new Treaty on European Union states that the Union '[s]hall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced.'[58] The respect for European cultural and linguistic diversity is affirmed among the objectives of the EU. The Union has also committed itself to respecting cultural and linguistic diversity in Article 22 of its Charter of Fundamental Rights which states that 'the Union shall respect cultural, religious and linguistic diversity.'[59] The enforcement of the Treaty of Lisbon has raised the legal status of the Charter for Fundamental Rights, placing it on a par with the Treaties.[60] Nevertheless, Article 22 is not drafted as an enforceable right, but rather as a principle for action. In the normative formulation, there are differences between 'shall respect' and, for example, 'guarantee' or 'secure'.[61] No subjective right is configured. The respect for linguistic diversity requires that EU policies take into consideration any possible negative effect they may produce on linguistic pluralism, especially if they could produce homogenizing effects. The respect for cultural diversity involves legal obligations for EU institutions and also for the Member States when they implement the EU policies.[62]

The engagement of the Union in the flourishing 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, is established in article 167(1) of the Treaty on the Functioning of the European

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57 See B de Witte, 'The Value of Cultural Diversity in European Union Law' in H Schneider and P Van Den Bossche (eds.) *Protection of Cultural Diversity from European and International Perspective* (Antwerpen/ Oxford/ Portland: Intersentia-Maastricht Center for Human Rights, 2008) at 222-225.

58 Article 3(3) TEU.

59 This article is considered as the 'most flexible element of the Equality Chapter' of the Charter of Fundamental Rights of the European Union. See M Bell, 'The Right to Equality and Non-Discrimination', in T K Hervey and J Kenner (ed.), *Economic and social rights under the EU Charter of Fundamental Rights: A Legal Perspective* (Portland: Hart Publishing, 2003) at 107.

60 By virtue of the first subparagraph of Article 6(1) of the Treaty on European Union (as amended by the Lisbon Treaty), the Charter of Fundamental Rights of the European Union of 7 December 2000, OJ C 364/01, 2000 has the same legal value as the Treaties.

61 *See* T McGonagle, 'The Quota Quandary', in D Ward (ed.), *The European Union and the Culture Industries* (Aldershot: Ashgate Publishing, 2008) at 204, highlighting that as such the wording involves a considerably lighter commitment for States.

62 See I Urrutia-Libarona and I Lasagabaster, 'Language Rights and Community Law' *European Integration online Papers* (EIoP), vol. 14 (2008), at 8.

Union. The article refers to the cultures of Member States and to the common cultural heritage,[63] and promises to respect both national and regional diversity.[64] Paragraph 4 of article 167 TFEU provides that '[T]he Union shall take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and to promote the diversity of its cultures.' There are many ways in which EU law impacts on languages and language policies of Member States (especially by legislation whose central aim is not cultural). This provision therefore requires that when dealing with purely economic or non-cultural areas the EU institutions and the Member States must act in compliance with the interests of cultural and linguistic diversity. Respect and promotion of the diversity of the cultures of the Member States effectively comprises responsibilities that are incumbent across the whole activity of the European Union. The Lisbon Treaty has given a new impetus to this approach.

These Articles provide safeguards against the homogenization of the cultural and linguistic characteristics of nations or regions.[65] They do not set out to extend the competences of the EU but comprise responsibilities that act as a barrier for EU action. Their role appears to involve setting boundaries rather than leading positive actions.[66] In all events, although the protection of cultural diversity is proclaimed as a common European value, the definition of cultural policies is a matter for each Member State to decide upon and implement.

3.1.1 · The Country of Origin Principle and the Procedure against Circumvention of Language Requirements

The country of origin principle is the core rule of the Audiovisual Media Services Directive. Member States are obliged to ensure freedom of recep-

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63 The ECJ has interpreted broadly the concept of common cultural heritage including the European languages (see Case 42/97, *European Parliament v. Council of the European Union* [1999] ECR I-869).

64 See M Ross 'Cultural Protection a Matter for Union Citizenship or Human Rights?' in N-A Neuwahl and A Rosas (eds.), *The European Union and Human Rights* (The Hague: Martinus Nijhoff, 1995) at 235-236.

65 See R Craufurd Smith 'Community Intervention in the Cultural Field: Continuity or Change?' in *Culture and European Union Law* (Oxford: Oxford University Press, 2004) at 50.

66 From this point of view it is doubtful that article 167(4) TFEU could serve as the legal basis for the AMSD. The article may be considered problematic from the point of view of subsidiarity (see I Katsirea note 49 *supra*, at 175) but what is clear is that the Union has to model its action on the cultural concepts of its Member States.

tion and shall not restrict retransmissions inside their territory of audiovisual media services from other Member States for reasons which fall within the fields coordinated by the Directive.[67] Media service providers are subject to the jurisdiction of their country of establishment,[68] and the receiving State cannot exercise a secondary control if the broadcasts comply with the AMSD in the country where they originate.[69] Only under exceptional circumstances can governments restrict the reception of foreign broadcasts of unsuitable content.[70] The application of the country of origin principle is of great significance for our analysis since the freedom of establishment and the freedom to provide services allow broadcasters to set up in any Member State and to target other Member States.[71] This may be the case of the UK station 3+, which targets Latvia and Estonia without maintaining minimum percentages for original productions in these languages.

The language of broadcasting is not one of the fields coordinated by the Directive. Therefore, it follows that the mechanisms for restricting the reception of foreign broadcasts provided for in Article 3 of the AMSD cannot be implemented based on the language criterion. In fact a language quota is arguably a more detailed rule than the European content quota included in the Directive.

Under Article 4, AMSD Member States are '[f]ree to require media service providers under their jurisdiction to comply with more detailed or stricter rules in the fields coordinated by this Directive' while ensuring that those rules are in compliance with Union law.[72] At all events, the aforementioned reference at the end to the possibility of acting in the fields coordi-

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67 Article 3 AMSD.

68 Article 2(3) AMSD provides practical criteria for determining when a media service provider shall be deemed to be established in a Member State.

69 The country of origin principle goes beyond mutual recognition in that the grounds of general interest falling within the ambit of the directive which can be invoked by the State of destination are narrowly circumscribed (see I Katsirea note 49 *supra,* at 190).

70 See Articles 3(2) and 3(3) AMSD for TV broadcasts and 3(4) and 3(6) AMSD for on-demand content. See P J Humphreys, *Mass Media and Media Policy in Western Europe* (Manchester: Manchester University Press, 1996) at 270.

71 Media service providers should in general be free to choose the Member States in which they establish themselves. The Court of Justice has also emphasized that 'the Treaty does not prohibit an undertaking from exercising the freedom to provide services if it does not offer services in the Member State in which it is established' Case C-56/96 *VT4 Ltd v Vlaamse Gemeenschap* [1997] ECR I-3143, paragraph 22; Case C-212/97 *Centros v Erhvervs-og Selskabsstyrelsen* [1999] ECR I-1459; see also: Case C-11/95 *Commission v Belgium* [1996] ECR I-4115; and Case C-14/96 *Paul Denuit* [1997] ECR I-2785.

72 Article 4(1) AMSD.

nated by this Directive does not necessarily imply that this capacity to act should be restricted to the points governed thereunder, but rather that the legal capacity of Member States to act can also affect it. Specifically, Member States have legal competences to regulate issues within the terms set down in the Directive and must exercise that power while respecting the fundamental freedoms guaranteed under the Treaty. In other words, any (language-related) legislation established by Member States must be compatible with other provisions of Community Law and particularly with the fundamental freedoms.

The original wording of Article 8 of the TWFD contained an explicit reference to the internal language policies making it possible for Member States to 'lay down more detailed or stricter rules in particular on the basis of language criteria.'[73] This explicit reference was removed from the articles of the Directive[74] but the main objective was addressed by recital 44 (now recital 78 of the AMSD) which provides as follows:

> In order to allow for an active policy in favour of a specific language, Member States remain free to lay down more detailed or stricter rules in particular on the basis of language criteria, as long as those rules are in conformity with Union law, and in particular are not applicable to the retransmission of broadcasts originating in other Member States.

The requirement to use the national languages is considered as a more detailed or stricter rule for the purposes of the AMSD. Member States remain free to apply them. Nevertheless, the Directive contains two explicit limits: the language rules should be in line with EU law, and must not be applicable to retransmissions. As we will see below, such 'more detailed or stricter rules' have to be 'of general public interest', a concept that has been developed by the Court of Justice in its case-law in relation to Articles 49 and 56 of the Treaty on the Functioning of the European Union (*ex* Articles 43 and 49 of the EC Treaty) and includes, inter alia, rules on cultural policy.

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73 The original wording of Article 8 TWFD (Council Directive 89/552/EEC of 3 October 1989) provided that 'Where they consider it necessary for purposes of language policy, the Member States, whilst observing Community law, may as regards some or all programmes of television broadcasters under their jurisdiction, lay down more detailed or stricter rules in particular on the basis of language criteria'.

74 The language criterion was repealed by Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 (OJ L 202, 30.7.1997, p. 60-70).

The second limit concerns the retransmissions. Unlike the European Convention on Transfrontier Television which defines retransmissions,[75] the AMSD does not contain any definition of this term. The problem of retransmission is whether the State being retransmitted from can control the retransmission or not (in addition to the control exercised by the State of origin). The European Court of Justice has stated that (cable) 'retransmissions' fall within the scope of the Directive,[76] that is to say, in the case of passive retransmissions the broadcasters have to comply only with the law of the country of establishment. The problem arises, however, when the foreign programmes are not retransmitted unchanged at the same time, but when cable distributors are empowered to interfere with their content.

From the point of view of the language requirements, another interesting issue is the possibility of *circumventing the national language legislation* by taking advantage of the freedom of establishment. The circumvention of the internal language legislation may arise when a broadcaster establishes itself in a Member State with the intention of evading the linguistic policy of another Member State, to which it directs the most of its programmes. The European Court of Justice examined the case of the Belgian legislation prohibiting cable operators from transmitting programmes originating from foreign broadcasting stations in the language or one of the languages of the Member State in which the station was established.[77] It was clearly an anti-circumvention measure but not so much an internal language policy measure insofar as its primary rationale was not to raise the use of the national language in the media but to restrict the reception of foreign broadcasts (also in Dutch). The Court held that that legislation constitutes a barrier to the freedom to provide services, and also that the language barrier was discriminatory because it prevented stations established in a Member State other than the Netherlands from offering programmes in

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75 Article 2(b) of the European Convention on Transfrontier Television defines retransmission as 'the fact of receiving and simultaneously transmitting, irrespective of the technical means employed, complete and unchanged television programme services, or important parts of such services, transmitted by broadcasters for reception by the general public.'

76 See Case C-11/95, *Commission v. Belgium* [1996] ECR I-4117. This case concerned legislation in the French and Flemish Communities that create a system of prior authorization for the retransmissions by cable of TV broadcasts from other Member States.

77 This prohibition was laid down in Articles 3 and 4 of the Decree of the Flemish Community of 28 January 1987 concerning the transmission of radio and television programmes on radio and cable television networks and the approval of non-public television broadcasting companies (*Moniteur Belge* of 19 March 1987, p. 4196)

Dutch to audiences in the Flemish Community. The Court dismissed the argument of the Belgian government according to which a person providing services cannot avoid the rules applicable to providers of services established in the Member State towards which his activity is directed. In this regard, the Court held that, while the State in which the service is provided may take measures to prevent a provider of services whose activity is entirely or principally directed towards its territory from exercising the freedom of establishment for the purpose of eluding the rules applicable to those who establish within that State, 'it does not follow that it is permissible for a Member State to prohibit altogether the provision of certain services by operators established in other Member State, as that would be tantamount to abolishing the freedom to provide services.'[78]

The circumvention of linguistic legislation has not been analysed directly by the Court. In any case, the case-law highlights a narrow construction of the circumvention principle:[79]

— First, the activity must be entirely or principally directed towards the territory of the other State.[80] Legal uncertainties regarding the interpretation of when a broadcast is 'wholly or mostly' directed towards the territory of another Member State may arise. By way of clarification, recital 42 of the AMSD states that '[a] Member State, when assessing on a case-by-case basis whether a broadcast by a media service provider established in another Member State is wholly or mostly directed towards its territory, may refer to indicators such as the origin of the television advertising and/or subscription revenues, the main language of the service or the existence of programmes or commercial communications targeted specifically at the public in the Member State where they are received.' The main language of the service is therefore considered as a sign or evidence of circumvention, and also as an indicator of territorial competence.

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78 Case C-211/91 *Commission v. Kingdom of Belgium* [1992] ECR I-6757, paragraph 12.

79 Case C-212/97 *Centros v Erhvervs-og Selskabsstyrelsen*, note 71 *supra*; Case 33/74 *Van Binsbergen v Bestuur van de Bedrijfsvereniging* [1974] ECR 1299; Case C-23/93 *TV 10 SA v Commissariaat voor de Media* [1994] ECR I-4795, paragraph 21.

80 A Member State, when assessing on a case-by-case basis whether a broadcast by a media service provider established in another Member State is wholly or mostly directed towards its territory, may refer to indicators such as the main language of the service, the origin of the television advertising and/or subscription revenues or the existence of programmes or commercial communications targeted specifically at the public in the Member State where they are received (see recital 42 AMSD).

— Second, the circumvention must actually be demonstrated by the Member State adopting the countervailing measure. Article 4.2 of the AMSD provides two possible successive procedures: a cooperation procedure between the Member States; and, when the results achieved through this voluntary procedure are not satisfactory, an executive procedure. The cooperative procedure consists of the following: the receiving Member State can contact the Member State having jurisdiction with a view to achieving a mutually satisfactory solution to any problems posed. On receipt of a substantiated request by the first Member State, the Member State having jurisdiction shall request the broadcaster to comply with the rules of general public interest in question. The Member State having jurisdiction shall inform the first Member State of the results obtained following this request within two months.[81]

If the results achieved through the application of this procedure are not satisfactory the receiving State may adopt appropriate measures against the broadcaster concerned, if the following requirements have been met: first, the broadcaster in question must have established itself in the Member State having jurisdiction in order to circumvent the stricter rules, in the fields coordinated by this Directive, which would be applicable to it if it were established in the first Member State; second, the receiving State must notify the Commission and the Member State in which the broadcaster is established of its intention to take such measures; and third, the Commission must have decided that the measures are compatible with Union law and in particular that assessments made by the Member State taking those measures are correctly founded.[82] If these three conditions are met, the receiving State may adopt measures against the broadcaster concerned. In any case, these measures shall be objectively necessary, applied in a non-discriminatory manner and proportionate to the objectives which they pursue.

As an overall assessment, it is worth highlighting the scepticism over the control system regulated by the Directive, which has been criticized for providing for a system of *ex post* control of doubtful theoretical and practical effectiveness.[83] A more effective solution could come from coordina-

81 Article 4(2) AMSD.
82 Articles 4(2) and 4(3) AMSD.
83 See I Katsirea note 49 *supra*, at 210.

tion between national regulatory authorities before granting a licence for broadcasting targeting a foreign State.

3.1.2 · Cultural content quotas and languages

Language use requirements (or language quotas) are usually included in the quota for European works or/and in the quota for independent works. Article 16 of the AMSD states that '[M]ember States shall ensure, where practicable and by appropriate means, that broadcasters reserve for European works a majority proportion of their transmission time, excluding the time allotted to news, sports events, games, advertising, teletext services and teleshopping.'[84] Regarding on-demand services the quota is more flexible, asking Member States to ensure that providers '[u]nder their jurisdiction promote, where practicable and by appropriate means, the production of and access to European works.'[85] The AMSD clarifies that '[s]uch promotion could relate, inter alia, to the financial contribution made by such services to the production and rights acquisition of European works or to the share and/or prominence of European works in the catalogue of programmes offered by the on-demand audiovisual media service.'[86]

Some Member States have introduced language quotas in order to protect their national language(s). This is the case in France, Italy, Portugal, Spain, Greece, the Netherlands, Poland and Latvia, among others. Member States have the power to adopt language quotas within the European quota, which are justified on the grounds of protection of national or regional languages, and which comply fully with the more detailed or stricter rules in particular on the basis of language criteria in the sense of recitals 78 and 66 of the AMSD.[87] The AMSD does not stipulate any fixed percentage re-

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84 Article 16(1) AMSD. Article 17 requires Member States to ensure that '[b]roadcasters reserve at least 10% of their transmission time, excluding the time allotted to news, sports events, games, advertising, teletext services and teleshopping, or alternately, at the discretion of the Member State, at least 10% of their programming budget, for European works created by producers who are independent of broadcasters.'

85 Article 13(1) AMSD.

86 *Ibid*.

87 Recital 66 of the AMSD refers to the importance of seeking appropriate instruments and procedures in accordance with EU law in order to promote the implementation of the objectives of this Directive with a view to adopting suitable measures to encourage the activity and development of European audiovisual production and distribution, particularly in countries with a low production capacity or a restricted language area.

served for television programmes made in European countries other than the country of establishment of the broadcaster, nor does it state a percentage of works made originally in European languages other the national language of the Member State. This suggests that the European quota could be fulfilled by productions in the Member State's own language.[88] It is true that national language quotas may act as a barrier to intra-Community trade, but it is also true that the European quota does not really contribute to the free movement of European productions.[89] In fact the AMSD does not require Member States to report the proportion of transmission time devoted to non-national European works.

The European quota may have reinforced national objectives to protect and encourage the domestic content sector rather than fostering a truly European market in programming and encouraging the exchange and circulation of European TV programmes within Europe. There are many factors that influence the higher or lower circulation of European programmes and films, but the most important among them are linguistic affinity or the fact that they all share the same linguistic area. As Katsirea has highlighted, smaller Member States that share a language with a larger neighbouring Member State, such as Austria, Belgium and Ireland, have larger proportions of imported European works shown on television. Larger Member States, such as France, Germany, Italy, Spain and the United Kingdom have the smallest proportion. But small Member States that do not share the same language with a larger State, such as Greece and Portugal, continue to broadcast only a small proportion of such works.[90]

3.2 · Negative integration

The EU law has certainly interfered with Member States' regulations in many fields despite recognizing Member States' jurisdiction. Language policy is a clear example.[91] The economic integration process as a motor of

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88 See the opinion of B de Witte note 15 *supra*, at 112.

89 See European Commission, *Issue Paper for the Liverpool Audiovisual Conference. Cultural Diversity and the promotion of European and Independent Audiovisual Production*, July 2005.

90 See I Katsirea note 49 *supra*, at 294.

91 See among others R Craufurd Smith, *Broadcasting Law and fundamental rights* (Oxford: Oxford University Press, 1997) at 186; B de Witte, 'Non-market values in internal market regulation', in N Nic Shuibhne (ed.) *Regulating the Internal Market* (Cheltenham: Edward Elgar Publishing, 2006) at 61.

EU's political integration places the emphasis on the free operation of the market mechanisms under conditions ensuring effective and undistorted competition and the removal of any obstructive barriers. From this point of view, any linguistic requirements that might be established at state or substate level could be considered suspicious insofar they might affect the market freedoms.[92] As we know, Article 167.4 of the TFEU (*ex* art 151.4 TCE) demands that EU take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and to promote the diversity of its cultures. Nevertheless, the ECJ has avoided grappling with the implications of the cultural cross-sectional clause, and in fact has moved in the opposite direction, shaping the linguistic configuration of the market freedoms, building its reasoning around principles with which it feels more comfortable such as the freedom of movement and the non-discrimination clause.[93] Following the case-law of the Court of Justice, we observe some language-based delimitation of EU freedoms (circulation, establishment) in areas relevant to the audiovisual services and film production.

The Court has consistently held that a measure that leads to a restriction of one of the fundamental freedoms guaranteed by the Treaty is warranted only if it pursues a legitimate objective compatible with the Treaty and is justified by overriding reasons of public interest.[94] If that is the case, the restriction must be suitable for securing the attainment of the objective which it pursues and not go beyond what is necessary in order to attain it.[95] In the *United Pan-Europe Communications* judgment[96] the Court dealt with

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92 See A Milian-Massana, *Globalización y requisitos lingüísticos: una perspectiva jurídica* (Barcelona: Atelier, 2008) at 41. See also B de Witte 'Common Market freedoms versus linguistic requirements in the EU States', in A Milian (ed.), *Mundialització, lliure circulació i immigració, i l'exigència d'una llengua com a requisit* (Barcelona: Institut d'Estudis Autònomics, 2008) at 119.

93 On the low judicial consideration of the cultural cross-sectional clause, see E Psychogiopoulou note 12 *supra*, at 145.

94 *See, e.g.,* Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 104; Case C-367/98 *Commission / Portugal* [2002] ECR I-4731, paragraph 49; Joined Cases C-92/04 and C-202/04 *Cipolla and Others* [2006] ECR I-11421, paragraph 61; Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union* [2007] ECR I-10779 ('*VikingLine*'), paragraph 75; and Case C-341/05 *Laval un Partneri* [2007] ECR I-11767, paragraph 101.

95 *See, e.g.,* Case C-429/02 *Bacardi France* [2004] ECR I-6613, paragraph 33, and Joined Cases C-338/04, C-359/04 and C-360/04 *Placanica* [2007] ECR I-1891, paragraph 48.

96 Case C-250/06, *United Pan-Europe Communications Belgium SA and others v Belgium* [2007] ECR I-11135

the compatibility of the Belgian 'must carry' regulation with the Treaties. The Court held that providers of services established in Member States other than the Kingdom of Belgium which are not designated under that legislation faced a burden which is not imposed on the providers of services designated by it. The Belgian government argued that the aim of the measure was to preserve the pluralist and cultural range of programmes available on television distribution networks and to ensure that all television viewers had access to pluralism and to a wide range of programmes, particularly by guaranteeing Belgian citizens of the bilingual region of Brussels-Capital that they will not be deprived of access to local and national news and to their culture. In this regard the European Court stated that '[I]t must be accepted that the national legislation at issue in the main proceedings pursues an aim in the general interest, since it seeks to preserve the pluralist nature of the range of television programmes available in the bilingual region of Brussels-Capital and thus forms part of a cultural policy the aim of which is to safeguard, in the audiovisual sector, the freedom of expression of the different social, cultural, religious, philosophical or linguistic components which exist in that region.'[97]

The Court ruled that the purpose of this was indeed in the public interest and that it formed part of a general cultural policy.[98] However, the case-law shows us that the principle of media pluralism that forms part of cultural policy is not interpreted in an expansive manner by the Court of Justice,[99] but on a case-by-case basis in the light of a strict proportionality and necessity test.

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97 Case C-250/06, *United Pan-Europe Communications*, cit. note 96 *supra,* paragraph 42.

98 The ECJ has produced a consistent set of judgements regarding the application of the freedom of movement rules where the presence of national regulations that could result in impediments to trade can be justified, and thus upheld, because they aim to safeguard media pluralism. This approach stems from the reasoning that media pluralism forms part of cultural policy which may constitute an overriding requirement relating to the general interest thus justifying a restriction on the freedom to provide services. See e.g. Case 352/85, *Bond van Adverteerders and others / The Netherlands State*, [1988] ECR 2085; Case C-211/91, *Commission of the European Communities / Kingdom of Belgium*, [1992] ECR I-6757; Case C-288/89, *Stichting Collectieve Antennevoorziening Gouda and others / Commissariaat voor de Media ('Mediawet I')*, [1991] ECR I-04007; Case C-353/89, *Commission of the European Communities / Kingdom of the Netherlands*, [1991] ECR I-4069; Case C-148/91, *Vereniging Veronica Omroep Organisatie / Commissariaat voor de Media*, [1993] ECR I-00487.

99 See F Casarosa 'The case of the European Union and the Council of Europe' in *Background information Report. Media Policies and Regulatory Practices in a Selected Set of European countries, the EU and the Council of Europe* (available at http://www.mediadem.eliamep.gr/wp-content/uploads/2010/05/BIR.pdf) (last visited December 2011) at 501.

Regarding the proportionality of the language restrictions to the freedom to provide services, the European Court stated in this ruling that '[h]aving regard to the bilingual nature of the Brussels-Capital region national legislation, such as that at issue in the main proceedings constitutes an appropriate means of achieving the cultural objective pursued, since it is capable of permitting, in that region, Dutch-speaking television viewers to have access, via the network of cable operators broadcasting in that area, to television programmes having a cultural and linguistic connection with the Flemish Community and French-speaking television viewers to have similar access to television programmes having a cultural and linguistic connection with the French Community. Such legislation thus guarantees to television viewers in that region that they will not be deprived of access, in their own language, to local and national news as well as to programmes which are representative of their culture.'[100] Providing a definite guarantee of language diversity in the TV programming in a given bilingual region and in accordance with its cultural policy was considered an objective in the public interest.

The most significant example of the consideration of language requirements as overriding reasons relating to the public interest is the *UTECA* case.[101] The ECJ was asked for a pronouncement on the compatibility with Articles 18 of the TFEU (*ex* art 12 TEC) and 107(1) (ex art. 87 TEC) of the requirement to reserve 60% of the compulsory investment for the prefunding of European and Spanish feature-length and short films and films made for television for the production of films of which the original language is one of the official languages of the Kingdom of Spain.

The European Court contextualized the language measure within the cultural field, namely '[t]he defence of Spanish multilingualism.'[102] It should be said here that the Court, in this regard, does go farther than the approach proposed by the Advocate General in her Opinion, where she refers exclusively to promotion of multilingualism in European audiovisual productions.[103] This issue is important in that the European Court does not circumscribe its ruling to the audiovisual industry but rather

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100 Case C-250/06, *United Pan-Europe Communications*,cit. note 76 *supra*, paragraph 43.

101 Case C-222/07 *Unión de Televisiones Comerciales Asociadas (UTECA)* [2009] ECR I-01407.

102 Case C-222/07, *UTECA,* cit. note 101 *supra*, at paragraph 26.

103 The Opinion of the Advocate General (case C-222/07, paragraph 90) referred '[t]o promot[ing] the production of European films the original language of which is one of the official languages recognized in Spain'

takes it further to what might be termed the defence of multilingualism *in genere*.

Having thus acknowledged that language promotion is a common objective of the Union and of its Member States, the European Court of Justice confirms in no uncertain terms that '[t]he objective, pursued by a Member State, of defending and promoting one or several of its official languages constitutes an overriding reason in the public interest.'[104] The Court had never, prior to this, expressed quite so clearly that the policy of defending and promoting one or several of the official languages within the Member State is deemed to be an overriding reason in the public interest which legitimizes a certain degree of distortion in European Community freedoms. Since that ruling, there can be no doubt that measures aimed at defending and promoting any languages which, under the legal order of the European Union, are considered official languages in part or in the whole of the national territory of any given Member State, do indeed amount to overriding requirements in the public interest.

Another interesting question is the dividing-line between cultural and economic measures. In the *UTECA* case the Commission found the scheme lacking in objective and verifiable criteria which could ensure that the advanced financing scheme would only be applied to cinema and television products deemed to be 'cultural products.' [105] The European Court of Justice, however, did not agree and stated that… '[s]ince language and culture are intrinsically linked, ... the view cannot be taken that the objective pursued by a Member State of defending and promoting one or several of its official languages must of necessity be accompanied by other cultural criteria in order for it to justify a restriction on one of the fundamental freedoms guaranteed by the Treaty.'[106] The European Court effectively sets down that measures for promoting languages, in order to be justified, may not refer to strictly cultural aspects (such

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104 Case C-222/07, *UTECA,* cit. note 101 *supra*, at paragraph 27. See I Urrutia "Approach of the European Court of Justice on the Accomodation of the European language Diversity in the Internal market: Overcoming Language Barriers or Fostering Linguistic Diversity? *The Columbia Journal of European Law*, vol 18-2, 2012 at 243 et seq.

105 The Commission was guided, on this point, by Case C-17/92 *Distribuidores Cinematográficos* [1993] ECR I-2239, paragraph 20. On that occasion the Court rejected the Spanish legislation in the film promotion sector based *inter alia* on the argument that it promoted 'national films whatever their content or quality'. In the *UTECA* case, however, the reference point was not the Member State in which a film was produced but a linguistic criterion.

106 Case C-222/07, *UTECA,* cit. note 101 *supra*, at paragraph 33.

as, for example, culture-related companies or films which might be categorized as being 'cultural products'). The criterion for weighing up is not the (cultural) nature of the object which the measure affects, but rather the linguistic instrument used to carry it out. The Court thus confirmed the autonomous nature of language criteria as an overriding reason in the public interest. Furthermore, it cannot be denied that promoting languages in all areas, including the audiovisual industry, does appear cultural in nature, bearing in mind the importance of languages in defending and promoting cultural expression and of linguistic diversity itself.[107]

The scheme was not considered as a protective measure, adopted on the basis of economic considerations and with the intention of benefiting production in the Member State and applied to the detriment of that in other Member States. The underlying motivation is not in fact a question of economic policy but rather a cultural/linguistic policy measure. The purpose is to defend and promote one or several official languages of the Member State, and for this reason the fact that production companies working in the languages comprising the object of the measure stand to benefit the most from it is considered 'inherent to the objective pursued.'[108] In any event the Court does not say that language-related measures are considered *per se* non-selective, but says only that language measures are not *per se* selective. The selectivity of the measure will depend on its proportionality taking into account the linguistic objective and the context, such as the relative position of the language in the market.

4 · National Language Policy

In this section we carry out a cross-national analysis on language regulations in the audiovisual sector with regard to some medium-sized languages. Taking into account the diversity of responses from national legislations, we analyse the techniques used to regulate the use of languages in the audiovisual sector and their intensity, attempting to extract characteris-

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107 See I Urrutia-Libarona, 'Libre competencia, prohibición de ayudas de Estado y fiscalidad lingüística' in I. Urrutia et al, *Estudios Jurídicos sobre Fiscalidad Lingüística: Incentivos Fiscales como instrumento de Política Lingüística* (Cizur Menor: Aranzadi — Thomson — Reuters, 2010) at 67-80.

108 Case C-222/07, *UTECA,* cit. note 101 *supra*, paragraph 36.

tics common to medium-sized languages. The areas of intervention are as follows:

— Compulsory use and language quotas.
— Language quotas inside the EU's quota for European Audiovisual works.
— Language commitments as a public service obligation.
— Language use and language promotion as a licensing condition.
— Language requirements in the on-demand services.
— Sanctioning procedures in the event of non-compliance.

4.1 · The case of a sole official medium-sized language in the whole territory of the State

We start with a brief analysis of the legislation related to some medium-sized languages in what have been called the Newly Independent States of the former Soviet Union. Taking into account the sociolinguistic situation in these countries, a variety of techniques have been implemented to privilege the official language in the media and to demote the primacy of Russian.

a) In **Latvia** the language policy aims to consolidate society by implementing the provisions of the State's Language Act, promoting the preservation and use of the Latvian language as the official language of the Republic of Latvia.[109] An important role in this process is played by the mass media. The Electronic Media Act of 12 July 2010[110] requires not only national but also regional electronic media to present at least *65% of all their programmes* in the official language, and also stipulated that these programmes must constitute at least *65% of the broadcast time*. This total does

109 See I Druviete and D Strelēvica-Ošiņa, 'Some Aspects of the Sociolinguistic Situation in Latvia: Causes and Effects', *Contemporary linguistics*, vol. 65:3.1 July 2008, at 89.

110 The Parliament of Latvia (Saeima) adopted the draft Electronic Media Act on 17 June 2010 but the law was not passed as the President used his constitutional right to return it to the Saeima for a second review. In his request of 22 June 2010 the President pointed out that it was unfair to limit the language use requirement (of 40%) only to nationwide broadcasters, and also that it was necessary to include news broadcasts within this language quota. The Parliament agreed with the suggestion and extended the requirement to regional TV broadcasters. See I Bērziņa-Andersone, 'The New Electronic Media Law in Latvia Finally in Force' IRIS nr 8, 2010 at 36.

not include games, commercials, and TV shopping, but it does include news programmes.[111]

Accordingly, the national and regional electronic media must ensure that *at least 40% of broadcast time of European audiovisual works is in the official language*.[112] A TV programme in a foreign language is also considered a programme in the official language if it is dubbed or voiced-over in the official language. The time devoted to commercials is not included in this 40%. The transitional provisions of the Act stipulated that this would come into force as of 1 January 2011.

In its Judgement of 5 June 2003, the Latvian Constitutional Court declared that the maximum quota of 25% of foreign languages programmes stipulated by Article 19 of the Radio and Television Act was incompatible with Article 100 of the Constitution of the Republic of Latvia, the Satversme. The Court found that 'the limitation to the use of language, included in the challenged norm, cannot be regarded as socially needed in the democratic society.'[113] Nevertheless, the Court recommended the use of licensing mechanisms to achieve the aims of language integration.[114] In the light of these recommendations, the new Electronic Media Act of 2010 states that: 'the language and format of the programmes of the electronic mass media shall be an unchangeable component of the principal conditions within the term of validity of the issued broadcasting permit.'[115] This ruling led to a modification in the legislation on radio and television endowing the 'Cabinet' with the capacity to respond in exceptional circumstances '[i]f the Cabinet determines that in a part of the territory of the State there exists a threat to the use of the official language, or also the use

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111 Electronic Mass Media Act, 2010, Section 32(3).

112 Electronic Mass Media Act, 2010, Section 32(2). Under paragraph 1 of the same article, at least 51 per cent of the weekly transmission time, except for the news, sports events, games, advertising, teleshopping and teleshopping windows, is reserved for European audiovisual works.

113 Constitutional Court of Latvia, Judgment of 5 June 2003, Case No.2003-02-0106, paragraph 4.1. The Court found that if — because of language restrictions — the residents cannot use the services of the local broadcasting organizations, they choose the services of broadcasting organizations of other States, mainly the Russian television channels. In this situation, the Court concluded that the implementation of the challenged norm has neither furthered more extensive use of the State language nor advanced the process of integration.

114 See Constitutional Court of Latvia, Judgment of 5 June 2003, cit. note 113 *supra*, at paragraph 4.2: 'Granting radio and television broadcasting licenses shall not create disproportionate restrictions to fundamental human rights; inter alia also to freedom of expression.'

115 Electronic Media Act, 2010, Section 24(3); see also Sections 16(2) 2) and 17(1).

or distribution thereof is insufficient, the Cabinet shall decide regarding measures promoting the use of the official language in the relevant territory.'[116] The Latvian legislation also establishes language requirements related to the public electronic mass media. Public broadcasters must produce their programmes for the first distribution network in the state language, while their programmes on the second distribution network must be 'mainly in the official language.'[117]

b) **Estonia** has around a million Estonian-speakers. Estonia has witnessed rapid development towards the creation of the information society and has a very liberal media policy.[118] In broadcasts (including transmission by television stations or cable networks) of audiovisual works (including programmes and advertisements), foreign language text must be accompanied by an adequate *translation* into Estonian.[119] The law therefore envisages exceptions to the translation requirement in cases involving retransmissions, learning programmes or in the case of newsreaders' text of originally produced foreign-language news programmes and of originally produced live foreign-language programmes.[120] In any case, foreign-language news programmes and live foreign-language programmes exempted from the translation requirement must *not exceed 10% of the volume of weekly* original production. The absence of an Estonian translation upon the transmission of foreign language audiovisual works, foreign language programmes of radio or television stations or international events directed at the public is punishable by a fine.[121]

c) In **Lithuania**, as a rule, public information must be *produced and disseminated in the state language*.[122] Broadcasts in other languages must be translated or subtitled, with limited exceptions.[123] The legislation on

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116 Now Section 28(7) of the Electronic Mass Media Law, 2010.

117 Electronic Media Act, 2010, Section 66(4). On the development of this section see T McGonagle and A Richter, 'Regulation of Minority-language Broadcasting' *Iris* 2004, at 4.

118 See *U Loit and H Harro-Loit, note 99 supra*, at 132.

119 See Estonian Language Act (21 February 1995) Article 25.1(1) (amended on 10 September 1997 entered into force 04.10.1997 - RT I 1997, 69, 1110).

120 Estonian Language Act, 1995, Article 25(2).

121 Estonian Language Act, 1995, Article 26(1) and 26(2).

122 Law on the Provision of Information to the Public, 2 July 1996 (last amended on 30 September 2010 N0 XI-1049) Article 34(1).

123 Article 34(2) of the Provision of Information to the Public Act states as follows: 'Radio and/or

the state language provides that 'Audiovisual programmes, motion pictures publicly shown in Lithuania must be translated into the state language or shown with subtitles in Lithuanian.'[124] This provision does not apply to teaching and special programmes and events, or to events and programmes held for a certain occasion or intended for the country's ethnic minorities.

Regarding (language) minorities, the Lithuanian legislation provides that 'the Commission [of the Lithuanian Language], taking into account the needs of ethnic minorities residing in the coverage zone of broadcast radio and/or television programmes, where necessary, when specifying the conditions of the licence may determine the share of broadcast and/or re-broadcast radio and/or television programmes or parts thereof which must be comprised of radio and/or television programmes or parts of programmes in the languages of the ethnic minorities.'[125]

The Provision of Information to the Public Act assigns a preferential position to EU languages vis-à-vis non-EU languages when broadcasting and also when re-broadcasting. Broadcasters of television programmes are prohibited from showing audiovisual works which have been translated from an official EU language into a non- EU language.

Concerning re-broadcasting, the re-broadcasting licence shall determine the programmes and the languages in which they are to be re-broadcast and/or shown with subtitles, and other re-broadcasting conditions.[126] And as a general rule, when re-broadcasting television programmes, re-broadcasters must give priority to the official EU languages; therefore, where it is possible to choose between an official EU language or any other language to re-broadcast the same television programme, they must provide all the conditions for the television programme or a part of the programme to be re-broadcast in an official EU

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television programmes broadcast in a language other than Lithuanian must be translated into Lithuanian or shown with Lithuanian subtitles, except for educational, occasional, special, music and re-broadcast foreign radio and/or television programmes or parts of programmes as well as programmes produced by broadcasters of radio and/or television programmes intended for the country's ethnic minorities.'

124 State Language Act (Lithuania), Article 13.

125 The Provision of Information to the Public Act, Article 34(2).

126 Article 33 paragraph 5 (as amended on 1 July 2011) The Provision of Information to the Public Act.

language.[127] These measures are not based so much on promoting the European audiovisual market as on limiting the influence of Russian in the media.

4.2 · The case of a sole official medium-sized language in part of the State

In **Belgium**, cultural affairs are the competence of the three communities: the Flemish, the French and the German Communities. As radio-diffusion and television matters are defined as cultural affairs broadcasting is the competence of the communities which have their own regulations in this domain.[128] In the Flemish Community, the Radio and Television Broadcasting Act[129] stipulates that '[l]inear radio broadcasters have to broadcast in Dutch. The Flemish government may authorize exceptions to this.'[130] The private linear television services are also bound by the same language requirement: '[p]rivate broadcasters [must] broadcasts in Dutch, except in case of derogations to this rule, to be granted by the Flemish government.'[131] Following the same language criteria, in order to receive a licence and to continue to be a licensed broadcaster, regional television broadcasters need to comply with (among other things) the following language condition: '[t]he regional television broadcaster broadcasts in Dutch subject to derogations granted by the Flemish government.'[132] Also, non-linear television broadcasters '[w]ill at least broadcast in Dutch', excluding the exceptions established by the Flemish government.[133]

Regarding the language quota inside the EU regulations on audiovisual content, television broadcasters in the Flemish Community and private lin-

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127 Article 34(3) of the Provision of Information to the Public Act, 2 July 1996.

128 In Belgium, political power is divided between the federal level, the language-based communities and the territory-based regions. In the field of the media, the main competences belong to the communities; as a result, there is a clear separation between the French-language media on the one hand and the Dutch-language or Flemish media on the other hand (see B Van Besien, 'The case of Belgium' in *Background information Report. Media Policies and Regulatory Practices in a Selected Set of European countries, the EU and the Council of Europe* cit. at note 99 *supra*, at 11).

129 Flemish Community Radio and Television Broadcasting Act (Official Gazette 30 April 2009) (*Decreet betreffende de Radio-omroep en de televisie)*.

130 Flemish Community Radio and Television Broadcasting Act, Article 129.

131 Flemish Community Radio and Television Broadcasting Act, Article 163.

132 Flemish Community Radio and Television Broadcasting Act, Article 169(6).

133 Flemish Community Radio and Television Broadcasting Act, Article 174.

ear television broadcasters must aspire to reserve a majority proportion of transmission time (excluding time for news, sports events, games, advertising, teletext services and teleshopping) for European productions. A significant proportion of this must be devoted to Dutch-language European works. The Flemish government can impose quota in order to achieve this aim.[134] According to Art 155, these broadcasters are required to reserve at least 10% of their transmission time for European works created by independent producers, of which a significant part must be recent and in Dutch.[135]

Finally, non-linear television broadcasters will promote the production of, and access to, European productions, insofar as this is feasible and can be implemented with suitable resources. This promotion could relate, inter alia, to the financial contribution made by the non-linear television broadcasters to the production and acquisition of rights of European works or to the share and/or prominence of European productions in the catalogue of programmes offered by the on-demand programme catalogue of the non-linear television service. A considerable share of these promotional resources must be used for Dutch-language European productions.[136] Article 174, 2°, third paragraph establishes that an Audiovisual On-Demand Service provider must at least *transmit in Dutch*, apart from the exceptions admitted by the Flemish government.

In the French Community,[137] the editors of radio services are under an obligation to broadcast in French, except for derogations granted by the government.[138] They have to broadcast at least 30% of French-language music, of which 4.5% must be musical works by composers, performers

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134 Flemish Community Radio and Television Broadcasting Act, Article 154.

135 Art 155(3) of the Flemish Community Radio and Television Broadcasting Act states that '[s]ufficient room must be provided for recent European Dutch-language productions.' The Flemish government can impose quotas for this purpose.

136 Flemish Community Radio and Television Broadcasting Act, Article 157.

137 See the *Arrêté du Gouvernement de la Communauté française portant coordination du décret sur les services de médias audiovisuels*' of 26 March 2009 as ratified by the '*Décret portant ratification de l'arrêté du Gouvernement de la Communauté française du 26 mars 2009 portant coordination du décret sur les services de médias audiovisuels*' of 30 April 2009, which was published in the Belgian Official Journal on 24 July 2009.

138 Article 54 of the Décret sur les services de médias audiovisuels states that '[s]ans préjudice des dispositions énoncées à l'article 104, le cahier des charges des éditeurs de services sonores prévoit, outre les obligations visées à l'article 35. 1° en ce qui concerne le contenu du service sonore: …c) l'obligation d'émettre en langue française, hors la diffusion de musique préenregistrée, sauf dérogation motivée accordée par le Collège d'autorisation et contrôle en vue de favoriser la diversité culturelle et linguistique des services.'

and producers from the French Community. Editors of TV linear broadcasting must reserve 20% of their air time (excluding time spent on information, sports events, games, advertising and self-promotion or teleshopping) for programmes which are originally in French. They are also bound to offer (except musical programmes) a majority of French language programmes (42.3). The Radio-Télévision belge de la Communauté française (RTBF) and the other linear broadcasting organizations must assign a majority proportion of their broadcasting time, to European works, including original works by authors of the French Community (except for the time spent on news, sports events, games, advertising, self-promotion, teleshopping or teletext). [139]

Concerning the editors of TV non-linear services, article 47 bis stipulates that '*Doivent… assurer une mise en valeur particulière des œuvres européennes comprises dans leur catalogue, en ce compris des œuvres originales d'auteurs relevant de la Communauté française, en mettant en évidence, par une présentation attrayante, la liste des œuvres européennes disponibles*.'[140] That is to say, an audiovisual on-demand service provider must not only ensure the transmission of European productions but also the transmission of original productions of authors originating from the French Community.[141]

4.3 · The case of a joint official medium-sized language in part of the State

By law, the State and the Autonomous Communities in Spain share competence over the audiovisual sector and the media. This shared competence empowers the central legislature to establish basic norms,[142] which

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139 Décret sur les services de médias audiovisuels Art 43. This provision does not apply to the television broadcasting organizations targeting a local public and which are not part of a national network. It neither applies to television broadcasting organizations that use only a language other than the official languages or those recognized by the States of the European Union and of which the programmes are exclusively meant for captation outside the European Union and which are not received directly or indirectly by audiences of one or more Member States.

140 Décret sur les services de médias audiovisuels Article 47bis.

141 In the German Community the '*Dekret zur Änderung des Dekrets vom 27 Juni 2005 über den Rundfunk und die Kinovorstellungen*' of 3 December 2009 establishes the obligation to transmit some programmes in German.

142 Spanish Constitution, Article 149(1)(27).

are then developed by the Autonomous Communities. The Catalan Statute of Autonomy declares that Catalonia has shared power over the regulation and control of broadcasting services that use any of the available formats and technologies aimed at audiences in Catalonia, and over the supply of broadcasting services if distributed in the territory of Catalonia.[143] Catalonia has exclusive power over the matter of its own language[144] and also over the organization of the provision of the public broadcasting services of the Generalitat (the Catalan government) and public broadcasting services at local level, while respecting the principle of local autonomy.

The Spanish General Audiovisual Communication Act (31 March, 2010)[145] recognizes the right to the inclusion in audiovisual media of free-to-air programming which reflects the population's cultural and linguistic diversity. The law contains an empowering prescription stating that 'Autonomous Communities with their own language can adopt additional rules for audiovisual media services in their area of responsibility in order to promote audiovisual production in their own language.'[146]

The Catalan Language Policy Act distinguishes between public and private media. In public radio and television broadcasting managed by the Generalitat and the local authorities in Catalonia, the normal language of use is Catalan[147] and in the Arán valley Aranese.[148] The Spanish Supreme Court ruled on the proportionality of this measure stating that 'we appreciate that in the present case there is an objective and reasonable justification for public television stations managed by the Generalitat of Catalonia broadcast in Catalan, insofar as the Spanish-language television global offer is broader than that offered in Catalan… it is reasonable therefore that, in order to balance the Catalan-medium broadcasting offer, public television media managed by the Generalitat of Catalonia make their broadcasts mainly in Catalan.'[149] The decision resolved the question from the perspective of the global offer of media in Catalonia (including media operating at national level), and held that the requirement that public media in Catalo-

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143 Statute of Autonomy of Catalonia, 2006 (19 July, on the Reform of the Statute of Autonomy of Catalonia), Article 146(1).

144 Statute of Autonomy of Catalonia, 2006, Article 143(1).

145 Official Journal (*Boletín Oficial del Estado*) number: 79/2010.

146 General Audiovisual Communication Act (31 March) Article 5.

147 Catalan Language Policy Act (1998), Article 25.

148 Catalan Audiovisual Media Act (2005), Article 86(1)

149 Judgment of the Spanish Supreme Court of 7 October 2002 (Aranzadi Rep. of Case-Law 2002, 9268), merit no 3.

nia should broadcast in Catalan was proportionate. However, two issues must be highlighted: firstly, the reference parameter assumed by the Court is the situation of 'balance' between official languages, which emerges from the status of joint official languages; secondly, the Catalan parliament's power to regulate the language of broadcasts is not conceived of as unlimited, not even where public media is concerned.

The private television services (the radio and television media broadcasting under licence granted by the Catalan government) is subject to the following rule of language use: 'at least fifty per cent of viewing time of all kinds of programmes produced by themselves and other tele-services are provided in the Catalan language.'[150] Equally, radio broadcasts by licensees granted by the Generalitat shall guarantee at least fifty per cent of broadcasting time in Catalan, although, depending on the nature of their audience, the government may modify this percentage by regulation.[151] The distributors of audiovisual media services must ensure that the majority of channels are offered in Catalan.[152] The balance between official languages is reflected by a minimum quota of 50%, in line with the joint official status of languages in Catalonia.[153] In any case it should be borne in mind that the power of the Catalan authorities cannot be exercised over all the media operating in Catalonia but only over those working on the basis of the licences granted by them and also over those operating exclusively in the territory of Catalonia.[154] A subsidiary of a State broadcaster located in Catalonia must comply with the language criteria. The problem arises when the authority issuing the licence is not the same as the one with language competence (the one that could open an infringement procedure).[155] An-

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150 Catalan Language Policy Act (1998), Article 26(1).

151 Catalan Language Policy Act (1998), Article 26(3).

152 Catalan Audiovisual Media Act (2005), Article 86(3).

153 See A Milian-Massana, *Público y Privado en la normalización lingüística. Cuatro estudios sobre derechos lingüísticos* [Public and private in language normalization: Four Studies on Language Rights] (Barcelona: Atelier, 2001) at 109; M Carrillo 'La normativa lingüística y los medios de comunicación' in *Estudios jurídicos sobre la ley de política lingüística* (Barcelona: Institut d'Estudis Autonòmics, 1999) at 383; I Urrutia-Libarona 'Los requisitos lingüísticos en la actividad socioeconómica y en el mundo del audiovisual' in A Milian (ed), *Mundialització lliure circulació i immigració, i l'exigència d'una llengua com a requisit* (Barcelona: Institut d'Estudis Autonòmics, 2008) at 277.

154 See Catalan Audiovisual Media Act (2005), Article 2(1)d.

155 See Catalan Audiovisual Media Act (2005), Article 133(f) classifying as a serious offence 'the omission of any of the duties in relation to the presence of Catalan and Catalan culture and Aranese in the audiovisual broadcasting in accordance with the provisions of this Act.'

other issue is the not always neutral decision on the areas of territorial coverage for subsidiaries.

Regarding the language quotas inside the EU content quota, the Spanish General Audiovisual Communication Act establishes that television media service providers with national or regional coverage shall reserve 51% of annual broadcasting time for each channel or set of channels of the same provider for European works, excepting the time dedicated to news, sports events, games, advertisements, teletext services and teleshopping. In turn, 50% of this quota is reserved for European works in any of the Spanish languages.[156] This measure has been applied by the Catalan legislature in identical terms requiring that, at least 50% of that 50% (that is, 25%) should be reserved for works originally produced in any of the official languages of Catalonia. The law also requires that 50% of that 25% should be in Catalan[157] which means that 12.5% of the original works should be in this language.

As regards on-demand services, the providers of a programme catalogue must reserve 30% for European works. Half of this shall be in any of the official languages of Spain. [158]

4.4 · The case of official medium-sized languages and recognition of linguistic minorities

In **Hungary** the Media Services Act of 2010 sets minimum parity levels for broadcasting programmes produced in Hungary and the EU. In the case of television, under article 20, media services providers must allocate over half of their annual total transmission time of linear audiovisual me-

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156 General Audiovisual Communication Act (31 March, 2010), Art. 5(2). The Act also establishes a quota of advance financing. Television audiovisual media service providers with national or regional coverage shall make an annual contribution to the advance funding of the European production of cinematographic films, films and series for television, as well as documentaries, films and animation series, with 5% of earned revenues in the previous financial year according to their operating profit, for the channels broadcasting audiovisual products within seven years of their date of production. Public audiovisual media service providers with national or regional coverage shall contribute 6%. At least 60% of this funding requirement, and at least 75% in the case of publicly-owned audiovisual media service providers, must be devoted to cinema films of any genre, and 60% of this funding requirement must be devoted to the production in any of the official languages of Spain (Art. 5.3.4). This article was introduced by the Sustainable Economy Act of 4 March 2011.

157 Catalan Audiovisual Media Act (2005), Article 87(2).

158 Spanish General Audiovisual Communication Act (31 March) Art 5(2)2.

dia services to broadcasting European works and over one-third of its transmission time to broadcasting Hungarian works (which include works originally produced in Hungarian and also in the languages of any of the national or ethnic minorities recognized by the Republic of Hungary, provided their subject matter concerns the life or culture of that given minority).[159] The quota for independent producers is at least 10% of annual transmission time, and at least 8% for those broadcasting independent productions of Hungarian works. The law, however, envisages exceptions to the content/language quota.[160] The percentages are higher for public media services providers (60% for European works and 50% for Hungarian works).[161]

In linear radio media services, at least 35% of the transmission time dedicated to broadcasting music must be allocated to broadcasting Hungarian works.[162]

The Hungarian Media Act enumerates the objectives of public media service including the following: '[t]o support, sustain and enrich national, community and European identity, culture and the Hungarian language' and also '[t]o satisfy the media related needs of national and ethnic minorities, religious communities and other communities, present their culture, support and sustain the mother tongues of national and ethnic minorities.'[163] Media Service Providers 'with significant influence' must meet the following obligations of public interest including '[e]nsur[ing] in the course of all of its media services transmitted by digital media service distribution, that at least one quarter of the cinematographic works and film series originally produced in a language other than Hungarian, broadcast between 7:00 p.m. and 11:00 p.m., shall be available in their original language, with Hungarian subtitles, including programmes starting before 11:00 p.m. but ending later.'[164]

The Hungarian Media Act recognizes that '[a]ll national and ethnic minorities recognized by the Republic of Hungary are entitled to support

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159 Act CLXXXV of 2010 on Media Services and Mass Media, Article 20(1); Article 203 defines what Hungarian *works* means.

160 See article 22 of the Act on Media Services and Mass Media, 2010.

161 Act on Media Services and Mass Media, Article 20(3). Public media service providers must allocate 30% to the independent productions, and 25% for Hungarian independent productions.

162 Act on Media Services and Mass Media, Article 21(1).

163 Act on Media Services and Mass Media, Article 83.b) and e).

164 Act on Media Services and Mass Media, Article 38(3).

and sustain their culture and mother tongue, and to be regularly informed in their mother tongue by way of separate programmes aired by public service media.'[165] This responsibility must be fulfilled by the public media service provider via national media services or, in view of the geographic location of the national or ethnic minority, via local services by airing programmes answering the needs of the national or ethnic minority in question, or via audiovisual media services using subtitling or broadcasting in multiple languages, as required.

Finally, on-demand audiovisual media services have to offer Hungarian works over one-quarter of the total sum of the length of the programmes made available by them.[166]

4.5 · Other cases in which the use of languages is compulsory

Apart from the above-mentioned cases in many EU Member States, broadcasting is under a general obligation to use the official language.

a) In **Greece** the Concentration and Licensing of Mass Media Act of 2007 establishes that the main broadcasting language for radio and television programs shall be Greek.[167] The Legal Status of Private Television and Local Radio Act states that broadcasters are obliged to broadcast at least 25% of their transmission time, excluding news, sports, games, advertising or teletext services for original works produced in Greek language.[168] Providers of pay-radio and television services are under the same obligation. Finally, in Greece, broadcasters are also obliged to devote 1.5% cent of their yearly income (after taxes) for the production or co-production of cinematographic movies (lasting at least 70 minutes) for the big screen.[169]

b) In **the Netherlands,** 40% of material broadcast by private television broadcasters must be in Dutch or Frisian.[170]

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165 Act on Media Services and Mass Media, Article 99(1).

166 Act on Media Services and Mass Media, Article 20(2).

167 Concentration and Licensing of Mass Media Enterprises and other Provisions Act, Article 6 paragraph 13, and Article 8 paragraph 13 (2007).

168 Article 3 (18) of the Legal Status of Private Television and Local Radio Act, Regulation of Issues Related to Radio and Television Market (1995, revised 2007).

169 Article 3(8) of the 1989 Act.

170 Article 52 (l) of the Media Decree (Bulletin of Acts and Decrees of the Kingdom of the Netherlands (Staatsblad van het Koninkrijk der Nederlanden) 1987, 573, as amended).

c) In **Bulgaria,** radio and television broadcasts must be in Bulgarian, except when the programmes have an educational objective, target Bulgarian citizens whose mother tongue is not Bulgarian, when programmes are designated for listeners or viewers from abroad, and when programmes are retransmitted.[171] The national providers of audiovisual services are required to support the development and dissemination of the Bulgarian language and culture as well as those of citizens of other ethnic backgrounds.[172]

d) In **Slovenia,** Article 11 of the Constitution grants official-language status to the Slovene language and, in some parts of Slovenia, to Italian and Hungarian as second official languages. According to the Electronic Communications Act, '[p]rogrammes… must be in the Slovene language.'[173] Publishers founded and registered in the Republic of Slovenia must disseminate programmes in Slovene, or must translate programmes into Slovene in an appropriate manner, unless they are primarily intended for readers, listeners or viewers from any other language group.[174] In addition, the broadcaster of television programme services must endeavour to see that a significant proportion of the annual transmission time comprises Slovenian audio-visual works (which include works produced originally in Slovene or works intended for the Hungarian and Italian ethnic communities in the language thereof).[175] Slovenian audio-visual works must account for at least two per cent of the annual transmission time of each one of a broadcaster's television programme services. The broadcaster must increase the proportion of these works each year in comparison with the proportion of annual transmission time in the previous year, until it reaches 5% of the annual transmission time. The public broadcasting company must devote at least 25% of the annual transmission time to Slovenian audio-visual works.[176] Finally, the law establishes sanctions in cases of violation of the rule to disseminate programme in

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171 Amendment of the Radio and Television Act (Official Journal: Държавен вестник, number 12) February 8, 2010, Article 12.

172 *Ibid*. Article 6(3).

173 Electronic Communications Act (Official Gazette of the Republic of Slovenia no. 13/07-UPB1 and 102/07-ZDRad), Article 5(1).

174 Exemptions are recognized in case of programmes intended for national minorities (article 5(7)), educational programmes (5.5) and also for reasons of the immediacy, directness and authenticity of informing the public (5.8).

175 Electronic Communications Act, Article 68(1).

176 Electronic Communications Act, Article 92(2).

Slovene, programmes without a suitable Slovene translation, or advertisements in Slovene or in a Slovene translation.

e) In **Portugal**, as a general rule, broadcasts must be primarily in Portuguese or subtitled in Portuguese (exceptions are allowed when programmes are intended to satisfy particular information needs, educational purposes or when programmes target immigrant communities).[177] In addition, television services with national coverage should devote at least 50% of transmission time to original Portuguese-language productions.[178]

f) In **Sweden,** more than half of the annual broadcasting time must be taken up by programmes of European origin and, in addition, unless there are special grounds militating against it, broadcasters shall include a substantial degree of Swedish-language programmes, programmes with artists active in Sweden and works of creators and originators active in Sweden.[179] Sound radio programmes aired under a government licence shall contain a substantial extent of Swedish-language programmes, programmes with artist active in Sweden and works of creators and originators active in Sweden.[180] Broadcasting licences of the public service broadcasting companies stipulate that they are obliged to attend to the interests of linguistic minorities.[181]

5 · Final reflections

The main instruments used by European national legislators in order to defend and promote the medium-sized languages in media and cinema

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177 Lei n.º 8/2011, de 11 de Abril, Procede à 1.ª alteração à Lei da Televisão, aprovada pela Lei n.º 27/2007, de 30 de Julho, à 12.ª alteração ao Código da Publicidade, aprovado pelo Decreto — Lei n.º 330/90, de 23 de Outubro, e à 1.ª alteração à Lei n.º 8/2007, de 14 de Fevereiro, que procede à reestruturação da concessionária do serviço público de rádio e de televisão, transpondo a Directiva n.º 2007/65/CE, do Parlamento Europeu e do Conselho, de 11 de Dezembro, Article 44(1).

178 *Ibid*. Article 44(2).

179 The Swedish Radio and Television Act of 17 June 2010 (Official Journal: Svensk författningssamling 2010/696), Chapter 5(2).

180 The Swedish Radio and Television Act, 2010, Chapter 14(6).

181 The Swedish Radio and Television Act, 2010, Chapter 11(3).

are linguistic obligations in broadcasting and distribution, language quotas, requirements to produce programmes in national languages and compulsory investment obligations for audiovisual works in national languages. The objective of this language policy is aimed in some cases at defend the national languages against the pressure exerted on them by international languages, and in other cases to defend medium-sized official languages against the pressure exerted by State languages in the media and cinema environment of the country.

The national legislation to protect medium-sized languages depends on various internal and external factors. The policy of protecting medium-sized languages in the audiovisual sector is framed inside two types of limits: supranational determinants established by international law for the protection of human rights and minorities (with a bottom-up effect on medium-sized languages); and by the European Union framework of liberalization and partial harmonization of the audiovisual services market (with a top-down effect on national regulation). This latter regulation contains some expedients on which an internal policy could be based on in order to guarantee the linguistic identity of medium-sized linguistic communities, but it is not unlimited. Supranational regulations will affect all languages equally, as they do not assume the size of linguistic communities as a reference, nor do they assume the concept of linguistic community, although the impact of supranational legislation on linguistic communities may differ depending on the size and relative position of each language.

National systems for guaranteeing the linguistic identity of linguistic communities and linguistic diversity also depend on various factors. Among these factors are the media landscape, the levels of media concentration, the public control or supervision over the media, the influence of the foreign language audiovisual services in the national market, and the recognition of internal language diversity (or language minorities). In any case, linguistic policy in the audiovisual sector will be mainly determined by the specific relations of contact between the languages in each State.

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d'Estudis
Autonòmics
82

In a State populated by different linguistic communities, the relations between the languages can be described using the concepts of majority language and minority language. In a globalized world, the relation between languages is ever more complex and new concepts are required to understand it. In this setting, the concepts of medium-sized language community (MSLC) and medium-sized language (MSL) are useful and help to identify issues which otherwise would pass unnoticed.

What are the challenges facing MSLCs in their attempts to safeguard their languages? What legal instruments do they have at their disposal? These are two of the questions that this book aims to answer. It approaches them from the perspective of the world of the law, or more precisely from that of the area of language rights. The wide variety of perspectives applied in the different studies (Case studies, the International context, and Sectors) allows a much more thorough analysis than one focusing only on specific communities, which would be unable to do justice to the range of problems and challenges facing MSLs in today's globalized world. To achieve a fuller vision, studies of key sectors and a keen awareness of the international dimension are mandatory.

In summary, the book offers an in-depth reflection on the current challenges facing MSLCs and their languages and helps to define the legal measures that can and should be adopted in each context.