

Recognition of the Basque Language in EU Law: A Pending Issue?

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Europar Batasuneko hizkuntza-legedia eta Batasunaren politikak hizkuntza ez-estataletan eragindako ondorioak aztertzen ditu lanak. Europar Batasuna sortzeko prozesuan zehar, Estatu kideen (eta legegintza-boterea zuten eskualdeen) boterea EBko erakundeen esku geratu da. Erakunde horiek beraien legegintza- eta administrazio-botereak eta botere judizialak dituzte. EBren jardunak bi ondorio eragin ditu hizkuntzen egoeran: batetik, eleaniztasun integralak baztertuta utzi ditu hizkuntza ez-estatalak, eta bestetik, zirkulazio- eta mugimendu-askatasuna ere kaltegarria izan da hizkuntza ez-estatalentzat.

Giltza-Hitzak: Europako hizkuntza-legedia. Eremu urriko hizkuntzak. Hizkuntza-politikak. EBko hizkuntza-baldintzak.

El trabajo ofrece un análisis de la legislación de la Unión Europea en material lingüística y de los efectos de la política de la unión en las lenguas no estatales. El proceso constructor de la Unión Europea ha supuesto la transferencia de poder de los Estados miembros (y las Regiones con poder legislativo) a las instituciones de la UE, que tienen sus propios poderes legislativo, administrativo y judicial. El impacto de la UE sobre la situación de las lenguas es doble y supone, por un lado, operabilidad de un plurilingüismo integral aplicado con carácter excluyente con respecto a las lenguas no estatales y, por otro, el ejercicio de la libertad de circulación y movimiento, la cual perjudica a las lenguas no estatales.

Palabras Clave: Legislación lingüística europea. Lenguas minoritarias. Políticas lingüísticas. Requisitos lingüísticos de la UE.

Ce travail présente une analyse de la législation de l'Union Européenne en matière linguistique et la répercussion de la politique de l'Union sur les langues non nationales. Le processus de construction de l'Union Européenne a entraîné le transfert du pouvoir des États Membres (et des Régions à pouvoir législatif) aux institutions de l'UE, qui possèdent leurs propres pouvoirs législatif, administratif et judiciaire. L'impact de l'UE sur les langues est double : il implique, d'une part, l'opérabilité d'un plurilinguisme intégral d'application excluante pour les langues non nationales et, d'autre part, l'exercice de la liberté de circulation et de mouvement, au détriment des langues non nationales.

Mots-Clé : Législation linguistique européenne. Langues minoritaires. Politiques linguistiques. Exigences linguistiques de l'UE.

INTRODUCTION

In this brief contribution, I intend to explain the position of the Basque language, Euskara, in the European Union and the repercussions of European Community law on the protection and promotion of this language.¹ To do so I will present, firstly, the rules governing the languages of the institutions of the European Union, shown in two levels of institutional recognition: the status of languages of the Treaties and the status of official languages and working languages (section 2). Then we will see the regime in which the other historical and traditional European languages spoken in Member States today have fallen into, including the Basque language (section 3). Thirdly, I propose to show how the Community secondary legislation severely conditions the linguistic policies of the Member States and of their regions, particularly prejudicing the languages which, in accordance with their constitutional order, enjoy official status in only part of the territory of the Member States (section 4). Final considerations will be drawn at the end of this chapter, to point out the urgent need for the European Union to confer some status on those languages (section 5).

THE RULES GOVERNING THE LANGUAGES WITH INSTITUTIONAL STATUS. OFFICIAL LANGUAGES WORKING LANGUAGES, AND LANGUAGES OF THE TREATIES

Neither the Treaties establishing the European Communities,² nor the Treaty on European Union, nor the treaties that have modified them have determined the official languages and working languages of the institutions of the Union. As far as languages are concerned, Community Treaties mostly limit themselves to listing the languages in which versions of the treaty are equally authentic (the languages that acquire the status of languages of the Treaties) and to specifying the institution authorized to determine the rules governing the languages of the institutions and to establish the procedures to follow according to those specifications.

With regard to the languages of the Treaties, Article 314 of the EC Treaty and Article 225 of the EAEC Treaty state the following:

This treaty, drawn up in a single original in the Dutch, French, German and Italian languages, all four texts being equally authentic, shall be deposited in the archives of the Government of the Italian Republic, which shall transmit a certified copy to each of the Governments of the other signatory States.

1. The Basque language or Euskara is spoken in the Basque Autonomous Community and to which I will refer to as "Basque Country", Navarre and Iparralde (the northern Basque territories administered by France). The legal status of Basque in each of these zones is different. While in the Basque Country it has the status of official language (together with the officialdom of Castilian – which is the official language of the state of Spain), in Navarre it only has the status of wholly official in a part of the territory. In contrast, in Iparralde it is hardly recognized. In this work I refer fundamentally to the Basque Country as it is the zone where recognition is greater, and therefore, where the European Community law has more effect.

2. Treaty establishing the European Community (hereinafter EC Treaty), and Treaty establishing the European Atomic Energy Community (hereinafter EAEC Treaty).

Pursuant to the Accession Treaties, the Bulgarian, Czech, Danish, English, Estonian, Finnish, Greek, Hungarian, Irish, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish and Swedish versions of this Treaty shall also be authentic.³

Therefore, the languages of the Treaties are twenty-three.

With regard to the institution responsible and the corresponding procedure, Articles 290 of the EC Treaty and 190 of the EAEC Treaty specify that:

The rules governing the languages of the institutions of the Community shall, without prejudice to the provisions contained in the Statute of the Court of Justice, be determined by the Council, acting unanimously.⁴

Therefore, it is the Council, being the institution representing national interests, which is responsible for determining the rules governing the languages of the institutions. Those rules must be adopted unanimously, and therefore the consent of each and every Member State is required.

The Council determined the rules governing the languages of the institutions in Council Regulations No 1 of 15 April 1958.⁵ Those rules grant certain languages the status of official languages and working languages of the institutions of the European Union.

At present, there are twenty-three official languages and working languages of the institutions, according to Article 1 of Council Regulation No 1, as last amended by Council Regulation (EC) No 1791/2006 of 20 November 2006:

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.⁶

These twenty-three languages do not, of course, constitute all of the historical and traditional European languages spoken in Member States today. In fact, there are many more. Currently around two thirds have no institutional recognition. This situation leads us to ask what criteria the Council has used to grant the

3. Text as last amended by Article 18 of the 2005 Act of Accession. OJ C 325, 24.12.2002, 154, and OJ L 157, 21.6.2005, 210. Similar wording in Article 53 of the Treaty on European Union.

4. OJ C 325, 24.12.2002, 148. See also Article 2(45) and Article 3(24) of the Treaty of Nice.

5. Council Regulation no 1 of 15 April 1958 determining the languages to be used by the European Economic Community [OJ 17, at 385/58] and Council Regulation no. 1 of 15 April 1958 determining the languages to be used by the European Atomic Energy Community [OJ 17, at 401/58]. Currently the content of both Council Regulations is identical. The two Council Regulations are hereinafter referred to as "Council Regulation No 1", in the singular.

6. OJ L 363, 20.12.2006, 80. While there were only six founder States, there were only four official languages and working languages: Dutch, French, German and Italian. The other languages have been incorporated coinciding with the accession of new Member States.

status of official language and working language to some languages, and to refuse it to others.

The preamble to Council Regulation No 1 refers to the criterion followed by the Council establishing that “each of the [...] languages [...] is recognized as an official language in one or more of the Member States”. Clearly, the preamble is ambiguous as the expression “an official language *in* one or more of the Member States” may be interpreted in two ways: as an official language in all the territory of one or more Member States, or as an official language *either* in part of or in all the territory of one or more Member States. We could even argue that the use of the preposition “in”, instead of the preposition “of” favors this second interpretation. However, in view of the practice followed by the Council, we must infer that it has chosen the first interpretation, granting the status of official language and working language of the institutions solely to those languages which are official languages in all the territory of a single Member State or which are official languages of the central institutions of a single Member State. This is why languages such as Catalan, Galician or Basque, which are official languages in *part* of the territory of a Member State (Spain) but do not have recognition in the central Spanish institutions, have not acquired the status of official language and working language.

The general criterion is subject to one exception: the case of Lëtzeburgesch. This language is an official language “in all the territory of a Member State” but did not enjoy the status of official language and working language. The reason for this exception must be sought in the fact that Lëtzeburgesch was not an official language in Luxembourg when this State, as a founder member, joined the European Communities. To date Luxembourg has not requested this status be attributed to Lëtzeburgesch. The status of official language and working language was not granted to Irish either, the national language and the first official language of Ireland when it joined the European Communities in 1973. At that time it was only granted the status of language of the Treaties. Recently, in 2004, Ireland once again expressly requested the status of official language and working language for Irish, which was agreed to in the Council Regulation (EC) No 920/2005 of 13 June 2005.⁷ In accordance with this Council Regulation, Irish became an official language and working language as of 1 January 2007 although, the publication of some regulations and other documents of general application is subject to temporary derogation. It is only compulsory to publish in Irish the Regulations adopted jointly by the European Parliament and the Council. In short, since 1 January 2007, the languages of the Treaties are the same as the official languages and the working languages.

Therefore, the differentiation of two levels of institutional recognition among the languages of the European Union (the status of languages of the Treaties,

7. The fact that, with the accession of Malta, the Maltese language was recognized as official language and working language has favored the recognition of Irish. Remember that, both in Malta and in Ireland, English is an official language.

and the status of official languages and working languages) has now lost significance since Irish has been recognized recently as official language and working language.

What legal effects result from the status of official language and working language? Council Regulation No 1 is not restricted to determining the official languages and working languages of the institutions: it also regulates the legal effects of this status. These effects are as follows: first, official languages are languages in which individuals and Member States can and must draft documents to be sent to institutions, and vice versa (Articles 2 and 3);⁸ second, regulations and other documents of general application must be drafted in all the official languages (Article 4); and, third, the *Official Journal of the European Union* must be published in all the official languages (Article 5). As we already know, some effects of Article 4 had been the object of a temporary derogation in the case of the Irish language.⁹ Similar temporary derogations have also been established with regard to the Maltese language, but by 31 December, 2008 at the latest can no longer be applied.¹⁰

As long as official languages are also working languages, these languages must be used in the internal activity of the institutions (Article 6).¹¹ Although there are twenty-three working languages, only English and, to a lesser extent, French are used, for the most part (Nic Shuibhne 2004:28).

Council Regulation No 1 is limited to granting certain languages the status of *official* language and *working* language of the institutions. There is no other linguistic status foreseen in the Regulation from which other languages can benefit. Official languages and working languages are official languages and working languages of the *institutions*, and this is why the rules governing languages may be different in the case of European Union bodies and agencies, which, as we are already aware, lack the character conferred on *institutions*.¹² This is the case, for example, with the European Central Bank or of the Office for Harmonization in the Internal Market (Trade Marks and Designs) (Milian-Massana 2002:67-71; 2004:229-233).¹³

8. Member States and persons subject to the jurisdiction of a Member State may select the official language in which the document to be sent to the institutions will be drafted. The reply must be drafted in the same language. Documents which an institution of the Union sends to a Member State or to a person subject to the jurisdiction of a Member State must be drafted in the language of that state.

9. See Council Regulation (EC) No 920/2005 of 13 June 2005 (OJ L 156, 18.6.2005, 3).

10. Council Regulation (EC) No 1738/2006 of 23 November 2006.

11. We note that the English version of Article 6 differs, for example, from the French and the Castilian version.

12. In a strict sense, the institutions are the following: the Council, the Commission, the European Parliament, the Court of Auditors and the Court of Justice.

13. See Case T-333/99, *X v ECB* [2001] ECR II-3021, parag. 186; and Case C-361/01 P, *Kik v OHMI* [2003] ECR I-8283.

According to the mandate foreseen in Articles 290 of the EC Treaty and 190 of the EAEC Treaty, Council Regulation No 1 applies to all institutions except the Court of Justice.¹⁴ The languages to be used in the proceedings of the Court are laid down in Articles 29 to 31 of its Rules of Procedure.¹⁵ However, an amendment introduced by the Treaty of Nice to Articles 290 of the EC Treaty and 190 of the EAEC Treaty states that the rules governing languages must be adopted in the Statute of the Court of Justice. When those rules have been adopted in the Statute, they will enjoy Treaty status. At present, the rules governing languages, with the adaptations required by the special characteristics of the jurisdictional activity, closely follow those established for the other institutions. The languages recognized as a language of a case are the twenty-three official languages and working languages.

It remains to be seen what legal effects result from the status of language of the Treaties.

The languages of the Treaties are the languages in which the text of Community Treaties is equally authentic. This is what is stipulated, as we have seen, in Articles 314 of the EC Treaty, 225 of the EAEC Treaty and 53 of the Treaty on European Union. Therefore, it is possible to invoke before the courts the versions of the Community Treaties drawn up in those languages. When the treaty of Amsterdam came into force on 1 May 1999, another important effect was included; namely, the fact that every citizen of the Union may write to any of the institutions or to some bodies (the Ombudsman, the Economic and Social Committee and the Committee of the Regions) in any of the languages of the Treaties and receive an answer in the same language (Article 21 of the EC Treaty, as amended by Treaty of Amsterdam). In reality, Irish was the only language of the Treaties which benefited from this amendment. This was because the other languages already benefited from that legal consequence, owing to the fact that such consequence is included in the status of official language and working language. Since 1 January, 2007, as Irish is an official language of the institutions of the Union and the citizens of the Union can use it in their relations with the institutions given the circumstance of being a language of the Treaties as well as being an official language. Current interest in the linguistic rule of Article 21 of the EC Treaty, as the languages of the Treaties coincide with the official languages, consists of that rule enjoying the level of the Treaties.

THE RULES GOVERNING THE LANGUAGES WITHOUT INSTITUTIONAL STATUS

During the 1950s, the period when the European Communities were created, there was not much interest in regional or minority languages. On the other hand,

14. Article 7 of Council Regulation No 1.

15. For the Court of First Instance, Articles 35 to 37 of the Rules of Procedure of the Court of First Instance of the European Communities. The provisions concerning the Court of First Instance's language arrangements apply to the European Union Civil Service Tribunal—a judicial panel attached to the Court of First Instance. [Article 7(2) Annex to Statute of the Court of Justice].

the Communities were created to satisfy exclusively economic objectives and tasks (the most important, to obtain a common market). For this reason regional or minority languages did not earn the attention of the Communities. It was later, with the rousing of these languages (or the permission to be used after periods of dictatorship), and above all, with the increase in the objectives of the Communities (first through the Single European Act, and then with the Treaty on European Union), that the question of these languages interested the institutions of the Communities and of the Union. However, not much has been done. This is because of, among other reasons, the lack of powers in matters of linguistic policy (not in cultural matters) and because the true interest lies in the official languages of the Union, which are, remember, the official languages of each Member State as a whole or of its central institutions. At the present time there are two precepts in the EC Treaty which serve as direct support for the intervention of the institutions of the Union in linguistic matters: Article 149.1 in educational matters, and Article 151.1 for cultural matters. However, given that the language serves as a support in any area, the institutions of the Union adopt linguistic measures in other fields such as on regulating matters for which they have specific powers. Sometimes the regulations affect the official languages of the Union, but other times they affect all of the languages which historically are spoken in its core.

The traditional activities provided by European Union law for the regional or minority languages

In short, the activities provided by European Union law for the regional or minority languages have been very limited. We would highlight, for example:

- 1) The numerous resolutions of the European Parliament encouraging their use, promotion and preservation, although well intended, are not binding.
- 2) Their incorporation in some European programs and plans,¹⁶ though until only recently they have been systematically excluded from the principal language learning programs (such as the so-called "Actions" known as Lingua and Comenius, which are part of the Socrates Program).¹⁷
- 3) Contribution to financial support of the European Bureau for Lesser-Used Languages up to a short time ago, and the Mercator research and documentation centers.
- 4) Submission of studies and reports on regional or minority languages.
- 5) Provision of some modest financial support to promote and safeguard regional and minority languages, dialects and cultures (de Witte 2004a:118-121).

In any case, since the proclamation in 2001, in Nice, of the Charter of Fundamental Rights of the European Union,¹⁸ the institutions of the European Union

16. Plans adopted based on Articles 149, 150, 151 and 157 of the EC Treaty

17. See the Annex of the Decision No 253/2000/EC of the European Parliament and of the Council of 24 January 2000 establishing the second phase of the Community action program in the field of education (the Socrates program) (OJ L 28, 3.2.2000, 1).

18. OJ C 364, 18.12.2000, 1.

must respect linguistic diversity. Article 22 of the Charter states that “[t]he Union shall respect cultural, religious and linguistic diversity”. But it is not clear whether the duty of respecting linguistic diversity has important implications for regional or minority languages – for three reasons: (1) because of the difficulty of deducing concrete measures from the general statement of Article 22; (2) because of the Union’s limited spheres of competence to carry out a policy promoting linguistic diversity, and (3) because the Charter of Fundamental Rights of the European Union has little effect since it has not been included in the Community Treaties.

Among the resolutions adopted by the European Parliament to encourage the promotion of regional or minority languages, mention must be given to the Resolution on Languages in the Community, and the situation of Catalan.¹⁹ This Resolution was adopted by the European Parliament on 11 December, 1990, in response to petitions made by the Catalan Parliament and the Parliament of the Balearic Islands that Catalan be recognized as an official language of the European institutions.

The European Parliament was not the institution responsible for recognizing Catalan as an official language of the institutions, since, according to the Treaties, the rules governing languages should be determined by the Council. The resolution limits itself to calling on the Council and the Commission to take the necessary steps to achieving the following objectives:

- the publication in Catalan of the Community’s treaties and basic texts;
- the use of Catalan to disseminate public information concerning the European institutions in all the media;
- the inclusion of Catalan in the programs set up by the Commission for learning European languages;
- the use of Catalan by the Commission’s offices in its written and spoken dealings with the public in the Autonomous communities in question.

Apart from its content, this Resolution is of particular interest to us because, although referring to the Catalan language, later on it was extended to Galician and Basque. A decision of the Committee on Petitions of the European Parliament, adopted on 26 and 27 January, 1993, stipulated that the Galician and Basque languages must receive the same treatment as the Catalan language (Agirreazkuenaga 2003:37). The Basque Parliament had agreed on 21 February, 1992, to demand that the European Parliament confer on Euskara the status of official language of the Community institutions.

Given its limited content, the Resolution of 11 December, 1990, has had reduced impact. Furthermore, one of the points which could most benefit Catalan, Galician and Basque –the inclusion of these languages in Community pro-

19. OJ C 19, 28.1.1991, 42-43.

grams related to the learning and improvement of European languages— has systematically failed to be carried out. Remember that the Resolutions of the European Parliament are non binding.

This was especially serious for some regional languages such as Catalan, Galician and Basque, which are used systematically as a language of communication in education. In the Basque Country, for example, more than half the students in compulsory education receive classes in Euskara (students in modules B and D); and in Catalonia for example, all students receive a great part of their education in Catalan.

In addition to its seriousness it was also especially unfair, because for the Socrates program (Action 4 “Lingua”, and Action 1 “Comenius”) not only the official languages and working languages, the Irish language (one of the languages in which the treaties was drawn up), and the Lëtzeburgesch (a language spoken throughout the territory of Luxembourg) were admitted, but also the national languages of the European economic area (EEA) countries and the national languages of the newly participating countries.²⁰ For example, Norwegian (in spite of the fact that on two occasions in a referendum Norway refused to join the Communities and the European Union) and Icelandic were able to join in the Socrates program. Another argument for its unfairness is because Icelandic or Maltese, for example, have fewer speakers than Basque. If we compare with Catalan, the situation is even more insulting: in 2004 Catalan had more speakers than eight of the twenty official languages and working languages (at that time there were twenty) and more, of course, than Irish.

In relation to the language learning programs, the Council has finally rectified its opinion on admitting all modern European languages spoken in the Member States in the last Decision. This was Decision No. 1720/2006/EC of the European Parliament and of the Council of 15 November, 2006, establishing an action program in the field of lifelong learning.²¹ This Decision entered into force on 1 January, 2001, and has replaced the 2000 Decision. According to the 2006 Decision, the Lifelong Learning Program covers all “modern foreign languages”. At last, languages other than the official languages and working languages are not excluded. The issue will still be to see what relevance is given to those languages when the program is implemented.

Despite this marked change, we can affirm in general that the regional or minority languages are very disadvantaged in the European Union. Perhaps some of the Resolutions of the European Parliament could help stimulate the promotion of minority languages which are in a precarious or very precarious situation. And it is possible that, for the languages spoken in those states that have been incorporated in recent years, joining the Union has benefited them

20. See Article 12 of the Decision No 253/2000/EC of the European Parliament and of the Council, as modified by Council Regulation (EC) No 885/2004.

21. OJ L 327, 24.11.2006, 45.

(for example, as we shall see below, through the requirement of respect for and protection of minorities by the candidate states). Yet these measures are not very useful for those regional languages that are already official in their territory and enjoy considerable vitality, to the point that they are languages of general communication in all levels and common to the group (or aspire to be so, as the conditions for this exist). For these languages, which are not many (among which we could include Basque and of course Catalan), the European Union Law is particularly unrewarding. If “[t]he fight for survival of minority languages in the national context is made more difficult by the added European dimension” (de Witte 1992: 292), it turns out that for those official regional languages, European Union Law adds a whole series of seriously damaging privations, which I will present in the next section, to the extent practically of encouraging their absorption.

One of the problems is that the European Community law has almost always treated the group of languages lacking institutional recognition homogeneously, in spite of their differing realities. The European Union has only recently begun to make distinctions in a structured way within the heterogeneous group of languages without institutional recognition, taking into account languages other than the languages referred to in Council Regulation No 1, which enjoy official status in all or part of the territory of the Member States. This has materialized 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,²² however, as we will see, the recognition has turned out to be quite unsatisfactory.

The new activities provided by European Union law for regional or minority languages: 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

Paragraph 1 of the Council Conclusion defines the languages concerned as follows:

1. These conclusions relate to languages *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 [author’s emphasis added].²³

The languages that can benefit from the conclusions, are, on the one hand, those that enjoy status through constitutional recognition (without necessarily being recognized as official languages) on all or part of the territory of the Member States, and, on the other hand, those that enjoy the status of national lan-

22. OJ C 148, 18.6.2005, 1.

23. OJ C 148, 18.6.2005, 1.

guage (being equivalent here to that of official language) by virtue of simple legal rule (without it being necessary that it be foreseen by the constitution). Paragraph 1, does not make clear if the Council Conclusion requires that the status of “national language” be valid in the whole territory of the Member States or not.

Regarding the official uses that will be authorized, the Council Conclusion refers (Paragraph 4) to those stipulated by subsequent administrative arrangements concluded between the Council and the requesting Member State, and possibly by another Union institution or body. These arrangements must comply with the conditions that the Council Conclusion itself establishes in paragraph 5. These conditions limit the possibility of using the languages concerned to three areas: a) the making public of acts adopted in co-decision by the European Parliament and the Council, b) speeches in meetings of the Council and possibly other Union institutions or bodies, and c) written communications to Union institutions and bodies.

Publicizing the acts adopted in co-decision is done via the Internet site of the Council, and a translation of this -being the responsibility of the interested Member State- has no legal value. The Council includes that translation in its archives and provides a copy of it, upon request. With respect to speeches in meetings (passive interpreting), the government of the interested Member State can request of the institution or body a permission to use the language. In the case of the Council, the Council Conclusion adds that “[the] request will in principle be granted, provided it is made reasonably in advance of the meeting and the necessary staff and equipment are available.” Finally, with respect to written communications to Union institutions and bodies, the Council Conclusion does not allow direct delivery, but insists on an indirect delivery via a body designated by the Member State. This body must translate the text of the communication into the language (or into one of the languages) of the Member State, which must at the same time be an official language of the Union, and must then send the original to the institution or body in question, along with a translation of the communication. The same indirect delivery procedure must apply *mutatis mutandis* to the reply from the institution or body in question. That is, the institution or body has to send the reply in the official language of the state to the body designated by it and then this body subsequently has to send the original sender the reply together with a translation to the language used by him or her. In the case of Union institutions or bodies having a fixed period of time in which to reply, the Council Conclusion determines when that period commences and when it ceases. According to the Council Conclusion the period commences from the date on which the institution or body receives the translation sent by the body designated by the Member State, and it ceases on the date on which the institution or body sends its reply to the competent body of the Member State.

Up to now, Spain is the only Member State to have signed administrative arrangements with the Council, the Commission, the Committee of the Regions, the Economic and Social Committee and the European Ombudsman. For the

moment, only the first two agreements have been published in the *Official Journal*.²⁴ As a result, the Basque language (and what is mentioned below for the Basque language is also valid for Catalan and Galician) may benefit from the recognition contained in the Council Conclusion, in accordance with the development obtained in the administrative arrangements. However, except for the spoken use of the Basque language which the ministers of the Basque government should so decide, and which they are authorized to do, in the meetings of the Council everything else is of little use or effectiveness.

In particular, with regard to written communications to Union institutions and bodies, the truth is that it is advisable not to use the Basque language, mainly for two reasons: 1) because the Council Conclusion puts the petitioning citizen in a vulnerable position with respect to the fixed period, when it exists. Administrative arrangements have attempted to correct this situation requiring that the European institution or body send its reply in Castilian directly to the sender at the same time as to the body designated to effect the translation. But this solution, while commendable from the point of view of legal certainty, is a mockery of the linguistic rights because it converts the version in the language of the sender into little more than an ornament; and 2) because, according to the administrative arrangements, the Union declines responsibility for possible translation errors.

In short, it is not likely that citizens would use any of the three languages concerned (Basque, Catalan and Galician) in their written communications, except, perhaps in informal communications. Indeed, this mode of communication has hardly been used. We would add that, in all cases, also in the assumption we are now commenting on related to the European Parliament, the costs correspond to the Spanish government. The institutions will not pay for translations.

With regard to the European Parliament, its Bureau has decided to accept citizens' correspondence in Basque, Catalan and Galician with certain requirements. However, the situation may arise that the European Parliament may resort to external translation agencies.²⁵ However, recognition which would have given visibility to these three languages, such as admitting their use in plenary sessions of the Parliament, has not been accepted.

24. Administrative Arrangement between the Kingdom of Spain and the Council of the European Union, OJ C 40, 17.2.2006, 2; Administrative Agreement between the European Commission and the Kingdom of Spain, OJ C 73, 25.3.2006, 14. "The Council of the European Union has recently authorized (15 July, 2008) the signing of an administrative arrangement with the United Kingdom, allowing the use at the Council of languages other than English whose status is recognized in the United Kingdom's constitutional system."

25. See Document PE 375.126/BUR, 3.7.2006, at 10-11. The Bureau follows the Conference of Presidents' invitation. See Document PE 371.339/CPG, 18.5.2006, at 24-26.

Monitoring minority rights in the European Union accession process

Probably the main impact of European Union law aimed at protecting the regional and minority languages has occurred indirectly – by means of the political criteria required to become a member of the European Union at the time of the last two adhesions. In fact, the European Commission reviewed progress on the situation of minorities in candidate countries on the basis of Articles 49 and 6(1) of the Treaty on European Union, as interpreted by the Copenhagen criteria of 1993 (Hoffmeister 2004). These criteria explicitly mention the “respect for and protection of minorities”, and the review has accordingly obliged the Baltic States and certain Eastern and Central European countries to make concessions to their linguistic minorities (see, among others, Pentassuglia 2001, Hoffmeister 2004).²⁶ This indirect method continues for future adhesions. The *Progress Reports* are explicit on this point.²⁷ Although these controls over minority rights have an important influence on internal linguistic policies, what most interests us are the measures which the EU adopts directly through the community legal documents (Regulations, Directives, Decisions, Conclusions, etc.), which affect the use of languages.

THE EFFECT OF THE COMMUNITY SECONDARY LEGISLATION ON THE LINGUISTIC POLICIES OF THE MEMBER STATES OR OF THEIR REGIONS

The accomplishment of free movement of productive factors characterizes international organizations which promote a common or internal market. This is the case, for example, of the European Community, one of the two communities currently found in the European Union.²⁸ In this way, Community freedoms – the free movement of goods, the freedom of movement for workers, the freedom of establishment, the freedom to provide services – together with free competition, become the spinal cord of the Community and the barriers that get in the way must be eliminated. For this reason, the internal linguistic requirements are, in general, seen as suspects of becoming barriers to free movement and, insofar as they effectively get in the way, they are considered as contrary to European Union law objectives. In this sense the Community law turns out to be a legal framework which could significantly constrain internal linguistic policies, whether they are of the states or of the regions.

Indeed, in order to prevent the states from incorporating linguistic requirements aimed at providing an advantage to their citizens or benefiting their products - measures which, hindering the movement of persons or goods coming

26. See also the Regular Reports on Accession 1999 to 2004 from the European Commission.

27. See, for example, the *Turkey 2007 Progress Report*, 22-23.

28. Article 1 of the Treaty on European Union states in the third paragraph that “The Union shall be founded on the European Communities, supplemented by the policies and forms of cooperation established by this Treaty [...]”.

from the remaining member states would constitute restrictions contrary to the interior market - the European Union has introduced linguistic provisions in some of the regulations and directives, issued to establish common rules and harmonizing criteria. With the establishment of common linguistic rules for the Member States, these regulations and directives aim, in short, to prevent internal linguistic requirements from actually constituting an arbitrary means of discrimination or an undercover restriction of free movement.

What is happening is that, often, especially if the provisions establish the compulsory use of certain languages, the European rules only take into consideration the official languages of the Member States. One paradigmatic example is the linguistic requirement for labelling.

In general, the directives regulate the language in which compulsory labelling details shall be given: or they may impose what details or indications shall be given in the official language or languages of the Member State where the product is placed on the market;²⁹ they may also authorize the Member States to impose the use of its national or official language or languages where the product is placed on the market;³⁰ or authorize Member States to demand that the labelling details be given in one or more languages which they shall determine from among the official languages of the Community. The latter is precisely provided for in 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.³¹ Article 16, paragraph 2, reads 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 shall be given in one or more languages which it shall determine from among the official languages of the Community.

Furthermore, some directives contain a precept recalling that the imposition of the official language or languages does not impede the use of other languages. In the case of the Directive 2000/13/EC, we find in paragraph 3 of Article 16 : "Paragraphs 1 and 2 shall not preclude the labelling particulars from being indicated in several languages."

29. For example, 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 (OJ L 194, 18.7.2001, 26); 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 the Council of 31 March, 2004, (OJ L 311, 28.11.2001, 67, and OJ L 136, 30.4.2004, 34).

30. Council Directive of 3 May, 1988, on the approximation of the laws of the Member States concerning the safety of toys (88/378/EEC) and (OJ L 187, 16.7.1988, 1).

31. OJ L 109, 6.5.2000, 29.

Insofar as the community provisions concerning labelling make reference to the official language or languages of the Member States, it transpires that they include only the languages that enjoy the status of official languages in all the territory of each of the states (or in its central institutions). Consequently, the languages that are official in part of the territory of a state remain outside these provisions.

The same happens when a directive – as is the case of the Directive 2000/13/CE of the European Parliament and the Council – authorizes Member States to be able to demand that details appear in at least one or various official languages of the European Union. And this is so because the present twenty-three official languages of the Union are precisely the languages that are recognized as having the condition of official language in the whole of the territory (or in the central institutions) of one or more Member States.³²

Therefore, European Union law impedes the regional legislatures from establishing that the compulsory labelling details be given in the official language of the region when the product is placed in its market. This explains, for example, that the Catalan legislature, on drawing up their Law 1/1998 of 7 January of Linguistic Policy, finally renounced the disciplining of compulsory labelling details in certain products, among them packaged food products, which are distributed in the territory of Catalonia having to be, at least, in Catalan (Milián-Massana, 2001).

For the same reason, the Parliament of the Basque Country cannot establish such a provision, guaranteeing the presence of the Basque language in the labelling of products. This limitation, which arises from Community Law, is particularly serious for languages such as Catalan and Basque. Remember that these languages are not necessarily minority languages. Apart from having more speakers (Basque) or even much more speakers (Catalan) than some official languages of the European Union, they are languages of general communication in the respective region (Catalan), or in the process of full revitalization (Euskara in the Basque country), that compete clearly with the majority languages and which therefore need the same or similar possibilities as these in order to be able to progress and not be assimilated: in the case in hand, being able to apply the same compulsory measures. Quite distinct is the case of the majority of the regional or minority languages, the scale and vitality of which do not justify the adoption of linguistic requirements though for their protection measures of persuasion or encouragement are enough.

Another example of the same phenomenon of marginalizing languages such as Basque or Catalan can be found in the Directive 94/47/EC of the European Parliament and the Council of 26 October, 1994, on the protection of purchasers

32. The only language with official effects in the whole of the territory of a Member State which has not acquired the condition of official language and working language of the institutions of the European Union, as we know, is Lëtzeburgesch.

in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis.³³ In this case, the Directive establishes a complex system concerning the languages in which these contracts and the information document (which becomes an integral part of the contract) must be drawn up. However, what is interesting to highlight here is that it establishes, *expressis verbis*, that the language or languages “shall be an official language or official languages of the Community” (Article 4); thus marginalizing other languages such as Basque or Catalan. This is serious because these languages are official in the Basque Country and in Catalonia and, therefore, the contracts signed in these territories, respectively, in Basque or in Catalan, are recognized, in terms of languages, as having validity and effectiveness. In other words, the Community provision, which does not impede the use of these languages, insisting as it does on the use of one of the official languages of the Union, actually restricts the officialdom of these languages, thus making them sociologically useless.

This partial abolition of the status of official language also appears in other assumptions. In particular, it is what could happen when, in accordance with the internal distribution of powers, the Administration of the Basque Country instructs and resolves procedures which have been regulated by a European provision which, in turn requires the use of one of the official languages of the Union. Then, as a result of the supremacy of the European Community law, it transpires that Basque, despite being an official language in the Basque Country, is marginalized from the procedure, except for written documents written in Basque accompanied by a translation in Castilian, which implies a displacement – with the corresponding partial loss – of the effects of recognized officialdom of the Basque language. This has happened to Catalan in Catalonia in matters of metrological control, which is an area of regional competence. This question of metrological control is regulated in the Council Directive 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 (71/316/EEC), where it stipulates 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, as the provision interprets] 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 to 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 effects of the status of Catalan as an official language (status recognized at a constitutional level) and the Community provision was brought before the Spanish Constitutional Tribunal, which ruled in favor of the prevalence of the supremacy of the European Community law (Milian-Massana 1995).³⁴

33. OJ L 280, 29.10.1994, 83.

34. STC 236/1991, 12 December 1991.

There are many more Community legal documents which marginalize languages other than those referred to in Council Regulation No. 1/1958, however, I shall terminate their enumeration at this point so as not to excessively lengthen this work. In my opinion, the examples already given sufficiently reflect the phenomenon which I am trying to illustrate. This marginalization does not usually have harmful effects for the majority of the regional languages or minority languages, given that their very condition as minority makes it “natural” that they cannot have recourse to Community provisions on majority languages (due to lack of translators, means, demand...). But it does not work like this, as we have seen, in the case of the languages that are *official* in part of the territory of the Member States, that demonstrate vitality and furthermore are languages of usual and common communication in their territory. In this case the treatment of these languages as a minority language facilitates their assimilation. Their protection requires that, if necessary and considering the principle of proportionality, the same or similar linguistic requirements can be established as those that are established for majority languages. The harmful effect of current Community secondary legislation represents an additional burden that the languages that are official in part of the territory of the Member States must support, and which adds to the already harsh conditions of survival common to all regional and minority languages as a consequence of the addition of the European dimension (for example, linguistic pressure which, *de facto*, accompanies the considerable movement of population which encourages the circumstance that every citizen of the Union enjoys “the right to move and reside freely within the territory of the Member States” (Article 18(1) of the EC Treaty), movement which encourage the use of the majority languages).

This burden arising from Community secondary legislation represents one more reason to add to those that justify the urgent attribution of a status within the European Union for languages that are official in part of the territory of a Member State and, in particular, for the languages that, *in accordance with the constitutional order*, enjoy official status (the status in part of the territory of a member state). This clause “in accordance with the constitutional order”, is not intended to be an arbitrary restriction, but quite the opposite. It constitutes an additional requisite for highlighting those languages that enjoy a true, whole and complete official status within a “region”, these being the languages that are most impaired. On the other hand, we shall see in the following section that this expression is taken up in the Treaty of Lisbon, amending the treaty on European Union and the Treaty establishing the European Community.³⁵

It would be incorrect to affirm that all Community legal documents ignore these official regional languages. There are some exceptions, fortunately, but still too few.³⁶ It is also true that, from the Community freedoms and the fact that “any

35. The Treaty was signed in Lisbon on the 13 December 2007. See the text in OJ C 306, 17.12.2007, 1. The Treaty has not entered into force, not having yet been ratified by all the Member States.

36. It is worth citing the Directive 2002/83/EC of the European parliament and if the Council of 5 November 2002 concerning life assurance (Annex III). (OJ L 345, 19.12.2002, 1).

discrimination on grounds of nationality shall be prohibited” (Article 12 of the Treaty EC), the Court of Justice has amplified the subjects that in each Member State may enjoy internal linguistic rights.³⁷ But this amplification, which also benefits regional or minority languages, has certain very limited sociolinguistic effects and does not compensate in any way for the marginalization, already commented, in the Community secondary legislation.

FINAL CONSIDERATIONS

The Treaty of Lisbon, if it finally comes into effect,³⁸ will not contribute significant changes in the rules governing languages. Without modifying the present linguistic framework, this Treaty will introduce three new aspects which are worth highlighting. Two are of a general nature and one refers explicitly to the languages that, in accordance with the constitutional order, are official in part of the territory of the Member States. The three new aspects, therefore, could benefit the Basque language.

The two aspects of a general nature affect all languages spoken historically in the European Union and are those that are contained in paragraphs 4 and 8 of Article 1 of the Treaty. In accordance with the first provision, respect for the rich cultural and linguistic diversity of the European Union will become one of the Union’s aims (provision which will become Article 3 of the Treaty on European Union). According to the second provision, the Charter of Fundamental Rights of the European Union of 7 December, 2000, as adapted in Strasbourg, on 12 December, 2007, shall have the same legal value as the Treaties. In this way, its Article 22, which has not undergone any modification, will have full legal value.³⁹ The real scope of these two aspects remains to be seen. Concerning the first I will comment below on the theme of jurisprudence of the Court of Justice.

What is specifically new can be found in Article 1, paragraph 61, and consists of the following:

This Treaty [the Treaty on European Union] may also be translated into any other language as determined by Member States among those which, in accordance with their constitutional order, enjoy official status in all or part of their ter-

37. Case 137/84, *Ministère Public c. Robert Heinrich Maria Mutsch* [1985] ECR 2681; Case C-274/96, *Criminal Proceedings c. Horst Otto Bickel and Ulrich Franz* [1998] ECR I-7637.

38. On completing this work – at the end of July 2008 – twenty-three of the twenty-seven Member States had ratified the Treaty. Doubt about its coming into force was posed, above all, with the victory of the “no” to its ratification in the referendum held in Ireland. Although any prediction is risky, it is probable that the Treaty will finally come into force, although with some modifications to overcome the opposition of the Irish population. In any case, possible changes will not affect the linguistic provision of the Treaty, because these provisions are not the focus of Irish contention.

39. Remember that Article 22 states that “[t]he Union shall respect cultural, religious and linguistic diversity”.

ritory. A certified copy of such translations shall be provided by the Member States concerned to be deposited in the archives of the Council.⁴⁰

This provision has just a symbolic value, since it lacks practical effects. However, it has the merit of establishing an objective distinction among the regional or minority languages, on the basis of differentiating the languages that, in accordance with the constitutional order, enjoy official status in part of the territory of the Member States.⁴¹ This distinction could make it easier for the European Union to establish specific recognition in favor of those languages in the future. This seems to be what is referred to in the last part of the first paragraph of the Declaration on Article 53(2) of the Treaty on European Union, annexed to the Final Act of the Treaty of Lisbon:

[...] 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* [the languages mentioned in Article 53(2), in other words, in accordance with the draft given by the Treaty of Lisbon, the languages that, in accordance with the constitutional order, enjoy official status in part of the territory of the Member States] and other *languages* (emphasis added).

Perhaps the new provision, in spite of being very exiguous, might constitute an embryo for future institutional recognition for the languages that, in accordance with the constitutional order, are official in part of the territory of the Member States (Milian-Massana).

In any case, we have already said that these languages deserve a true status and not symbolic recognition. The European Union ought to attribute to them a recognition which would bring them closer to the status of the official languages and working languages: for example, the status of language of the Treaties (which is what Irish had enjoyed until obtaining on 1 January, 2007, the official and working status) or some similar recognition. The rules governing the languages of the Treaties do not impede this.

The excuse for refusing them a status, that the number of languages would increase a lot,⁴² is not exact because the languages that, in accordance with the constitutional order, enjoy official status in part of the territory of the Member

40. The official languages in all the territory of the Member States can only be Lëtzeburgesch (See above n. 32).

41. This provision already existed—and comes from— Article IV-448(2) of the Treaty establishing a Constitution for Europe, although logically referring to this Treaty. As is known, the Treaty establishing a Constitution for Europe did not come into force. However, Spain had recourse to Article IV-448(2), taking advantage of the recommendation contained in Declaration No 29, on Article IV-448(2), annexed to the Final Act. On 4 November, 2004, certified copies of translations of the Treaty into Catalan, Galician and Basque were deposited in the archives of the Council.

42. The number of languages historically spoken in the Union is currently around sixty-eight (according to data provided by the Euromosaic study, carried out by the European Commission, and including the twenty-three languages which benefit from legal status).

States are very few and I believe would be Catalan, Galician, Basque, Croatian and perhaps Welsh (and Gaelic).

Nor is it a valid excuse that many languages are already recognized, as regards the twenty-three official languages and working languages. It is true that the number of languages recognized in the institutions would be surprising if we compare it with the number of languages normally recognized in international organizations. But it is necessary to remember that the nature of the European Union is not that of a traditional international organization, but that of a supra-national organization, that is, an organization to which the Member States have conferred part of their sovereignty, allowing the Union to adopt regulations and other documents of general application capable of producing a direct applicability or a direct effect on the citizens of the Union. Therefore, the number of official languages – as we have already said with regard to the working languages practically only English and French are used – does not respond exactly to the multilingual will (or, in any case, only to it), but to a requirement to guarantee legal certainty. Because this multilingualism is the only way to equally guarantee communication between all citizens of the Union and its institutions, it is the only way to ensure the publication of the *Official Journal of the European Union* in a comprehensible way for all the citizens of the Member States. If the Institutions of the Union did not translate the regulations, documents of general application, and other documents to the official languages of the Member States, these states would be obliged to translate them in order to guarantee legal certainty. This would represent a mere transfer of economic costs and the risks, given the dispersion of translation centers, of lack of reliability of the norms and of altering the uniform application of European Community law.

The only two languages whose recognition was not necessary to guarantee legal certainty are Maltese and Irish. Therefore, the recognition of these two languages alone could be construed as clearly expressing an intention to favor multilingualism.

Likewise, the European Union should try hard not to discriminate against languages that, in accordance with the constitutional order, are official in part of the territory of the Member States, in the Community secondary legislation, and should only exclude them if strictly necessary. The Court of Justice has vindicated the restrictions which the linguistic compulsory provisions imply for Community freedoms in the case of official languages of the Member States. In this case, the “mandatory requirement” or “imperative requirement” justifying restrictions on Community freedoms to date have been consumer protection, the reliability of medical professionals’ communication with their patients, and the protection of public health.⁴³ But these justifications probably do not serve to justify the lin-

43. Case C-51/93, *Meyhui NV c. Schott Zwiesel Glaswerke AG* [1994] ECR I-3879; Case C-33/97, *Colim NV c. Bigg's Continent Noord NV* [1999] ECR I-3175; Case C-169/99, *Hans Schwarzkopf GmbH & Co. KG c. Zentrale zur Bekämpfung unlauteren Wettbewerbs eV* [2001] ECR I-5901; Case C-424/97, *Salomone Haim c. Kassenzahnärztliche Vereinigung Nordrhein* [1999] ECR I-5123.

guistic requirements related to the languages that, in accordance with the constitutional order, enjoy official status in part of the territory of the Member States, because the citizens who speak these languages nearly always already understand the official language of the State. However, the Court of Justice could justify these linguistic requirements, on the basis of other criteria: the promotion or the protection of the languages and linguistic diversity. Up to now, the Court of Justice has not recognized these criteria as “mandatory or imperative requirements”, but it would have reasons to do so, and will have, especially if the provisions of the Treaty of Lisbon come into effect, as this Treaty recognizes among the aims of the Union a respect for its rich cultural and linguistic diversity, a commendable aim which acquires a level similar to the aim to “establish an internal market.”

The institutional recognition at the heart of the European Union of the languages that, in accordance with the constitutional order, are official in part of the territory of the Members States is a matter which is pending resolution and must not be delayed. Meanwhile, the European Union law erodes these languages. It would be a pity as well as regrettable that the European Union should contribute to the assimilation of these languages or aid in the perpetration of what in the domestic sphere, the philosophy of the Nation-state was unable to conclude: “one state, one language”. It is perhaps convenient to recall here what Leibniz wrote in French more than two centuries ago:

Les cartes font connoître les bornes des Etats, mais non pas celles des nations que l'harmonie des langues fait mieux paroistre. Rien ne marque d'avantage la grandeur d'un Empire, que la multitude des nations et langues qu'il embrasse.⁴⁴

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44. My translation for the French original: “Maps enable us to know the frontiers of states, but not those of nations which are better shown by the harmony of languages. Nothing better illustrates the magnitude of an Empire than the multitude of nations and languages which it embraces”. Leibniz, *Projet de lettre à Lefort le Jeune*. Text written by Leibniz in French and taken in this language from the book by Enric Prat de la Riba, *Per la llengua catalana*, Barcelona, Publications of “La Revista”, 1918, p. 52.

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