# International Legislation and the Basque Language

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*Artikulu honetan, euskararen biziraupenari eta sustapenari nazioarteko erakundeek emandako laguntza aztertzen da. Nazioarteko araudiaren ezaugarriei eta hedadurari buruzko azterketan oinarrituta, hiru babes-paradigma aplikatzen zaizkio euskarari: giza eskubideena, gutxiengoena eta hizkuntza-aniztasunarena. Azkenik, nazioarteko legeriaren potentzialtasunen eta mugen balantzea egiten da.*

*Giltza-Hitzak: Nazioarteko Zuzenbidea. Giza Eskubideak. Hizkuntza-gutxiengoak. Hizkuntza-aniztasuna. Europako Kontseilua.*

*En este artículo se analiza la contribución de las instancias internacionales a la preservación y promoción del euskera. A partir del examen de las características y el alcance de la normativa internacional, se aplican al euskera tres paradigmas de protección: los derechos humanos, las minorías y la diversidad lingüística. Por último, se hace balance de las potencialidades y límites de la legislación internacional.*

*Palabras Clave: Derecho internacional. Derechos Humanos. Minorías lingüísticas. Diversidad lingüística. Consejo de Europa.*

*Cet article analyse la contribution des instances internationales à la préservation et à la promotion de l'euskara. À partir de l'étude des caractéristiques et de la portée de la normative internationale, trois paradigmes de protection sont appliqués à l'euskara: les droits de l'homme, les minorités et la diversité linguistique. Avec, pour terminer, un bilan des potentialités et des limites de la législation internationale.*

*Mots-Clé : Droit International. Droits de l'Homme. Minorités linguistiques. Diversité linguistique. Conseil de l'Europe.*

## INTRODUCTION

The United Nations proclaimed 2008 to be the International Year of Languages.[1] The Resolution approved by the General Assembly states that genuine multilingualism "promotes unity in diversity and international understanding" and urges the member states and the UN Secretary to pursue a means of "promoting, protecting and preserving diversity of languages and cultures globally". At present, UNESCO estimates that close to 6,000 languages are spoken in the world today.[2] However, over the last few decades the linguistic substitution processes are accelerating as a result of the impact that economic and technological globalization, on the one hand, and mass migratory movements on the other, have on the always difficult balance between the coexistence of different languages.

The Basque language represents an outstanding contribution to global linguistic heritage. It is one of the few languages of uncertain and oldest origin, which, linguistically speaking is not related to the seventeen large families in which almost all the languages of mankind are grouped. From the sociolinguistic perspective, the situation of *Euskara* (the Basque language) as regards the number of speakers and areas of use does not differ greatly from some of the official languages of the European Union. However, its condition as a non-state language and the high level of legal-political fragmentation of its territorial area are aspects that weaken its status. This emphasizes the importance of the international dimension of protection, which positively complements and conditions the state and sub-state action of recognition and protection of the Basque language.

This article reflects on this contribution from international instances to the preservation and promotion of *Euskara*. First, we will analyse the characteristics and general scope of international regulations on languages. We will then apply the three main protection paradigms identifiable at international level to the Basque language: these are human rights, minorities and linguistic diversity. And finally, we will assess the potentialities and the limitations of international law in tackling some of the challenges facing the Basque-speaking linguistic community at this time.

## GENERAL CHARACTERISTICS OF INTERNATIONAL LEGISLATION ON LANGUAGES

International law has been consolidated as one of the mainstays of the regime of languages and linguistic minority communities. The interest in languages shown by international instances is nothing new, and it dates back to experiences in the protection of linguistic minorities in the framework of the Soci-

1. Resolution 61/266. Multilingualism, approved by the 96th plenary session of the General Assembly, on 16th May 2007.

2. Stephen A. Wurm (ed.), *Atlas of the World's Languages in Danger of Disappearing* by the 96th plenary session of the General Assembly, on 16th May 2007., UNESCO, 2001.

ety of Nations (1919-1945). Since its creation in 1945, the UN aimed to redirect linguistic matters towards the human rights protection model. However, this focus proved to be insufficient and, particularly from the 1990s, there was a proliferation of new international instruments regarding the linguistic rights of minorities and the protection of linguistic diversity.

This growing interest shown by international organizations of universal and European scope in different dimensions of linguistic reality has given rise to an international doctrine and regulations that are increasingly more widespread and recognized. Their general characteristics can be demonstrated via the following questions: What are the current focuses of international legislation on linguistic material? What is the general scope of the international instruments in force? And, finally, what position do the two state bodies of France and Spain that currently include the Basque Country[3] adopt in view of this international framework?

It is necessary to observe that languages are not usually subjected to independent treatment in most international instruments. Indeed, their protection is normally directed via the protection of other protection objects. A general view of the international rule of law enables the identification of three great paradigms of protection applicable to the idiomatic terrain:[4] Firstly, human rights, via the formulation of linguistic rights or the identification of linguistic content implicit in other rights; secondly, the protection of minorities, and in particular those of a linguistic and national nature; and thirdly, the protection of linguistic diversity, of which the content is linked at universal level with the diversity of cultural expressions, and at a European level with the protection of regional or minority languages.[5]

The coexistence of a plurality of international and European protection systems is a second factor that must be taken into account. Each of the current international organizations can present an individual approach to the linguistic phenomenon, conditioned by its own aims or objectives. In this way, in systems of universal scope, the UN has traditionally subsumed the linguistic matter in the protection of human rights;[6] however, more recently it has developed the perspective regarding minorities.[7] For its part, the action carried out by UNESCO pre-

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3. In this article, I will use the term "Basque Country" to refer to the seven territories where the Basque language is spoken. Fom a cultural perspective, the term "Euskal Herria" is also used and refers to a European space or cultural region, located on both sides of the Pyrenees, which includes Basque-speaking territories from the Spanish and French states.

4. Cf. Eva Pons Parera, "Los derechos lingüísticos en el ámbito internacional y comunitario europeo", in J. M. Pérez Fernández, *Estudios sobre el estatuto jurídico de las lenguas en España,* Atelier, Barcelona, 2007, p. 65 onwards.

5. In fact, the three paradigms are not exclusive: at times they interrelate and reinforce each other (in this way, when the link between the protection of minorities and human rights is highlighted), whilst at other times they can oppose or neutralize each other (e.g. when the states make use of the paradigm of diversity to attempt to elude collective rights).

6. *International Covenant on Civil and Political Right*s of 1966 (ICCPR), and *International Covenant on Economic, Social and Cultural Right*s of 1966 (ICESCR).

7. *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* of 1992.

dominantly covers the protection of linguistic and cultural diversity.[8] In the European regional system, the Council of Europe displays more extensive and complete actions, which respond to the triple outline given: human rights,[9] the protection of minorities,[10] and the safeguarding of linguistic diversity.[11] In addition, the Organization for Security and Cooperation in Europe (OSCE) has intervened in the linguistic field, especially since the creation in 1992 of the High Commissioner on National Minorities.[12]

The independent or non-hierarchical action of the above-mentioned organizations can introduce a certain degree of lack of definition or ambiguity in the formulation of linguistic rights. However, it is necessary to highlight the interconnection and complementary nature of the protective action developed by different organizations which have contributed to reinforcing the international profile of linguistic rights, particularly over the last few years.

A third perspective to consider is that regarding the scope of international instruments and the type of link that arises from these to the states. On this subject, it is necessary to warn of the lack of a multilateral treaty of universal scope which has the specific objective of protecting linguistic rights. The Council of Europe, the leading institution in formalizing linguistic dispositions in legally binding multilateral instruments, together with the jurisdictional guarantee of the ECHR and its protocols, provides greater efficiency for its action. Diversely, in the framework of the UN and UNESCO, certain linguistic rights are protected via international treaties on human rights;[13] however, a significant part of the international doctrine on linguistic matters is included in non-binding documents and resolutions, known as *soft law*, with an indicative value for the states.

The stances taken by the states that share the territories of the Basque Country in view of this international legislation differ. The Kingdom of Spain includes in its Constitution (SC) internal linguistic pluralism, by recognizing, along side Spanish, the state's official language, the presence of other "Spanish languages", which will also be declared official by the statutes of autonomy of the autonomous communities (Art. 3 SC).[14] This constitutional treatment offers a suitable base for the reception of the right projected from the international organizations. In this

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8. *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* of 2005.

9. *European Convention on Human Rights*, 1950 (ECHR) and its protocols.

10. *Framework-Convention for the Protection of National Minorities,* 1995 (FCPNM).

11. *European Charter for Regional or Minority Languages*, 1992 (ECRML).

12. *The Hague Recommendations Regarding the Educational Rights of National Minorities*, 1996, and *The Oslo Recommendations on the Linguistic Rights of National Minorities*, 1998.

13. Among the latest ones, in the *Convention on the Rights of the Child*, 1989 (CRC), and in the *Convention against Discrimination in Education*, 1960.

14. In the Spanish system of political decentralization, the autonomous communities are substate entities equipped with legislative and executive institutions and the capacity to design and apply their own policies with their powers, which include their own language. The Statute of Autonomy is the founding standard and higher standard of the autonomic rule of law, although its final approval corresponds to the central state by means of Organic Law.

way, Spain has ratified the most relevant treaties of universal and European scope regarding linguistics, which are incorporated within its rule of law as an internal law (Art. 96 SC). The Spanish constitutional system also includes a clause, according to which the *Universal Declaration of Human Rights* (UDHR) and the ratified international treaties regarding human laws must be used to interpret the scope of fundamental laws recognized by the Constitution (Art. 10.2 SC). Problematic matters basically arise in the terrain of the application and materialization of international dispositions, particularly due to the risk that the state authorities tend to minimize the transforming potential of the internal rule of law.

The stance of the French Republic, however, is not comparable. This country maintains a traditional reserve in view of taking on international commitments regarding linguistic and minority laws. This results in France ignoring certain linguistic policy international standards which is particularly difficult to justify when the European Union Charter itself requires new member states to follow its rules on rights of cultural minorities for admission. More specifically, after signing the ECRML, the French Authorities expressly rejected the possibility of ratifying it alleging it to be contrary to the Constitution. However, the positive influence of international and European regulations appears to be behind the apprehensive opening up of French linguistic policy to regional languages. On 21 July, 2008, the French Parliament passed a constitutional reform that recognizes its regional languages as French cultural patrimony, although separately from the article that recognizes the French language as its official language.[15] These events point to an incipient policy of recognition of linguistic minorities in France, because in no way does it declare any official status to the different languages of the French state.

## HUMAN RIGHT TO USE THE BASQUE LANGUAGE

In a somewhat surprising way, in the preamble of the ECRML (the typical instrument of the paradigm of diversity) we find the most direct proclamation of the "inalienable right" to use a language in private and public life

> conforming to the principles embodied in the United Nations International Covenant on Civil and Political Rights, and according to the spirit of the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms.

In this way, it states the legal character of the right of the use of languages, protected by international texts. This right is rated as inalienable due to its connection with human rights, and it is not linked to the internal status of the official nature of languages, but rather it goes beyond it.

Legal doctrine has identified, with the principle of non-discrimination due to language, recognized by diverse international instruments,[16] the grounds of the

15. This is found in Article 75 which states "Les langues régionales appartiennent au patrimoine de la France."

16. Art. 2.1 UDHR, Art. 2.1 ICCPR and Art. 14 ECHR.

linguistic freedom enjoyed by everyone. According to its negative primary content, the interdiction of discrimination means the exclusion of all discriminatory treatment which implies the denial or deprivation of rights from using a specific language. It does not confer an autonomous protection to languages and linguistic rights, but rather a protection linked to exercising other rights recognized by the treaties. Along these lines, the UN Human Rights Committee states that the term "discrimination" refers to "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."[17] Therefore, it implies the need for equal treatment of individuals, without attending to a purpose of protecting differentiated identities. For this reason, it is a case of a minimum protection threshold, opposable against those actions or displays that stigmatize or give unfavorable treatment to certain people or groups due to the use or defence of a language.[18]

Beyond the reference to language in the framework of non-discrimination, the presence of explicit linguistic rights in the human rights instruments is quite small. The protection of linguistic rights is usually articulated indirectly, through the identification of linguistic content implicit in other human rights. That is, from extracting from the recognition of other human rights the guarantee of subjective linguistic positions.

Firstly, the right to use a language is protected by the right to hold opinions and freedom of expression.[19] The content of this freedom is projected not only on the content of the message, but also on the choice of the means or language of expression. The idiomatic dimension of the freedom of expression is not conceived in absolute terms, but rather it can be limited mainly in virtue of the attribution of a constitutional or legal status to certain languages. In such a context, the use of one or more official languages can be prescribed by internal rules of law in public spheres and, under certain conditions, in private spheres. In this way, the status of the official nature of *Euskara* in the community of the Basque Country and in part of the territory of Navarre legitimizes the obligatory nature of its use in the public service and in education, as well as the requirements for linguistic qualification for public agents. In the same way, constrictive linguistic interventions in the private sphere are allowed, as long as they meet the conditions required on the limits to freedom of expression.[20]

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17. *Human Rights Committee General Comment Number 18: Non-discrimination: 10/11/89,* paragraph 7.

18. The interpretation of the principle of non-discrimination regarding the protection of minorities has evolved in order to derive from it certain positive obligations for the states (*infra* epigraph 4).

19. Art. 19 ICCPR and Art. 10 ECHR.

20. Human Rights Committee, *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, of 31st March 1993,* which considers Article 19 of the ICCPR applicable to language on commercial signs. More specifically, it requires that the limitations be established by law, that they pursue any of the objectives listed in Art. 19.3. *a* and *b* of the ICCPR and that they are necessary in order to achieve the legitimate purpose established (in the case, in order to protect the rights of the French minority in Canada it is not necessary to prohibit commercial signs in English).

On the other hand, the possibilities of limiting freedom of linguistic expression are drastically reduced when their privacy, family, home or correspondence is affected.[21] In the European sphere, this right tends to be conceived at this time in quite broad terms, which reach the sphere of the self-determination of the individual which is deemed necessary in order to lead a decent life.[22] In this way, the courts have prevented the public authorities from conditioning the individual option in favor of a language when the linguistic use is set out in the sphere of private life. An example of this can be found in the Sentence by the Spanish Constitutional Court 201/1997, of 25th November, in which the fundamental right to family privacy (Art. 18 SC) protects the power to use the Basque language by an inmate in a penitentiary institution in communications with their his or her family. The penitentiary authorities' powers of control, linked to the individual's situation of special subjection, are not sufficient elements, in the Court's opinion, to legitimize a general restriction of idiomatic freedom, which must be respected.

Another aspect that has been recognized as content of the right to private life is the right to choose a name, without idiomatic restrictions. The European Court of Human Rights states that public interest to protect in the area of naming must not prevail over the parents' desire to choose a name for their child in another language that is not the official language.[23] This doctrine goes beyond the traditional orientation of international texts regarding the right to have a name,[24] where the main legal purpose protected is the identification of a person, whereby the imposition of legal restrictions justified by reasons of public interest is expressly admitted. In Spain, during Franco's dictatorship, people were forced to translate their names to Spanish, whereby the authorities justified refusing to register a child's name in the Register in *Euskara* as it entailed a separatist aim.[25]

It impossible to ignore the fact that freedom of expression normally takes on its meaning when the individual is placed in a certain social context. The impediment by the authorities of the use of a certain language in a framework of collective exercising of the freedom of expression will normally fall on the exercising

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21. Art. 17 ICCPR and Art. 8 ECHR.

22. For all, European Court of Human Rights Sentence *Evans v. The U.K,* Sec. 4a., 10th March 2006 and, on the same case, the European Court of Human Rights Sentence, Court Room, 10th April 2007.

23. European Court of Human Rights Sentence *Johansson v. Finland,* Sec. 4a., 6th September 200. In the case, the parents wanted to name their son "Axl Mick", which was rejected by those in charge of the Register. Regarding the conflict between public and privates interests, the European Court of Human Rights accepts that: "the preservation of a national name practice may be considered part and parcel of that aim and therefore in the public interest". However, insofar as the name does not harm the child and "had already gained acceptance in Finland, and it has not been contended that this has had any negative consequences for the preservation of the cultural and linguistic identity of Finland", the violation of Article 8 of the ECHR is observed.

24. Art. 24.2 ICCPR and Art. 7 CRC.

25. The progressive liberalization of Spanish legislation in this matter has also reached the linguistic terrain (Law of the Register of Births, Deaths and Marriages of 8th June 1957, which has been subjected to successive modifications, the last in 2007).

of rights (e.g. political freedoms of assembly and association[26] or the religious freedom, which can protect the right to choose the language when professing or practicing the religion, whether individually or in a community with others).

A linguistic right specified by international legislation is that everyone who is arrested or accused of a crime shall be informed, in a language which he or she understands, of the reasons for his arrest and the nature and cause of the accusation against him, and have the free assistance of an interpreter if he cannot understand the language of the authorities.[27] It is an individual human right linked to the fact that the person seeking justice or the detainee does not speak or understand the language use by the state authorities. Diversely, this negative condition is not required in the framework of the recognition of minorities' rights of linguistic use before the administration of justice.[28] Recently, a central Spanish court has recognized, with the backing of international regulations, the right of defendants of Spanish nationality to testify in their mother tongue in criminal proceedings -even if these proceedings are outside of the territories where the language is official- regardless of whether they understand the language of the state.[29]

Also regarding the right to education, certain explicit linguistic contents are internationally proclaimed. However, the international instruments on human rights which refer to education in minority languages are still somewhat vague and general. As a general principle, the *Convention on the Rights of the Child*, approved in 1989, establishes that education should be aimed at instilling into the child the respect"for his or her own cultural identity, language and values" (Art. 29.1. c). This clause discredits the homogenizing linguistic-school policies and models, which ignore or underestimate the child's language. However, positive obligations for the states only reach greater expression in the instruments on the protection of minorities or minority languages.

In short, the outline of protection based on individual human rights enables the identification of certain minimum standards. Their efficiency regarding civil liberties may receive greater protection in those territories where *Euskara* does not have an internal legal statute. However, in any case, its general influence on the status and use of languages is necessarily limited, as it does not cover their collective dimension or specify the type of positive measures required to preserve the individual or group idiomatic identity.

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26. Arts. 21 and 22 ICCPR and Art. 11 ECHR.

27. Art. 9 UDHR, arts. 9.2 and 14.3 ICCPR, Art. 5.2 and 6.3, sections *a* and *e*, ECHR.

28. Art. 10.3 FCPNM and Art. 9 ECRML.

29. Sentence of the *Audiencia Nacional*, *Sala penal*, 24th April 2008. In the case judged by the Sentence the right of the accused to use the Catalan language, which is only the official language in the territory of certain autonomous communities, before a central judicial body (previously, this right had been recognized *de facto* by the same Court, by providing an interpreter for those who opted to use *Euskara*).

## PROTECTION OF BASQUE-LANGUAGE SPEAKERS AS A MINORITY

As already mentioned, language is an essentially collective phenomenon, which not only serves the purposes of communication but also of the safeguarding and creation of collective identities. For this reason, the link from linguistic rights to minority protection systems is of special relevance.

On examining the possible projections of this paradigm on *Euskara*, it is necessary to take into consideration that certain basic aspects of the minority protection systems are still vague. To begin with, there is no agree upon definition at the international or European levels of what constitutes a "minority language." Regarding this issue, we should utilize the most precise concept which identifies *linguistic minorities*,[30] a concept that takes on greater precision when connected with the protection of *regional or minority languages*[31]; whilst at the European level the reference to *national minorities* prevails, in which the linguistic element may not be a determining factor of the particular group identity, even if it is used as a defining target element.[32]

In general terms, the linguistic rights recognized for minorities are an *extra* as regards those sanctioned by the human rights instruments. However, the formulation of international texts tends to be quite open as regards the positive obligations of the states to satisfy the rights stated. In addition, although binding rules exist at the heart of the UN and the Council of Europe, the legal protection of minorities is weakened as it is included, to a certain extent, in non-binding dispositions.

The core of the international legal status of minorities is Article 27 of the ICCPR, which states:

> 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.

From this disposition, the international action for the protection of minority groups is conceived as a dimension of human rights, basically focussing on their protection from the perspective of non-discrimination.[33]

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30. This concept takes on even greater precision if it is connected to the protection of regional and minority languages (Vid. *infra* epígrafe 5).

31. Vid. *infra* epigraph 5.

32. For instance, the Preamble of the FCPNM mentions the respect of the "ethnic, cultural, linguistic and religious identity of each person belonging to a national minority".

33. Francesco Capotorti pointed out in his now classic study on the subject that "the struggle against discrimination, on the one hand, and the application of special measures aimed at the protection of minorities, on the other, are just two aspects of the same problem, that is, defending human rights." Cf. *on the Rights of Persons Belonging to. Ethnic, Religious and Linguistic Minorities,* Human Rights Series 5, New Cork, United Nations.

The content of the principle of non-discrimination in this scope has been specified by the UN Human Rights Committee, distinguishing Article 27 from the guarantees established in Articles 2.1 and in 26 (principle of equality before the law), which together do refer to the extent that it "applies to all individuals within the territory or under the jurisdiction of the state whether or not those persons belong to a minority".[34] Without detriment to its negative terminology formulation ("shall not be denied"), Article 27 of the ICCPR does not only entail the public authorities' obligation to refrain from establishing unjustified differences, but it also includes a sense of positive equality in reference to the protection and promotion of the linguistic and cultural identity of the minority.[35]

More specifically, from the above-mentioned Article 27 of the ICCPR the right has been derived to the individual and not only the collective for the use of the actual language, in private and in public, which, according to the Human Rights Committee "should not be confused with other personal rights conferred on one and all under the Covenant". And although the individual of the protected linguistic rights is sustained, it is recognized that these in turn depend on the minority group's capacity to preserve their language, to the extent that

> measures by states may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language (...) in community with the other members of the group (...) as long as those measures are aimed at correcting conditions which prevent or impair the enjoyment of the rights guaranteed under article 27, they may constitute a legitimate differentiation under the Covenant, provided that they are based on reasonable and objective criteria.[36]

According to the Human Rights Committee, the presence of minorities for the purposes of the application of Article 27 of the ICCPR does not depend upon their recognition by the state and that the applicability of the protective measures set out is general in all those states in which minorities exist. The characterization of the precept as a consuetudinary right involves the impossibility of submitting it to reservations by the states. The matter was raised by the French Republic, which alleged the lack of recognition of minorities in its territory, however, the Committee was clear when ratifying the French state's adhesion to the Covenant, regarding not refusing minorities the use of their own language. This gives the precept an interesting projection regarding the protection of language rights over the territories where the Basque language is used, but no recognition of its official status exists.

The international agreements approved during the 1990's in the new geopolitical scene arising after the disappearance of the East-West blocks, contribute to specifying the areas of projection of the right to use a language and the posi-

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34. *Human Rights Committee General Comment Number 23, on Article 27*, 8th April 1994.

35. In the Council of Europe, a similar meaning can be given to the principle of non-discrimination, recognized as an autonomous right, in the framework of Protocol Number 12 to the ECHR (in force since 2005).

36. *Human Rights Committee General Comment Number 23, on Article 27*, 8th April 1994.

tive measures that the states must apply to guarantee they are exercised by the members of minorities. The participation of the people in the decision making regarding the adoption of policy at the state and regional levels is highlighted. [37]

As regards the right to use the language in the public sphere, it directly protects the linguistic interactions that take place in the public (or external) space, among people belonging to the minority or in the presence of other people, through the circulation of publications, posters or commercial signs, for example, via private media sources or in the framework of meetings.[38] On the other hand, the use of the minority language is not assured in dealings with the public authorities -particularly where the language lacks internal legal recognition- and is usually conditioned by a demand and a significant number of speakers.[39] With regard to education, the presence of the minority language at school is doubly guaranteed as an alternative by enabling the pupils to learn the language or by establishing its vehicular use in teaching. Some agreement texts also include a right for the minority to create private schools in which their own language is taught or used.[40] Other rights to use the language of members of national minorities are projected in the following areas: People's first names and surnames; practicing religion and religious events for civil purposes; setting up of non-governmental associations and organizations; the creation of own media sources and the presence in publicly-owned media; the private company; independent state institutions (Ombudsman or similar); and penitentiary institutions.[41]

The French Republic, seeking protection in the absence of an internationally accepted minority concept, maintains the lack of a presence of minorities in its territory. Based on this argument, founded on an interpretation of certain constitutional principles, the French authorities have refused to subscribe to the Framework Convention for the Protection of National Minorities. However, despite the fact that the states can condition the application and execution of international legislation on minorities, this does not mean that they can remove themselves from the standards formulated in the framework of the UN and the Council of Europe from the principle of non-discrimination. Therefore, the Basque-speaking linguistic minority present in this territory must be recognized with the right to

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37. Art. 2.3 of the UN Declaration on Minorities

38. Art. 2.1 of the UN Declaration on Minorities and, in more detail, Art. 9.1 FCPNM regarding the freedom of expression (which comprises "freedom to hold opinions and to receive and impart information and ideas in the minority language, without interference by public authorities"), Art. 10.1 ("right to use freely and without interference his or her minority language, in private and in public, orally and in writing") and Art. 11.2 (right to display "inscriptions and other information of a private nature visible to the public") and 3 ("traditional local names, street names and other topographical indications intended for the public also in the minority language", conditioned by the demand and presence of a considerable number of people).

39. Art. 10.2 of the FCPNM and *Oslo Recommendations regarding the linguistic rights of national minorities* Numbers 14 and 15.

40. Art. 30 CRC, Art. 14 of the FCPNM and Art. 4 of the UN Declaration on Minorities.

41. Besides the instruments mentioned in previous notes, vid. in the framework of the OSCE *Helsinki Final Act*, 1975 and *Guidelines on the use of minority languages in the broadcast media* (2003).

practice and preserve their language. This entails the adoption of positive measures by the public authorities, in line with the demands formulated on the subject, and the presence of a significant number of speakers of the language.

In the case of the Kingdom of Spain, the official status of the Basque language in most of the territory in which it is used reduces the potential virtual nature of this protective focus.[42] However, a relevant conceptual matter is the identification of the existing national minorities for the purposes of the commitments assumed on ratifying the Framework Convention for the Protection of National Minorities.[43]

The Spanish state's response was as follows: the only one included in the Convention is the Gypsy community – despite acknowledging that it does not constitute a national minority. The Council of Europe demanded an explanation of the role of language as a fundamental element of the identity of "peoples of Spain" or "nationalities" referred to in the Spanish Constitution of 1978 (Preamble and Art. 2), for the purposes of their inclusion in the Convention. The Spanish state, seeking protection in the absence of a definition of the term *national minority* in the Convention, redirected the above-mentioned constitutional concepts to the autonomic articulation of the state into autonomous communities, stressing their inclusion in the "Spanish nation".[44] Indeed, although the official status of the Basque language in the Basque Autonomous Community and in parts of Navarre grants some superior linguistic guarantees, the recognition as national minorities would enable the action of the Spanish state to be classified by the general principles of the FCPNM, by subjecting to international scrutiny the treatment the minority linguistic groups receive. An example of this is the matter raised by the Consultative Committee responsible for supervising compliance with the FCPNM on the proportionality of the Spanish authorities' measure in 2003 closing down of the Euskara language newspaper "Euskaldunon Egunkaria".[45]

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42. However, we could raise its applicability to the situation of the Basque language in the so-called non-Basque-speaking area of Navarre, where it does not receive an official status, particularly when associating the regime of linguistic minority to that of protection of regional or minority languages (*Infra* epigraph 5).

43. The Kingdom of Spain signed the Convention on 1st February 1995 and the instrument of ratification is dated 20th July of that same year.

44. In the Spanish state's reply it stated: "However, there is in any event in the Spanish legal-political reality a concept of a people as an entity as such, with differentiated characteristics of ethnicity, religion or identity (...) The populations of the various Autonomous Communities have in common the existence of historical-cultural and linguistic links, but there are no significant ethnic components. The languages of some Autonomous Communities enjoy specific constitutional protection, focused on their recognition as the "official language" along with Spanish in the area of that Autonomous Community and guaranteeing citizens the right to use it in all their relations with the public administrations in that territory, with specific protection covering both autonomous and state authorities. In linguistic terms, the Spanish state complies with the protection established in the European Charter of Regional and Minority Languages, duly signed and ratified by Spain" (Comments of the Government of Spain on the Opinion of the Advisory Committee on the Report on the Implementation of the Framework Convention for the Protection of National Minorities in Spain, CM(2004)6 Addendum, 10 June 2004).

45. Consultative Committee, *Opinion on Spain,* epigraph 53, Document ACFC/INF/OP/I(2004)004. Vid. http://www.coe.int

## THE BASQUE LANGUAGE AS PART OF EUROPEAN LINGUISTIC DIVERSITY

As already mentioned, in the 1990s international legislation incorporated new avenues on the linguistic matter, which were added to its traditional treatment linked to the protection of human rights and minorities. This extension of protected linguistic interests is set within the protection of cultural rights and languages as an expression of cultural heritage. The concepts of *linguistic and cultural diversity* take on greater relevance in this context.[46]

In the European framework, the most relevant instrument is the European Charter for Regional or Minority Languages (ECRML), approved in 1992 by the Council of Europe. Nowadays, the Charter is the only specific multilateral treaty on the protection of languages. Furthermore, it stands out when compared with other international instruments regarding the idiomatic subject due to the level of detail with which the positive measures to be adopted by the states are set, and also due to the design and dynamism of the international mechanisms for supervision and control provided. All of this gives the Charter significant opportunities regarding the protection of the Basque language.

The Charter's Preamble mentions the principles on which this legal system of protection are based as being on the one hand, the promotion of linguistic diversity in the European sphere; and, on the other, the principles of democracy and pluralism, which are associated with the activity to promote regional or minority languages. Furthermore, as already mentioned, the text assumes the principles derived from human rights instruments, from which the "inalienable right" to languages is extracted. The Charter does not establish collective rights for linguistic communities, but rather for the protection of European linguistic diversity, opening up new possibilities for the states to establish individual linguistic rights.[47]

The regional or minority languages (a conceptual distinction with no direct legal consequences) are defined as those that are "traditionally used within a given territory of a state by nationals of that state who form a group numerically smaller than the rest of the state's population" (Art. 1.a ECRML). The concept of historicity is applicable to the reality of the Basque language across the Basque Country. The delimitation of the territorial area is in line with the presence of a number of a specific language-speaking people justifying the adoption of the various protective and promotional measures provided for (Art. 1.b ECRML). And it does not only include that territory in which the regional language persists as the majority language, but rather it can be extended to other areas in which it has traditionally been installed and it has become a minority language,[48] as is the case in the so-called non-Basque-speaking area of Navarre or in the Northern Basque

46. In the UNESCO framework, the Convention on the Protection and Promotion of the Diversity of Cultural Expressions, 2005, was recently approved, which expressly protects cultural policy measures applied by the state authorities which aim to guarantee the presence of a certain language in cultural activities, goods and services (Art. 6).

47. *Explanatory Report,* paragraph 11. http://conventions.coe.int

48. *Explanatory Report*, paragraphs 59 and 60. http://conventions.coe.int

Country in the French state. The Basque language also meets the requirement that it is not the state language.

Without detriment to the possibility of objectively classifying the Basque language in the Charter's field of application, its protective efficiency is conditioned by its ratification by the states belonging to the Council of Europe. The Kingdom of Spain ratified this instrument in 2001, and, therefore, its rules are applicable and binding for the citizens and the administrative and court authorities.[49] The ratification formula used refers to the languages recognized in the Statutes of Autonomy of the autonomous communities and provides the application of two levels of protection to the Basque language: in the territories of the Basque Autonomous Community and the part of Foral Community of Navarre where the language is official, Part II is applied ("Objectives and principles", Art. 7), and the specific commitments taken on by Spain in the framework of Part III ("Education" -Art. 8-, "Judicial authorities" –Art. 9–, "Administrative authorities and public services -Art. 10-, "Media" –Art. 11–, "Cultural activities and facilities" –Art. 12–, "Economic and social life" –Art. 13–, "Transfrontier exchanges" –Art. 14–). In the rest of the community of Navarre, Part II is applied and "all those dispositions of Part III of the Charter that can be *reasonably* applied in accordance with the objectives and principles established in paragraph 7". This distinction is possible due to the structure of the Charter, which, from basic protection based on Article 7, enables the states to shape the commitments assumed in the framework of Part III, whilst respecting the pre-established minimum levels.[50]

In the area of objectives and principles (Article 7), the general commitment is made by the states to eliminate any restrictive measures, which have the objective of discouraging or endangering the use and development of regional and minority languages. The principle of non-discrimination is established in its positive sense by declaring that,

> The adoption of special measures in favor of regional or minority languages aimed at promoting equality between the users of these languages and the rest of the population, or which take due account of their specific conditions, is not considered to be an act of discrimination against the users of more widely-used languages (Art. 7.2).

These commitments affect the state's internal linguistic policy, with legislative and executive implications, by obliging it to review all those rules and decisions that place the Basque language in a disadvantaged position. Furthermore, the mandate is established to promote understanding among all linguistic groups,

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49. In Spain the ECRML, together with its declaration, was approved in the Congress of Deputies, practically unanimously, on 23rd November 2000, it was ratified on 9th April 2001 and published in the Official State Gazette (BOE) on 15th September 2001.

50. More specifically, the Kingdom of Spain ratified 69 paragraphs -from a total of 98- from Part III, placing it in the top level as regards the number and intensity of the commitments made.

whereby this is one of the more under developed aspects in the Spanish context as recognized by the state.[51]

Secondly, the Charter establishes the objective of a resolute action to promote regional or minority languages, their teaching and study at all stages, their use in public and private life, the maintenance and development of links between groups using a regional or minority language and other groups in the state employing a language used in identical or similar form and the promotion of appropriate types of transnational exchanges. In all these aspects, the linguistic affirmative action or promotion policies developed by the Basque Autonomous Community authorities are equipped with additional regulatory coverage. In the Foral Community of Navarre, the Charter can take on the reactive role against the interruption of the affirmative action language policies [52] to the extent that the political authorities are constrained to provide regular information about the measures adopted in favor of *Euskara*. In the same way, the objectives highlighted commit the central institutions of the Spanish state, thus denying the argument it has made to exclusively offload to the autonomous communities the responsibility of protecting languages other than Castilian.[53]

Thirdly, another of the important objectives in the Charter is

> the respect of the geographical area of each regional or minority language in order to ensure that existing or new administrative divisions do not constitute an obstacle to the promotion of the regional or minority language in question.

The legal-political fragmentation of the Basque-speaking linguistic area awards special interest to this provision. This way, in the autonomous Foral Community of Navarre, the internal administrative divisions created by the Foral Law for Basque Language -including a Basque-speaking area, mixed area, and non-Basque speaking area- has led in practice to a restriction of the linguistic rights linked to the official status of *Euskara* in the mixed area and to a situation of institutional neglect in the non-Basque area. The Council of Europe has highlighted the necessity of the commitments regarding Part III to be extended to the mixed area, thus reinforcing the legal protection of *Euskara*. As regards the non-Basque-speaking area, the Charter also encourages the development of a policy to promote the use and learning of the language, without the non-official status of *Euskara* being considered an

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51. Until now, two cycles of control have been completed for the application of the Charter, with the presentation of two reports by the Spanish State (the first presented in September 2002 and the second in May 2007) and the approval of two reports by the de del Council of Europe's Expert Committee (the first in April 2005 – which lead to the recommendations Council of Ministers of 29th September 2005- and the second –which was not available when this article was written- dated April 2008). Vid. http://coe.int

52. Cf. Xabier Arzoz, "Políticas lingüísticas actuales en las tierras del euskara", *Revista de Llengua i Dret,* Number. 47, 2008, p. 56 onwards.

53. This discourse, reiterated in the Spanish State's reports to the Council of Europe, could be questioned in virtue of Article 3.3 CE, which entrusts all public powers with the respect and protection of Spanish linguistic heritage.

obstacle to this.[54] An even more evident situation of a lack of protection of the Basque language is produced in the area of the Condado de Treviño, an enclave of the Community of Castile and Leon that is located inside of Araba, but which belongs administratively to the Community of Castile y León. The lack of recognition of this linguistic reality by the autonomous authorities, and their actions contrary to certain public uses of the language, do not appear to have a place in the Charter's principles.[55]

Together with the general matters highlighted, the control process for the application of the Charter by the Spanish state has enabled the Council of Europe to note certain shortcomings in the internal rule of law and in the actions of the public powers in order to guarantee compliance with the obligations of Part III. In order to illustrate this point we will highlight the following three spheres:

In the education sphere (Art. 8), the options chosen by the Spanish state do not directly consider the need for new legislative developments for the autonomous communities. However, in the unique case of Navarre, in its non-Basque-speaking area, the *Ley del Vascuence* states that teaching the language will be supported and, where appropriate, totally or partially financed by the public powers according to the demand.[56] The precept may contribute to the compliance with this legal provision, insofar as it requires a public activity for promotion aimed at guaranteeing the learning of the language,[57] and also incorporates a dimension of freedom which would prevent the authorization of educational institutions or centers from being denied, based on the reason of using the minority language.

Regarding judicial authorities (Art. 9) the contrast between the commitments made by the Spanish state and the provisions of the internal rule of law is more evident. The Council of Europe has noted that the compliance with the commitments required regarding *Euskara* in the Basque Country would require, among other measures: the modification of the state legal framework to ensure it remains clear that the judicial, legal, civil and administrative authorities of the Basque Country will carry out the procedures in said language on the request of any party involved in the process[58]; the formal guarantee of the defendant's right

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54. *Report of the Committee of Experts on the Charter* (2005), paragraphs 64 to 74.

55. The Spanish Supreme Court, in the Sentence of 2nd February 2005, established the legitimacy of the agreements of the Councils of Condado de Treviño and Puebla de Arganzón to promote the use of *Euskara* in the towns, which had been contested by the Regional Government of Castilla y León. The recent reform of this community's Statute of Autonomy does not mention the Basque language, despite having introduced references to Galician and *Leonés*.

56. Law of the Foral Community of Navarre Law 18/1986, of 15th December, of the Basque Language (Art. 26).

57. Iñaki Agirreazkuenaga Zigorraga, "La Carta Europea de la Lenguas Regionales o Minoritarias como derecho interno", in *Diversidad y convivencia lingüística. Dimensión europea, nacional y claves jurídicas para la normalización del Euskara,* University of the Basque Country-Regional Council of Guipúzcoa, Donostia, 2003 p. 119.

58. The basic regulations on this subject are established in Organic Law 6/1985, of 1st July, of the judicial authorities (Art. 231).

to use *Euskara* even though he or she speaks Spanish; and the necessary legal and practical measures to ensure that a percentage of those employed as legal authorities in public institutions have practical knowledge of the Basque language. The current situation, as observed by the Committee of Experts, makes it practically impossible for a trial to be carried out in *Euskara* in the Basque Country, and what is actually offered is the possibility of using the language with the help of translators and/or interpreters.[59] However, to this date, the Spanish state has not made the above-mentioned reforms, alleging the unity of the judicial authorities and the mobility of the staff of the judicial bodies as the reason for this.

Finally, the presence of the Basque-speaking community in two states highlights the importance of Article 14 of the Charter which states in the interests of regional or minority languages, to facilitate and/or promote cooperation across borders, in particular between regional and local authorities in whose territory the same language is used. In the same way, it encourages the states to apply existing bilateral agreements or to seek to conclude them in such a way as to foster these contacts. Despite the presence of the Spain-France Treaty for Cross-Border Cooperation, signed in Bayonne in 1995, its application to cooperate with linguistic matters is scarce.[60] However, since 1999, the Autonomous Community of the Basque Country has developed an active policy for collaboration and coordination with the institutions of the Northern Basque Country and the Autonomous Community of Navarre regarding linguistic policy. In February 2007, the Basque Government and the Public Office of the Basque Language (association of public interest created in France in 2004, which includes the French state, the Region, the Department and the local councils in a project for a linguistic policy in favor of *Euskara*) held a collaboration agreement, which configures the first framework for a stable relationship regarding this matter.

Despite having initially signed the Charter, the French Republic has explicitly rejected the possibility of ratifying it. Alleging the incompatibility of the Charter's prescriptions with the principles of indivisibility of the Republic, equality of the Law and unity of the French people, which the French Constitution establishes[61] (here we must point out that Article 5 of the Charter specifies that nothing contained in it may be interpreted as contrary to "the principle of the sovereignty territorial integrity of states"). Therefore, the Charter is not directly applicable to *Euskara* in the Northern Basque Country, although this does not deprive its provisions entirely of their effectiveness. Indeed, to the extent that the principle of protection of linguistic diversity is conceived as a supranational European princi-

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59. In this respect, the matter was raised before the Spanish Constitutional court of the possible breakdown of the official status of the Basque language (Art. 3.2 CE) and of the principle of immediacy during the evidence (Art. 24 CE) due to the need for an interpreter to be present in criminal proceedings (Ruling of the TC 166/2005, 19th April).

60. The Spanish State alleges that the lack recognition of the official status of *Euskara* in the French Department of Pyrénées Atlantiques does not facilitate these relations (Vid. *Segundo Informe periódico sobre la aplicación de la CELRM en España*, p. 493).

61. Decision of the *Conseil Constitutionnel* nº 99-412. See http://www.conseil-constitutionnel.fr/decisión/1999/94412/99412dc.htm.

ple (currently included in the Charter of Fundamental Rights of the European Union of 2000 and the Treaty of Lisbon of 2007), the Charter represents the expression of the European standard for protection of regional languages. Along these lines, particularly with regard to its hard core (Part II), the inspiring and guiding nature of the Charter must be stated as regards the eventual reform of France's internal linguistic regulation.[62]

## FINAL CONSIDERATION

The development reached by international regulations highlights the interest of this perspective to describe the legal regime covering the Basque language. Through the formulation of general standards that limit the action of the states and the interaction with state and sub-state rules of law, the international and European framework may positively influence the status and uses of *Euskara*, as a minority language with a territory subjected to important legal-political fragmentation.

The projection of human rights instruments and minorities takes on special relevance in situations of a lack of protection of the Basque language from internal rule of law, as an ultimate guarantee of the rights of the citizens and the weakest linguistic groups. In this regard, France's policies are of great interest as it is one of the European states most reluctant to recognize its internal linguistic diversity, including the use of Euskara. Its condition as a member of the international and European community entails the subjection to certain minimum standards of protection which in reality it is not implementing. Hopefully, these international standards may contribute to producing positive changes in the way regional or minority languages are considered in the Constitution and in law.

Due to its impact on the internal regulation of Member States of the European Union, we should highlight the *European Charter of Regional and Minority Languages.* The coming into effect of this Charter in Spain requires a reinterpretation of the scope of the legal regime of *Euskara* via its substantive principles and contents. From these we can deduce not only freedoms of use, but also more specific obligations for the public authorities to guarantee and bring into effect the linguistic rights in the regulated areas. Furthermore, the mechanism to ensure compliance by the states gives sub-state institutions and non-governmental organizations the right to voice an opinion, which gives this instrument a dimension as an open and dynamic process. Finally, as an expression of the supranational principle of respect for linguistic diversity, the Charter must act as an inspiration to any eventual reform of linguistic legislation in France.

In any case, the international standards cannot be trusted to resolve most of the legal-political matters that are raised in the process for the standardization

62. Cf. Iñigo Urrutia Libarona, *Derechos lingüísticos y Euskara en el sistema educativo,* Lete, Pamplona/Iruña, 2005, p. 279.

of the Basque language. Along these lines, it must reject certain attempts at an instrumentalization of human rights which aim to derive specific linguistic policies from these, without taking into account the crucial importance of the historical, political and social factors that operate in a particular context.[63] The progressive adaptation of the internal legal framework on *Euskara* and the constant desire of the political and social elite to protect and promote the language are basic factors in guaranteeing its vitality and current and future expansion.

63. Along these lines, "some commentators have pushed to strengthen these international standards and/or to reinterpret them (...) But it is doubtful that international law will ever be able to do more than specify the most minimal of standards." Cf. Will Kymlicka and Alan Patten, *Linguistic Rights and Political Theory,* Cambridge University Press, 2003, p. 34.