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THE COUNCIL OF EUROPE AND THE EUROPEAN UNION FRAMEWORKS IN THE LEGAL PROTECTION OF MINORITY LANGUAGES: UNITY OR DIVERSITY?[1]

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Abstract. This article focuses on the comparison between European Union Law and Council of Europe Law in the field of the protection of minority languages and looks at the relationships between the two systems. The Council of Europe has been very important in the protection of minority languages, having created two treaties of particular relevance: the European Charter for Regional or Minority Languages in 1992 and the Framework Convention for the Protection of National Minorities in 1995; both treaties contain many detailed provisions relating to minority languages. Not all countries, even of the European Union, have ratified these treaties. 12 out of 27 EU countries did not ratify the European Charter for Regional or Minority Languages. The European Union supports multilingualism because it wants to achieve unity while maintaining diversity. Important steps, with respect to minority languages, were taken in the European Community, notably in the form of European Parliament Resolutions. The Charter of Fundamental Rights of the European Union, approved in Nice the 7th December 2000, contains art. 21 and art. 22 related to this topic. The Treaty of Lisbon makes a cross reference to the Charter of Fundamental Rights of the European Union which is, consequently, legally binding under the Treaty of Lisbon since December 2009. The Charter could give ground for appeal to the European Court of Justice in cases of discrimination on the grounds of language.

Keywords: linguistic rights, minority languages, Council of Europe, European Union, European Court of Justice

[1] A revised and more extensive version of this article is already published, reference: VACCA A., A comparative approach between the Council of Europe Treaties and the European Union Framework in the legal protection of minority languages, in Revista de Llengua i Dret n. 53, June 2010, Barcelona, p. 111–136.

1. Introduction

This paper focuses on the comparison between European Union law and Council of Europe law in the field of the protection of minority languages. The CoE and the EU, both in their own way, raise the complicated question of human rights. The different legislation is an effort to cooperate but, at the same time, there are different methods and solutions. The EU has 27 member states at the moment; it was born for economic purposes and has real powers. In contrast the Council of Europe has 47 member states; its aim is the protection of human rights and its treaties create binding legal obligations, though the mechanisms for enforcement, as compared with the EU, are limited and, arguably, weaker. Is there unity or diversity between the two systems in the protection of minority languages?

Language was always felt to be a problem because it is closely associated with the formation and identification of national identities. For many constitutionalists of the last century there should be a perfect correspondence among "State, language-culture and Nation"[2].

In the world there are situations where majority languages coexist with minority languages in many communities but minority languages could disappear from such communities for many reasons. Indeed some linguists argue that, by the end of this century, 90% of the world's languages could disappear[3], for example because the majority language is considered more useful than the minority one or more prestigious. It is estimated that every 2 weeks a language disappears[4].

According to some statistics 80% of African languages have no orthography, 96% of 6,000 world languages are spoken by 4% of world's population[5]; it is impossible to find 90% of world languages in Internet websites, and about 70% of Internet websites are in English[6].

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2 About this topic: CARROZZA P., voce Nazione in Dig. Disc. Pubbl., vol. X, Torino 1995, UTET, pp. 148–149.

3 CRYSTAL D., *Language Death*, Cambridge University Press 2000; NETTLE D., ROMAINE S., *Vanishing Voices: The extinction of the World's Languages*, Oxford University Press, 2000.

4 www.eblul.org

5 www.eblul.org Eurolang 2008.

6 http://www.isoc.org/inet99/proceedings/3i/3i_3htm;http://www.ethnologue.com/ehno_docs/distribution.asp?by=area

Preserving one's own language is a way to keep and to discover information that would irremediably otherwise be lost: in Australia for example aborigines' words have played a part in the discovery of new vegetable species.

One's language is important to everybody and the language is a core part of a population; to protect endangered languages is a problem not only in Europe but all over the world.

Certainly the problem of managing linguistic diversity in Europe increased after the dissolution of socialism/communism in East Europe, which resulted in the creation of new States and the emergence of repressed identities, as an example the case of violent break-up of Yugoslavia. Most of the recent conflicts have an important relationship with the minority issues[7]. It is possible to avoid conflicts, as an example the recent case of Kosovo, respecting minorities.

The minority phenomenon must be seen as an element of cultural enrichment for a nation; where several languages are spoken there is development and integration.

2. The Council of Europe treaties: the European Convention for the Protection of Human Rights, the European Charter for Regional or Minority Languages and the Framework Convention for the Protection of National Minorities

The Council of Europe, founded in 1949, seeks to develop throughout Europe common and democratic principles. The European Convention for the Protection of Human Rights and Fundamental Freedoms, dated 1950, is an important Council of Europe Treaty and has been ratified by all CoE member states[8]. The ECHR established the European Court of Human Rights; consequently any person who feels his/her rights has been violated under the

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[7] FERNANDEZ LIESA C. R., *Derechos Linguisticos y derecho internacional*, Madrid 1999: p. 8 *et seq*.

[8] The UK implemented with the ratification this treaty very late with the Human Rights Act only in 1998, even though the UK had a big role in the creation of the European Court of Human Rights in Strasbourg and was the first one to sign. The labour government introduced this Act with other new programs, included the devolution.

Convention by a State party of the Convention can apply to the Court. The decisions of the Court are legally binding and the Court has the power to award damages[9]. The ECHR includes art 5, art 6 and art. 14 which are linked with the topic of language. Art. 5 states that everyone who is arrested shall be informed in a language which he understands of the reasons for his arrest, art. 6 states that everyone charged with a criminal offence has the right to be informed promptly, in a language which he understands, of the nature and cause of the accusation against him and has the right to have the free assistance of an interpreter, if he cannot understand or speak the language used in court. These articles concern the fairness in a trial rather than relating to linguistic rights. The case law of the European Court of Human Rights suggests that these rights do not apply when a person speaks also the national language[10]. Art. 14 states that the rights and the freedoms set forth in the Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. It is a kind of right of no discrimination because of the language[11]. The provisions are generic.

The Council of Europe has been very important in the protection of minority languages, having created two treaties of particular relevance: the European Charter for Regional or Minority Languages in 1992 and the Framework Convention for the Protection of National Minorities in 1995. Both treaties contain many provisions relating to minority languages and, as treaties, they are legally binding for the states which have signed and ratified them. These documents have become a point of reference for national legislation of those states that have subsequently ratified these treaties.

The Framework Convention was opened for signature in Strasbourg the 1st February 1995 and came into force on the 1st of February 1998. It is the first legally binding multilateral instru-

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9 www.echr.coe.int

10 For example Isop v Austria n. 808/60, 5 YBECHR (1962), p. 108; see also DUNBAR R., «European Traditional Linguistic Diversity and Human rights: A critical assessment of International Instruments», in Eduardo J. Ruiz Vieytez and Robert Dunbar, eds, *Human Rights and Diversity: New challenges for plural societies*, Bilbao, University of Deusto, 2007, p. 90.

11 DUNBAR R., «Minority Language Rights in International Law», *International and Comparative Law Quarterly*, Oxford 2001, n. 50, pp. 90–120.

ment concerned with the protection of national minorities. The total number of ratifications/accessions at the moment is 39[12] from 47 member states of the Council of Europe. France, Turkey, Andorra and Monaco did not want even to sign. Belgium, Greece, Iceland and Luxemburg did not ratify although Belgium in particular has important linguistic diversities. It is interesting to note that among these countries which did not ratify there are some members of the EU: France, Belgium, Luxembourg (EEC members since its origin), Greece, and a candidate country, Turkey. The Parliamentary Assembly of the CoE now generally requires States applying for membership to ratify the Framework Convention. The Convention promotes the effective equality of national minorities by creating appropriate conditions enabling them to preserve and develop their culture[13].

The word "framework" in a legally binding Convention recalls soft law and gives a margin of discretion to the States in its implementation[14]. The Framework Convention contains mostly programme-type provisions which are not very specific but vague, leaving to the States discretion in the implementation of the objectives that they want to achieve[15]. It does not contain a definition of the notion of national minority. Every person belonging to a national minority shall have the right freely to choose to be treated or not to be treated as such without disadvantage[16]. The approach is individualist since it does not recognize collective rights but it has to protect persons belonging to national minorities as individuals who may exercise their rights individually and in community with others. The Framework Convention is an open Convention which

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[12] See the website: http://conventions.coe.int. The 39 States which have ratified are: Albania, Armenia, Austria, Azerbaijan, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, Georgia, Germany, Hungary, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Malta, Moldova, Netherlands, Norway, Poland, Portugal, Romania, the Russian Federation, San Marino, Slovakia, Slovenia, Spain, Sweden, Switzerland, the former Yugoslav Republic of Macedonia, Ukraine, the United Kingdom and Serbia and Montenegro. 23 members of the EU ratified out of 27.

[13] http://conventions.coe.int/Treaty/en/Summaries/html/157.htm

[14] THORNBERRY P. and MARTIN ESTEBANEZ M. A., «The Framework Convention for the Protection of National Minorities», *Minority Rights in Europe*, 2004, p. 91.

[15] http:/conventions.coe.int/Treaty/en/Reports/Html/157.htm

[16] Art. 3.1.

may be signed by States which are not members of the Council of Europe. There is no competence for the interpretation of the Convention for the organs created by ECHR but the provisions have to be interpreted considering the general norms in human rights. The Convention seeks to promote the spirit of tolerance and intercultural dialogue, mutual respect and cooperation. Education, culture, public administration and media are important to obtain these aims. Art. 10, regarding the public services, recognizes the right to use a minority language freely and without interference, in private and public, orally and in writing. Paragraph 2 ensures the possibility of using the minority language with administrative authorities. There are financial, administrative and technical difficulties, in particular financial ones can limit the applicability of these provisions but they are not an excuse for a non implementation. Words as "real need", "as far as possible" make the nature of the obligation unclear and give discretion on the applicability of the norm because of its vagueness. This article is not very detailed and has some weaknesses, but the Advisory Committee has strengthened it through their interpretations. The Committee of Ministers is charged with monitoring the implementation of the Convention. An Advisory Committee has to help the Committee of Ministers in the monitoring process; its members shall have recognised expertise in this area.

The European Charter for Regional or Minority Languages was adopted by the Committee of Ministers of the Council of Europe on 25 June 1992 and was opened for signature on 5 November 1992 in Strasbourg. It entered into force on 1 March 1998. There are, as noted, 47 members of the Council of Europe, but only 24 have ratified the Charter[17]. This means that half of the members of the Council of Europe are not legally bound by the Charter and the provisions cannot apply to these countries. In addition, among these 24 countries, only 15 out of 27 member states of the European Union have ratified. France and Italy (former EEC members) did not ratify it. Belgium, Greece, Ireland, Portugal, Turkey did not even sign the Charter. The Parliamentary Assembly of the CoE now generally requires States applying for mem-

[17] Armenia, Andorra, Croatia, Cyprus, Czech Republic, Denmark, Finland, Germany, Hungary, Liechtenstein, Luxembourg, Montenegro, Netherlands, Norway, Poland, Romania, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Ukraine, United Kingdom have already ratified.

bership to ratify the Languages Charter. The preamble of the Charter states that the right to use a regional or minority language in private and public life is an inalienable right. The protection and promotion of regional or minority languages, in the different countries and regions of Europe, represents an important contribution to the building of Europe based on the principles of democracy and cultural diversity within the framework of national sovereignty and territorial integrity. The European Charter for Regional or Minority Languages not only contains non-discrimination principles but also provides for measures offering active support for the minority languages in education and the media and to permit their use in judicial and administrative sectors. Its main purpose is cultural; it has to promote regional or minority languages, not linguistic minorities[18]. The Languages Charter imposes obligations on States in respect of individual users. The adoption of special measures in favour of regional or minority languages aims at promoting equality between the users of these languages and the rest of the population. The fact that it takes due account of their specific conditions, is not considered to be an act of discrimination against the users of more widely-used languages, but is a sort of compensation for unfavourable conditions of the past. The languages mentioned are the historical ones, traditionally used over a long period in a territory of a state. The definition of minority and linguistic minority is not an abstract concept but it depends on historical, political and social considerations that could be modified from time to time[19]. For example, dialects and immigrant populations' languages are excluded from the Charter's definition, but the definition of dialect too is an academic and artificial one[20]. The Charter contains no definition of "dialect" and this is precisely the problem since the distinction between dialect and language is very discretional and when there are not precise criteria politics has an important influence.

There is no list of regional or minority languages. The adoption of the various protective and promotional measures is not for an exact number of people, it is up to the state to assess the appropriate number of speakers of the language. The provisions of Part II are applied to all regional or minority languages spoken in a

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18 http://conventions.coe.int/Treaty/en/Reports/Html/148.htm

19 PALICI DI SUNI PRAT E., *Intorno alle minoranze*, Torino 2002, p. 12.

20 BARBINA G., *La geografia delle lingue,* Roma 1993, p. 140.

territory which comply with the definition in article 1; thus, they can be applied to non-territorial languages[21]. Regarding the provisions of Part III, states are free, with some limits, to determine which provision will apply to each of the languages spoken in their territory[22]. Article 10 regarding administrative authorities and public services is important because the utilisation of such languages with the public authorities means that these languages are used beyond the private sphere and can grow up their visibility. This article distinguishes three categories of types of action taken by the public authorities of the state: action by administrative authorities of the state, action by local and regional authorities, and action by bodies providing public services, in some cases as far as this is reasonably possible, because in some circumstances the total application of the provisions could be unrealistic and there are also implications in terms of finance, staffing and training. This article, though contains detailed provisions, is a little bit vague and discretional because could be difficult for a state recruit officers speaking the minority language especially for financial reasons[23].

This document considers directly minority languages and has become a cornerstone for the protection, at the European level, of the lesser used languages and an example for the national legislation that put into effect this treaty.

Both the European Charter for Regional or Minority Languages and the Framework Convention for the Protection of National Minorities did not create a judicial mechanism; individuals cannot propose a claim.

The enforcement of the Charter is under control of a Committee of Experts. The Committee of Experts periodically examines reports presented by the parties. The Languages Charter is one of the standards that countries candidate to be members of the Council of Europe have to respect; consequently, the new candidate members of the Council of Europe must ratify the European Charter if they want to join the Council of Europe. This treaty has provisions relating to the use of minority languages in a number of

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21 There is not a clear definition of territorial language. In the absence of a territorial base, only a limited part of the Charter can be applied.

22 http://conventions.coe.int/Treaty/en/Reports/Html/148.htm

23 THORNBERRY P. and MARTIN ESTEBANEZ M. A., «The European Charter for Regional or Minority Languages», *Minority Rights in Europe*, 2004, p. 153.

areas, including education, the legal system, media and as well administrative authorities and it makes specific mention of steps which must be taken in this area in order to continue and consolidate the development and use of language. Generally the refusal to fully implement the international obligations is not very common, though the states often engage in simulated implementation not followed by practice. For example, art. 10 of the European Charter for Regional or Minority Languages ensured that, as far as this is reasonably possible, the officers, that are in contact with the public, use the regional or minority languages in their relations with persons applying to them in these languages but in practise it is difficult to find officers able to answer in the minority language and forms in this language. Sometimes there is a gap between the law and the reality and some provisions are only "*flautus vocis*". The Committee of experts is charged to find the gap. Cooperation among the Committee of experts, the Advisory Committee and the Court and the Committee of Human Rights can help to achieve the outcomes. In practice, however, cooperation between the first two is likely, with the European Court of Human Rights it is difficult for a variety of reasons.

3. European Community and European Union Framework

In all European Union countries minority languages are spoken. The situation of these languages varies from few thousand people (some Finno-Lappic languages) to roughly six million people (Catalan in Spain).

At the moment 27 countries are members of the European Union and there are 23 official EU languages, each official language of an EU member is an official language of the EU itself, although some members share an official language[24].

In the EU instruments there are clear provisions about the EU official languages but there are not strong basis in order to protect minority languages. The 23 official languages need an expensive linguistic policy.

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[24] For example German is an official language of Germany and Austria, English is an official language of the UK and Ireland, French is an official language of France and Belgium.

In Europe roughly 60 minority languages are spoken, in addition to the 23 official languages of the EU member States. About 40 million people speak a minority language[25], representing 10% of the European Union population. Thus, Europe is like "The Tower of Babel".

The European Union supports multilingualism because it wants to achieve unity while maintaining diversity.

Important steps, with respect to minority languages, were taken notably in the form of European Parliament Resolutions, such as the Arfe' Resolution in 1981[26], the Kuijpers Resolution in 1987[27] and the Killilea Resolution in 1994[28]. None of which created legal standards. The Parliament Resolutions are not legally binding for the member states but have a political influence because the European Parliament is the most democratic institution in the EU since its members are elected by the EU citizens. The Morgan Resolution on Regional and Lesser Used Languages on 13-12-2001 supported the reintroduction of financial assistance for lesser used languages, the ratification of the European Charter for Regional or Minority Languages and the implementation of Article 22 of the Charter of Fundamental Rights of the European Union. The Resolution 14 February 2002[29] on the promotion of linguistic diversity called the Commission and member states to adopt positive measures for the languages at the end of the European Year of Languages (2001)[30]. The Committee of the Regions also adopted a number of Opinions in which a clear positive position was expressed regarding minority

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[25] http://ec.europa.en/education/policies/lang/languages/regmin_eu.html; www.mercator-central.org

[26] Resolution Arfè on a Community Charter of Regional Languages and cultures and on a Charter of Rights of Ethnic Minorities, adopted by the European Parliament on 16 October 1981, in 1983 a further Arfè Resolution was adopted, Resolution Arfè on measures in favour of minority languages and cultures, adopted by the European Parliament on 11th February 1983.

[27] Resolution Kuijpers on languages and cultures of regional and ethnic minorities in the European Community, adopted by the European Parliament on 30 October 1987.

[28] Resolution Killilea on linguistic and cultural minorities in the European Community, adopted by the European Parliament on 9 February 1994.

[29] Resolution 14 February 2002, in GUCE C 50 of 23 February 2002.

[30] See also CERRETELLI A., «Lingue, ricchezze dell'Europa» (interview to Jan Figel, EU Commissar, for the day for the promotion of different languages), *Il Sole 24 ore del Lunedì*, n. 264, 26 September 2005, p. 7.

languages[31], again such opinions are not legally binding for the member states but have a political influence.

The European Commission, with the support of the European Parliament, arranged financial instruments to help languages which are not official. For example, in 1992, it commissioned a report called "Euromosaic"[32]. This report was a series of surveys conducted to assess the situation of the various minority languages; it was a study of the linguistic health of these languages. The European Commission supported the biggest organizations in this field: EBLUL and Mercator.

EBLUL is the European Bureau for Lesser Used Languages. Established in 1982, it is a Non-Governmental Organisation (NGO) promoting linguistic diversity and has an important role in providing information about policies to protect minority languages.

Mercator is the European information and documentation network for minority languages, established in 1987. It provides the general public data and reliable information on the situation of minority languages. It is a network of three research and documentation centres. Each centre has its own theme and role: Mercator-Education, Mercator-Legislation, and Mercator-Media[33].

In 2002, an EU Network of Independent Experts on Fundamental Rights was established to exercise monitoring and advisory functions. A European Union Agency for Fundamental Rights (FRA) has been established in Vienna by Council Regulation n. 168/2007 of 15 February 2007. The Agency's aim is to provide assistance and expertise to the Institutions and Member States on fundamental rights when implementing community law, it has to monitor and to collect information related to the situation of fundamental rights in the EU, develop data, promote research in the fundamental rights field, formulate opinion, make reports, promote dialogue[34]. The new Fundamental Rights Agency (FRA) included discrimination against national and linguistic minorities[35], thus, has competence to investigate such discrimination.

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31 CDR 86/2001 of 13 June 2001.

32 http://www.uoc.es/euromosaic

33 http://www.mercator-central.org/

34 http://europa.eu/agencies/community_agencies/fra/index_en.htm

35 The European Parliament voted by 420 votes to 26, in January 2008, in order to include amendments, tabled by Kinga Gal, Bairbre de Brun and Magda Kosane Kovacs, to include discrimination against National and linguistic minorities as part of the remit of the new Fundamental Rights Agency (FRA).

Human Rights, in general, were not considered in the original treaties, such as the Treaty of Rome, since the main aim was economic. In order to solve this paradoxical situation, human rights started to be considered as general principles of the law and the standards were the Constitutions of the member states and the International agreements.

The protection of regional or minority languages was not a priority for the European Community, considering also that, at the beginning, the purpose was especially economic. Thus, there were provisions aimed to protect the official languages of the EU basically for political reasons. The Treaties did not contain a catalogue of fundamental rights, thus the respect for human rights was encouraged from the Court of Justice through the system of general principles of the law. Fundamental rights form an integral part of the general principles of law. In safeguarding these rights the Court is bound to draw inspiration from constitutional traditions common to the member states and International Treaties on which the member states have collaborated or they are signatories[36].

Article 314 of the European Community Treaty stated that the treaty was written in the four official languages of the six original member states: Italian, French, German and Dutch[37]. It declares that the words of the Treaty are equally valid in all EU official languages. Article 21 states that every citizen of EU can write in one of the official languages in addressing certain European Institutions and can receive an answer in the same language. There are no detailed and specific provisions for the protection of languages, especially minority languages, in the treaties but there are some articles related to the topic or better related to "languages" without further specification such as "official" or "minority". The problem is to "force" the norms saying that since in some articles "languages" are mentioned without the adjective "official" we can include also minority languages with a broad interpretation.

Article 149 (formerly Article 126) about education made mention of the protection of linguistic diversity and stated that the Community action shall be aimed at developing the European di-

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[36] CRAIG P. and DE BURCA G., *EU Law Text, Cases and Materials* 4e Oxford University Press 2007.

[37] MILIAN I MASSANA A., «Le principe d'égalite des langues au sein des institutions de l'Union europèenne et dans le droit communautaire, mythe ou réalite?» *Revista de Llengua i Dret*, n. 38, December 2002.

mension in education particularly through the teaching and dissemination of the languages of the Member States.

One of the many purposes of the Maastricht Treaty was to promote the culture in the member states, to respect the national and regional diversities (Art. 151, formerly art. 128); thus, we can find a commitment to cultural and linguistic diversity. It is not clear if in these regional diversities we can include minorities and minority languages. It depends on the interpretation and a broad interpretation in theory is possible but it is also a political issue, consequently, if a member state does not want to sign and ratify the European Charter for Regional or Minority Languages will be not too much supportive of this broad interpretation. The ECJ judges are men and women with personal opinions but all depends on contingent circumstances.

Art. 6 of the 1992 Treaty on the European Union states that respect for human rights is a basic principle of the Union. Article 13 of the EC Treaty (formerly art. 6a) contains a passage in favour of positive discrimination, so the Community " within the limits of the powers conferred may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation". Unfortunately language is not mentioned at all in this article[38].

The Treaty of Amsterdam went beyond the Maastricht Treaty, in articles 6.1 and 6.2 of the EU Treaty (former art. F.1) accepting the position of the ECJ about the general principles of Community Law, and declares: "1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States. 2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law".

The enjoyment of human rights is guaranteed, since, in the following article, Article 7 of the TEU there is the possibility to recourse to a complex procedure to sanction the member States which are not respectful of human rights.

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[38] URRUTIA I. and LASAGABASTER I., «Language Rights as a General Principle of Community Law», *German Law Journal* n. 5, 1 May 2007, p. 11 available on line at http://www.germanlaw journal.org/article.php?id=822

The respect of minorities is a prerequisite for the adhesion of further states to the European Union. In respect of enlargement, the Copenhagen political criteria for candidate countries include treatment of minorities, along with matters such as the respect for the rule of law, human rights and democracy[39]. However, it appears that there are not requirements to ratify instruments of the Council of Europe such as the Framework Convention since only the ECHR is mentioned in article 6 EU Treaty.

It is not clear if languages rights are included in the general principles of the law[40] but the answer looks positive since minority rights are included in the instruments of the Council of Europe (ECHR, ECRML and Framework Convention for the Protection of National Minorities), which most of the member states ratified, and in many Constitutions of Member States, for example art. 6 of the Italian Constitution and art. 3 of the Spanish Constitution. In several judgments the ECJ considered principles which were not included in the Treaties but in the ECHR[41] which is an instrument of the Council of Europe and the EU is not part of ECHR but we cannot forget that the EU countries are part of ECHR, consequently, it is not so easy to neglect the provisions for the protection of human rights included in the Council of Europe instruments. In the case of minority languages the situation is a little bit more complicated since not all member states ratified the Languages Charter, only 15 out of 27, and also not all member states have in their Constitutions provisions on minority languages but the ECJ, in other circumstances, accepted in its judgments principles which were not common to all member states. Experience seems to demonstrate that the ECJ is able to give broad interpretations even when important interests of member states are involved[42]. In the Metock

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[39] Art. 49 EUT states that "(a)ny European State which respects the principles set out in Article 6 (1) may apply to become a member of the Union".

[40] See also SCHILLING T., «Language Rights in the European Union», *German Law Journal* n. 10, 1 October 2008, available on line at http://www.germanlawjournal.org/article.php?id=1015 p. 1220 *et seq.*

[41] See for example C- 60/00 Carpenter v Secretary of State for Home Department, 11 June 2002, (2002) ECR I-6279.

[42] See the ECJ case C-200/02 Zhu and Chen v Secretary of State for the Home Department. A Chinese lady who was living in UK, pregnant moved in Northern Ireland in order to give birth to her daughter, Catherine, who, according the Irish law, became automatically Irish citizen. The lady exploited the European Union law in order to stay in UK.

case[43] an important political issue relating to immigration was involved and the ECJ on 26 July 2008 ruled that "a non-community spouse of a citizen of the Union can move and reside with that citizen in the Union without having previously been lawfully resident in a member state. The right of a national of a non-member country who is a family member of a Union citizen to accompany or join that citizen cannot be made conditional on prior lawful residence in another Member State". This condition was prescribed by Irish Immigration Law and other countries also have Immigration Laws, for example Denmark and the UK, which have restricted the possibility of immigration. After this case the Danish Immigration Law could be brought down by ECJ[44]. The sensitive issue is that when the rules are not detailed enough, thus giving the judges of the ECJ the possibility to interpret them more broadly and even to force solutions upon on its member states. This kind of orientation may be useful also for the minority languages but all depends on judges' wishes and on contingent circumstances.

4. The Charter of Nice and the Treaty of Lisbon

A relevant document, which will be legally binding when the Treaty of Lisbon is ratified by all member states[45], is the Charter of Fundamental Rights of the European Union[46], approved in Nice the 7th December 2000.

On the 19th October 2007 the Informal European Council in Lisbon approved a new Treaty; it was signed on 13th December 2007 in Lisbon, exactly 50 years after the Treaty of Rome[47].

Art. 2:3 of the Lisbon Treaty states that the EU "shall respect its rich cultural and linguistic diversity and shall ensure that Europe's cultural heritage is safeguarded and enhanced", this "re-

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43 ECJ case C-127/08 Metock and others v Minister for Justice, Equality and Law Reform.

44 http://www.brusselsjournal.com/node/3457

45 At the moment, October 2009, after the successful referendum in Ireland and the ratification of Poland, the Presidents of Check Republic and Ireland have to ratify, thus, after these ratifications, all member states have ratified.

46 At the moment the Charter could be considered as soft law because the institutions have considered the compatibility with the Charter of their acts and proposals.

spect" can have a very loose meaning. Again, this article does not say "minority languages" but it does not refer merely to the "23 official languages of the EU"; consequently, with a broad interpretation minority languages might be included in this reference to "linguistic diversity". A further problem is that "respect" does not say that positive measures are requested in order to guarantee this respect; consequently the meaning is very loose.

The Treaty of Lisbon makes a legally binding cross-reference to the Charter of Fundamental Rights of the EU as a real catalogue of rights. The Charter of Nice did not introduce substantial new provisions. It did emphasize respect of diversities; however, it did not consider the right of minorities as a fundamental right[48]. The Court of Justice should ensure that the Charter is applied correctly. At the moment it is not legally binding but it is respected by the institutions as a source of soft law.

Art. 21 states: "Any discrimination based on any such ground as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited…"

According to Art. 22: "The Union shall respect cultural, religious and linguistic diversity".

Articles 21 and 22 of the Charter of Nice are too generic and vague but could be a base for the protection of minority languages. In these articles "language" is not followed by other adjectives; thus the interpretation could be broad, considering also that in article 21 the word "language" is close to "membership of a national minority". However, these rights will apply only to acts and legisla-

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[47] Before the Treaty of Lisbon there was the project of the Constitution for Europe (signed in October 2004 in Rome) which failed after the referenda in France and Netherlands. The preamble of the European Constitution, although did not have legal force, contained the principle of no discrimination, respect of diversities and could show a "*favor*" for languages, maybe minority languages too but it was too generic and also was not a sufficient guarantee. The second part of the European Constitution had incorporated the Charter of Fundamental Rights of the European Union and would give its provisions a binding legal force.

[48] CAMPINS ERITJA M., «El reconeixement de la diversitat linguistica a la Carta dels drets fonametals de la Unió Europea», in *Revista de Llengua i Dret*, n. 38, december 2002, p. 95 *et seq.*

tion emanating from the EU and not to domestic State legislation[49]. The respect of minorities is also a prerequisite for the adhesion of further states to the European Union.

Article 41.4 of the Charter concerns the right of good administration and includes the right of petition and declares the right to address to the Institutions in one of the languages of the Treaty and to receive the answer in the same language. This provision is only for official languages of the EU.

On Wednesday, 12 December 2007, in Strasbourg, the President of the Commission, European Parliament and the Council signed and solemnly proclaimed the Charter of Fundamental Rights of the EU which will take on legal force under the Reform Treaty. In the EU framework there is not a strong base for an appeal to the European Court of Justice regarding minority languages. Rather the role of the ECJ should be to make a step forward and interpret the European Union Law in order to substitute the lack of political goodwill and to make a new statement as in Costa/ENEL[50]. In this case there was not a strong legal basis in the European Community framework to claim the supremacy of EC Law over national law but the ECJ decided to make a statement going beyond the rules of the CE Treaties to create new rules. The Treaty signed in Rome on 25 March 1957 did not explicitly establish the supremacy of Community Law over the laws of the member states but the ECJ has established firmly this principle in the landmark case Costa/ENEL and in other cases. The ECJ is an influential body in the EU legal system and, over the years, exceeded its judicial role and strayed into a law and policy-making role. The ECJ (and also the CFI) is not bound by any doctrine of precedent and often exceeded its original function with the "invention" of concepts never mentioned in the Treaties: for example supremacy, direct effect or even the development of human rights. In the case of minority languages

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[49] http://www.eblul.org./index.php?option=com_contentandtask=viewandid=1508Itemid=1 According Eblul "It will give those language groups which are still continuously discriminated against some grounds for redress, if they are discriminated against in any EU based acts and legislation".

[50] ECJ Costa/Enel case 6/64 ECR 585, Flaminio Costa was an Italian citizen opposed to nationalizing the Italian Energy company ENEL, because he had shares in it. In order to protest he refused to pay his electricity bill. He argued that nationalization infringed EC Law as it distorted the market. The ECJ ruled in favour of the Italian government. Nevertheless, the ECJ made it clear that Community law could not be challenged by any piece of national legislation.

too the treaty basis is not so strong and the provisions are very generic, but the ECJ could do the same as in Costa/ENEL. However, at the moment, it appears that the orientation of the judges of the ECJ, most of whom are from Civil Law countries, is to respect, apply and to follow strictly the law instead to create new law as in the past.

5. Conclusions

The Council of Europe and the European Union frameworks are important because they create obligations for the countries which signed the treaties (Council of Europe) and which are members of the European Union. Regarding minority languages the domestic law often implemented principles contained in these instruments. In the system of the Council of Europe the provisions on minority languages are detailed but there are not true sanctions and language rights will be fundamental rights in the proper way only if the laws adopt true sanctions; without sanctions and obligations a human right is fundamental only in theory but not in practice. The instruments of the Council of Europe often lack effectiveness because the enforcement of the Conventions and of the ECtHR judgments, has been left to the Member States, there is only a political supervision by the Council of Ministers. If there is no sanction for disrespecting the rights, the legal order is not effective and can become declaratory only. In addition the Conventions not ratified are not effective; we cannot to say that a Convention is really useful if the state which really needs it has refused to ratify.

The system is more effective and there is more protection within the European Union.

European Union differs from other International Organizations such the Council of Europe because has real powers. The rules of the founding treaties are self sufficient and legally complete, without an action by Member States. The European Union through the European Court of Justice has put serious effort toward assuring effectiveness of its instrument. The European Union has an important framework for official languages but there are not requirements to provide services in minority languages, the provisions are generic and not detailed. The member states are reluctant to leave their powers in the human rights area, especially minorities, to the European Union, since the main purpose at the

beginning was the development of internal markets and economic integration whereas the main purpose of the Council of Europe is the protection of human rights. The Languages Charter is a valuable instrument for the protection of minority languages, as it contains a lot of detailed provisions; however 12 of the European Union countries did not ratify it, and these are countries with several minority languages in their borders and it is not possible to force them to sign and ratify. This is the way how the International Law works but this is also the limit of the International Law. The publication of reports is a good incentive for a state but it is not a sufficient deterrent. If there are not sanctions the norms become merely moral duties and a state is free to follow or not the suggestion received; with sanctions normally is possible to obtain the desirable result. The EU is more than an International Organization and the member states must respect the ECJ's judgments and the EU legislation since there are true sanctions for those member states that are disrespecting regulations, directives, decisions and ECJ's judgements. In the European Union when the Charter of Nice will be effective, if it is possible to appeal to the Court of Justice, could be very important for the protection of minority languages, especially for the countries which did not sign and ratify the European Charter for Regional or Minority Languages but at the moment it is difficult to say. Judges are careful to interfere in the sphere of human rights and to influence the decisions of the states but sometimes, even recently, happened[51]. The composition of the ECJ changes over the time and also judges are humans thus they can change opinion. In the case of minority languages all depends on the orientation of ECJ and judges' will to make a statement without strong legal basis.

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[51] See ECJ case C-127/08 Metock and others v Minister for Justice, Equality and Law Reform.

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Alessia Vacca: Euroopa Nõukogu ja Euroopa Liidu raamistikud vähemuskeelte seaduslikus kaitsmises – ühtsus või erisus? Artikkel võrdleb Euroopa Liidu ja Euroopa Nõukogu seadust, mis kaitsevad vähemuskeeli, ja vaatleb nende kahe süsteemi vahelisi suhteid. Euroopa Nõukogul on vähemuskeelte kaitsmisel olnud väga tähtis roll. See on loonud kaks eriti tähtsat konventsiooni: Euroopa regionaal- või vähemuskeelte harta (1992) ja rahvusvähemuste kaitse raamkonventsioon (1995). Mõlemad konventsioonid sisaldavad mitmeid vähemuskeeltega seotud detailseid sätteid. Kõik maad, sh isegi mitte kõik Euroopa Liidu maad, ei ole neid konventsioone ratifitseerinud. 27 Euroopa Liidu maast ei ratifitseerinud 12 maad Euroopa regionaal- või vähemuskeelte hartat. Euroopa Liit toetab mitmekeelsust, sest ta tahab saavutada ühtsust, säilitades samal ajal erisust. Euroopa Ühendus on astunud olulisi samme vähemuskeelte osas, neist märkimisväärseimad on Euroopa Parlamendi resolutsioonid. Euroopa Liidu põhiõiguste harta (vastu võetud Nice'is 7. detsembril 2000) sisaldab artikleid 21 ja 22, mis on selle teemaga seotud. Lissaboni konventsioonis on ristviide Euroopa Liidu põhiõiguste hartale, mis on seetõttu seaduslikult seotud Lissaboni konventsiooniga alates 2009. aasta detsembrist. Harta järgi võiks apelleerida Euroopa Õiguskohtusse, kui on tegemist keelega seotud diskrimineerimisjuhtudega.

Märksõnad: keelelised õigused, vähemuskeeled, Euroopa Nõukogu, Euroopa Liit, Euroopa Õiguskohus