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Linguistic Diversity within the Integrated Constitutional Space*

Abstract

The language issue within the European constitutional space is one of the most fascinating challenges to supranational integration. On the one hand, the principle of equal standing of all official and working languages is constantly reaffirmed; on the other hand the necessity to simplify the European Babel on the basis of a more functional consideration of the language issue seems unavoidable. Several solutions have been proposed both by scholars and by European institutions.

The paper argues that there is an intimate contradiction in today's linguistic policy in the EU, oscillating between the need to simplification and the constitutional duty to respect linguistic pluralism as imposed by the member states. In fact, the language issue is just the mirror of the constitutional law of integration as a whole. Looking closer at the constitutional dimension of supranational integration can help better address the language issue too.

The analysis is divided in four parts, dealing respectively with the role and the limits of law in matters of language, the present allocation of competences in language-issues, the development of the concept of "integrated constitutional space", and its legal nature under the viewpoint of the language dimension.

1. Introduction

According to an anecdote, during the negotiations for Denmark's accession to the EEC, the Danish government proposed to renounce to the official status of the Danish language and to adopt English and French as the sole official languages of the Community, under the condition that French

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were forced to use English and vice versa.¹ Everybody knows how this ended up.

In the nation-state building process, language was one of the most relevant features of national identity, and even in the peaceful development of European integration the language issue played a crucial role in determining power structures and relationships.² More recently, Austria imposed a protocol on the use of specific Austrian terms in the German language in the frame of the EU, as a sign of its distinct “national identity”.³ In addition, during the German Presidency of the Union in 1999 – following the Austrian one – attempts were made to introduce German as a working language in informal meetings of the Council.⁴ The Charter of Fundamental Rights of the EU, adopted in Nice in 2000 (hereinafter “The Charter”), states in its Article 22 that the Union respects “cultural, religious and linguistic diversity”. Meanwhile, 2001 was declared “the ‘European year of languages’”, starting from the perspective, that “all the European languages [...] are equal in value and dignity from the cultural point of view and form an integral part of European cultures and civilization”.⁵ This principle is not a mere declaration, considering the impressive amount of resources invested by the EU in language services and in

¹ I was not able to find a source to prove it. This anecdote was quoted by a German professor of linguistics during a conference I attended some years ago. However, if it is just a myth, it is even more significant, because it shows the clear perception of the problem and the need to work out a solution.

² See Andreas Beierwaltes, “Sprachenvielfalt in der EU. Grenze einer Demokratisierung Europas?”, ZEI Discussion Papers (1998) and Gabriel N. Toggenburg, “Die Sprache und der Binnenmarkt im Europa der EU: Eine kleine Beziehungsaufstellung in 10 Punkten”, 1 European Diversity and Autonomy Papers – EDAP (2005), at http://www.eurac.edu/documents/edap/2005_edap01.pdf.

³ Act concerning the conditions of accession of Norway, Austria, Finland and Sweden, protocol no. 10 on the use of specific Austrian terms of the German language in the frame of the European Union, OJ C 241 of 29 August 1994, 370. In the same occasion, the Kingdom of Norway made a declaration (no. 38) which stated that: “in the written use of Norwegian as official language of the institutions of the Communities, equal status must be given to Bokmaal and Norsk”, (OJ C 241 of 29 August 1994, 395).

⁴ In the second half of 1999, under Finnish Presidency, the Germans insisted in getting interpreting not only into English and French, but also into German, when informal preparatory meetings of the Council took place. After the Finns made concessions to appease the German government, Spain and Italy began to claim an analogous treatment for their languages. Similar problems arose some years later when the Commission proposed to abolish Italian and Spanish in the weekly press conferences. See Thomas Oppermann, “Das Sprachenregime der Europäischen Union – reformbedürftig? Ein Thema für den Post-Nizza-Prozess”, 1 Zeitschrift für Europäische Studien (2001), 1-21, at 13-16 and id., “Reform der EU-Sprachenregelung?”, 37 NJW (2001), 2663-2668.

⁵ Decision No 1934/2000/EC of the European Parliament and of the Council of 17 July 2000 on the European Year of Languages 2001, OJ L 232 of 14 September, 1. The same principle lies on the basis of Regulation no. 1/1958 of the Council of 15. April 1958, OJ 1958, 386 (not by chance the first regulation adopted by the Council in the history of the EC).

promotion of languages.⁶ In addition, many non-binding activities have been undertaken by the EU/EC in order to protect and improve linguistic diversity,⁷ and enlargement of 2004 brought the language issue even more to the fore. Finally, in several

declarations and resolutions, the European Parliament reaffirmed the strong commitment to the equality of all official and working languages of the Union.⁸

A double and contradictory tendency thus emerges. On the one hand the principle of equal standing of all official and working languages is constantly reaffirmed;⁹ on the other hand the necessity to simplify the European Babel (especially considering the additional problems deriving from the Eastern enlargement) on the basis of a more functional consideration of the language issue seems unavoidable. A third element must be considered: even in the formal-equality-of-all-languages-approach, many languages, i.e. the minority or only partially official languages, are excluded.

In the (artificial, inasmuch as it is institutionally shaped) identity-formation process of the EU, again language is playing a fundamental role.¹⁰ Mirroring the evolution of monolingual nation states, the constitutional development of multilingual Europe takes language as a value. Instead of the “one language – one nation – one State” approach,¹¹ the new paradigm of “many languages – many nations – one polity” seems now to be followed, neglecting the existence of many languages not officially

⁶ To date, translators represents 12% of the Commission’s personnel (30% of the personnel with university degree) and the expenses for translations make up 30% of the Commission’s budget. The Commission’s translation service is in numerical terms the biggest world institution dealing with translations. Further data in Kristina Cunningham, “Translating for a larger Union – can we cope with more than 11 languages?”, (http://europa.eu.int/comm/translation/reading/articles/pdf/2001_cunningham.pdf); Miguel Siguan, *L’Europa de les llengües* (Edicions 62, Barcelona, 1996), 166-167; Kerstin Loehr, *Mehrsprachigkeitsprobleme in der Europäischen Union* (Peter Lang Verlag, Frankfurt am Main, 1998) and at http://europa.eu.int/comm/translation/index_en.htm.

⁷ E.g. financial support to European Bureau for Lesser Used Languages (and problems attached, etc.).

⁸ See in particular resolution no. B5-0770 of 13 December 2001, resolution on measures for minority languages and cultures of 11 February 1983 and others.

⁹ Such a constant highlighting of the parity of all languages may indicate that the EU needs to persuade itself that this is the truth. According to an old Latin saying, “*excusatio non petita, accusatio manifesta*”.

¹⁰ Also in terms of democracy. See further Sue Wright, “Language Issues and Democracy in the European Union”, paper presented at the workshop “The Public Discourse of Law and Politics in Multilingual Societies”, IVAP, Oñati, 2002 and Philippe van Parijs, “Linguistic Justice”, 1(1) *Philosophy, Politics & Economics* (2002), 59-74.

¹¹ In some cases even through the establishment of an artificial, unifying language, such as new-Norwegian, Hebrew, Basque, etc.

recognized by the states. Thus, the traditional syllogism “language instrumental to identity, identity instrumental to power, language instrumental to power” remains the same. Is this the correct approach? Does it really take us towards an “ever closer Union”? And, finally, are there alternative and perhaps more viable approaches to be pursued in dealing with the linguistic issue in the framework of European integration?

This paper argues that the approach followed until now shows many deficits. New tentative solutions will be proposed, based on the more recent achievements of the integration process, especially considering the new role of the member states and the principle of substantive equality in European law.

The paper is an attempt to analyze the role of linguistic diversity in Europe’s constitution-making process, as “filtered” through national identity, oscillating between its symbolic (identity) and functional (use of languages, need of effective communication) dimension as well as between power and efficiency on the one hand, and equality (between states and between citizens) on the other. The analysis is divided in four parts, dealing respectively with the role and the limits of law in matters of language (2), the present allocation of competencies in language-issues (3), the development of the concept of “integrated State” (4), and its legal nature under the viewpoint of the language dimension, elaborating some tentative proposal (5).

2. Culture, Language and the Role of Law

Unlike several international organizations, the EU provides no definition of either culture or of language.¹² Not even the Charter, despite protecting and promoting cultural and linguistic diversity (Article 22), contains any clarification of the concepts of culture and language. In the light of the case law of the European Court of Justice (ECJ), two possible meanings of culture seem to emerge.¹³ The first one considers historical or artistic heritage as a possible limitation to the free movement of goods and serv-

¹² Several attempts to define these concepts, however, have been made by the drafters of some international declarations. That is the case, for example, of the UNESCO Declaration of cultural policies (adopted in Mexico City in 1982 and based on a very comprehensive concept of culture), in the UNESCO draft declaration of cultural rights of 1996, and others. See Roberto Toniatti, “The Legal Dimension of Cultural Citizenship”, in Symposium “Integrating Diversity in Higher Education: Lessons From Romania”, OSCE High Commissioner for National Minorities, 2000.

¹³ According to Cinzia Piciocchi, “La Carta tra identità culturali nazionali ed individuali”, in Roberto Toniatti (ed.), *Diritto, diritti, giurisdizione. La Carta dei diritti fondamentali dell’Unione europea* (Cedam, Padova, 2002), 119-134, at 126.

ices;¹⁴ the second and larger one also includes all the values contributing to “national cultural identity”,¹⁵ thus embracing a wide range of possible cultural choices that the ECJ tends to respect¹⁶ and which can be summarized in the concept of pluralism.

A first provisional conclusion is that, in the EU-law perspective, culture and language are considered as they are by the member states, and the Union is committed to respect and protect diversity and pluralism (in particular Article 6 TEU and Article 151 TEC).

The borderline between culture and language is not easy to define.¹⁷ It is rather intuitive that language is only part of a more general and

¹⁴ For this interpretation see George Karydis, “Le juge communautaire et la préservation de l’identité culturelle nationale”, 30(4) *Rev. Trim. De Droit Européen* (1994), 551-560

¹⁵ In the words of Advocate General Van Gerven, opinion delivered on 11 June 1991 in Grogan, judgment of 4 October 1991, case C-159/90, ECR 1991, I, 4685 it is necessary to allow the competent national authorities an area of discretion within the limits imposed by the Treaty and the provisions adopted for its implementation. There can, in my estimation, be no doubt that values which, in view of their incorporation in the Constitution, number among ‘the fundamental values to which a nation solemnly declares that it adheres’ fall within the sphere in which each Member State possesses an area of discretion ‘in accordance with its own scale of values and in the form selected by it’ (at 26). And it is for each Member State to define those concepts in accordance with its ‘own scale of values’ (at 38).

¹⁶ The “cultural options” of the member states that have yet been challenged in front of the ECJ range from domestic rules on abortion (Grogan) to rules on languages (Groener, judgment of 28 November 1989, case C-379/87, ECR 1989, 3967; Mutsch, judgment of 11 July 1985, case 137/84, ECR 1985, 2681; Bickel/Franz, judgment of 24 November 1998, case C-274/96, ECR 1998, I-7637) and on the prohibition of Sunday trading (Council of the City of Stoke-on-Trent and Norwich City Council v B & Q plc., judgment of 16 December 1992, case C-169/91, ECR 1992, I, 6635) and many others. “However, it is not sufficient for a national rule to be in pursuance of an imperative requirement of public interest which is justified under Community law, it must also not have any effects beyond that which is necessary. In other words, it must comply with the principle of proportionality” (Advocate General’s opinion in Grogan, 27).

¹⁷ An interesting example under EC Law can be derived from the Konstantinidis case ruled by the ECJ in 1993 (judgment of 30 March 1993, case C-168/91, *Christos Konstantinidis v. Stadt Altensteig – Standesamt e Landratsamt Calw – Ordnungsamt*, ECR 1993, I, 1191 – see case notes by Dominique Gaurier, 3 *European Review of Private Law* (1995), at 490 and by Rick Lawson, *CMLRev* (1994), at 395). A Greek national, married in Germany, applied to the Registry Office for the entry of his surname in that register to be rectified by changing it from “Konstandinidis” to “Konstantinidis” on the ground that the latter spelling indicated as accurately as possible to German speakers the correct pronunciation of his name in Greek and that it was, moreover, the way in which his name was transcribed in Roman characters in his Greek passport. German law prescribes the transcription on the basis of a standard ISO-convention, according to which the applicant’s name was transliterated into “Hrēstos Kōnstantinidēs”. The applicant argued that it distorted the pronunciation of his name, thus constituting an encroachment contrary to the provisions of the Treaty guaranteeing freedom of establishment and freedom to provide services. For the Court it is contrary to former Article 52 (now 43) ECT “for a Greek national to be obliged, under the applicable national legislation, to use, in the pursuit of his occupation, a spelling of his name whereby its pronunciation is modified and the resulting distortion exposes him to the risk that potential clients may confuse him with other persons”. For Advocate General Jacobs, however, the erroneous transcription threatened not only the economic activity of Mr Konstantinidis, but also his cultural identity.

complex phenomenon called “culture”, but the interrelations between the two concepts are so manifold that it is impossible to clearly distinguish between them. What is relevant for our purposes, however, is that the criteria for the analysis of both culture and language are by far the same. Therefore, from a (European) constitutional perspective, it seems possible and even necessary to analyze language by means of the same conceptual categories.¹⁸

In the context of a legal analysis of culture and language, two main preliminary pre-legal questions should be raised, bearing in mind that no definite answers are possible. First, the lawyer must be aware that not every single manifestation of culture or language is (nor can be) equally relevant for the legal system. On the contrary, the legal system tends to be quite selective in recognizing (and even more in protecting) cultural and linguistic difference. Thus a first question is when and under which circumstances and conditions a culture or language becomes relevant for the legal system and can therefore claim legal recognition and protection.¹⁹ Many factors, such as number, proportionality, intensity, political influence, etc. might determine this choice.²⁰ It is clear, however, that it must be decided what, when and under what conditions can be considered as a cultural or linguistic group, as well as whether and by what means said group may obtain legal protection and/or promotion. This decision has to be made by an entity possessing the power to establish legal norms that are binding for a group of persons living in a territory. In the last four centuries, this entity has been the nation-state, which was basically free to choose its approach towards diversity, mostly determined by extra-legal factors.²¹ Two main models were adopted: inclusive on the one hand (based on integration and formal equality, in some cases causing assimilation), exclusive on the other hand (based on separation, sometimes respectful of formal and substantive equality, sometimes

¹⁸ See Matthias Niedobitek, *The Cultural Dimension in EC Law* (Kluwer Law International, The Hague, 1997); and Joseph A. McMahon, “Article 128: A Community Contribution to the Cultural Policies of the Member States?”, in Stratos V. Konstantinidis (ed.), *A People’s Europe. Tuning a Concept into Content*, EC/International Law Forum III (Ashgate, Dartmouth, 1999), 18 183-210; Peter Hilpold, *Bildung in Europa* (Nomos, Baden Baden, 1995).

¹⁹ See Roberto Toniatti, “Minorities and Protected Minorities: Constitutional Models Compared”, in Tiziano Bonazzi and Michael Dunne (eds.), *Citizenship and Rights in Multicultural Societies* (Keele Univ. Press, Keele, 1995), 195-219.

²⁰ See Bruno de Witte, “Surviving in Babel? Language Rights and European Integration”, in Yoram Dinstein (ed.), *The Protection of Minorities and Human Rights* (Martinus Nijhoff Publishers, Dordrecht, 1992), 277-300.

²¹ For a brief overview Neus Oliveras Jané, “The Main Concepts in the Recognition of Linguistic Rights in European States”, 2 Mercator Working Paper (2001), at http://www.ciemer.org/mercator/Menu_nou/index.cfm?lg=gb.

degenerating into segregation).²² This state of the art is now confronted with new challenges, since the nation-state (especially in the context of the European integration) is no longer the sole owner of the power to “say what the law is”, and also the concept of citizenship is facing a process of transformation.²³

The second problem the lawyer must be aware of concerns the limits of the law’s influence in determining cultural or linguistic rules.²⁴ In other words, to what extent can law pass rules on subjects like language, which are social and cultural phenomena and therefore based on conventional, non-legal rules? If language is the instrument of (also legal) communication and the basis of legal certainty,²⁵ thus requiring precise rules, linguistic regulation by legal means is hardly efficient. Among the possible examples, references can be made to the establishment of a binding legal terminology in bilingual or multilingual areas like Canada, Switzerland, Belgium, or certain Italian regions and Spanish autonomous communities, where special authorities establish the official legal terminology in the second/minority language, but their decisions often lack of efficiency and social acceptance.²⁶ The same goes not only for minority languages, but also in the case of officially monolingual states. Examples are provided by the recent German litigation on orthography, which ended up in some

²² See Joseph Marko, *Autonomie und Integration* (Böhlau Verlag, Wien, 1995); and id., “Citizenship beyond the Nation State? The Transnational Citizenship of the European Union”, in Massimo La Torre (ed.), *European Citizenship: An Institutional Challenge* (Kluwer Law International, The Hague, 1998), 369-385.

²³ For an interpretation on how to possibly combine culture and citizenship in the modern times, see Will Kymlicka, *Multicultural Citizenship* (Clarendon Press, Oxford, 1995). See also the highly interesting symposium “The State of Citizenship”, 7(2) *Indiana Journal of Global Legal Studies* (2000), 447-510 (papers by Linda Bosniak, Aristide R. Zolberg, Kim Rubenstein, Daniel Adler, David Thelen, Heinz Klug, Saskia Sassen, Susan B. Coutin and Kenneth L. Karst).

²⁴ Alessandro Pizzorusso, “L’uso della lingua come oggetto di disciplina giuridica”, 6 *Le Regioni* (1990), 1329-1347.

²⁵ See, in this respect, the Declaration on the quality of drafting of Community legislation (Inter-institutional agreement of 22 December 1998) annexed to the Final Act of the Treaty of Amsterdam. See also the rich case law of the ECJ on the importance of legal certainty, which is determined also by language rules (starting from case 24/62, *Germany v. Commission* [1963], ECR, 63 up to case C-6/98, *ARD v. Pro Sieben* [1999], ECR I-7599).

²⁶ For example, the Office de la langue française in Quebec, the Translation and terminology office of the Swiss Federal Chancery, the Terminology commission established for the purification of languages in South Tyrol, the Real Academia de la lengua vasca in the Basque country, etc. See further Francesco Palermo, “Insieme per forza? Aporie epistemologiche tra lingua e diritto”, in Daniela Veronesi (ed.), *Linguistica giuridica italiana e tedesca / Rechtslinguistik des Deutschen und Italienischen* (Unipress, Padova, 2000), 17-28.

decisions of the Federal Constitutional Court,²⁷ and by the decision of the French Constitutional Council on the so-called “loi Toubon”.²⁸ As the German Bundesverfassungsgericht and the French Conseil constitutionnel pointed out, inefficiency of legal rules on how language must be is due to the fact that “language belongs to people,” and the natural evolution of a language usually runs counter to a strict normative approach to the language issue.

It can be thus affirmed that law faces several factual and legal obstacles when dealing with language issues, and that the establishment of complete equality between languages is merely a legal fiction and cannot correspond to reality nor can influence it beyond a certain extent. In other words, the response to the necessity to improve linguistic pluralism cannot be found only in legal instruments, although law can contribute greatly this aim.

3. Language and National Identity

The Role of Member States and the EU/EC as a Multinational Polity in Determining the Legal Context of Linguistic Diversity

As shown, language issues – as far as they can be determined by law (especially linguistic rights) – belong traditionally to the realm of nation states, and a deferential attitude towards states’ prerogatives in the sphere of language is clearly enshrined in the European treaties. The reason is the simple syllogism already mentioned: language is something that belongs to people; people are the intimate basis of national identity; therefore language is the core of national identity, which the EU “respects” (Article 6(3) TEU).

Nevertheless, the TEC contains some provisions in the fields of culture and (to a more limited extent) language. More generally, the Community carries out relevant cultural and linguistic policies that obviously have an

²⁷ Judgment of 14 July 1998, BVerfGE 98, 218. See Jörg Menzel, “Zur Bedeutung des β in der Staatsaufgabenlehre unter dem Grundgesetz”, in Jörg Menzel (Hrsg.), *Verfassungsrechtsprechung. Hundert Entscheidungen des Bundesverfassungsgerichts in Retrospektive* (J.C.B. Mohr, Tübingen, 2000), 648-653. The last decisions were adopted in 1999 on the basis of individual claims (20 July 1999, 1 BvQ 10/99 and 25 November 1999, 2 BvR 1858/99, NJW (1999), 3477). See also Sally Johnson, “The Cultural Politics of the 1998 Reform of German Orthography”, 53(1) *German Life and Letters* (2000), 106-125. For the latest developments see Wolfgang Kopke, „Die Rechtschreibung erneut vor Gericht”, 49 NJW (2005), 3538-3541.

²⁸ Conseil Constitutionnel, decision no. 94-345 DC of 29 July 1994 (on the law on the use of the French language), commented by Jean-Pierre Camby, “Le Conseil constitutionnel et la langue française”, 5 *Revue de droit public* (1994), 1663-1672.

impact on the language policy of the member states.²⁹ In this section the distinct functions of member states and EU concerning language policies shall be analyzed.

From the point of view of the states, language clearly belongs to their (national) identity, in the sense that the state is not only a form of organization of public power, but also a community of people.³⁰ Thus, national identity of the states means their constitutional identity,³¹ and consequently their sovereignty. This perception is reflected in the community legal order, which considers language part of the national identity of each member state.³²

It is therefore at the level of the member state that the legal identification and protection of language(s) and language diversity is determined, whereas the role of the Union is limited to the presumption of cultural and linguistic diversity (Article 22 of the Charter), to the recognition of the choice made by each member state regarding its national identity (Article 6(3) TEU)³³ and, where possible, to “contribute to the flowering of cultures of the member states, while respecting their national and regional diversity” (Article 151(1) TEC).

So does no European language issue exist at all? Quite the contrary.

From a states’ constitutional perspective, the question arises, why should the Union commit itself to respecting something (the national identity of the member states, and thus their languages) that belongs to the inalienable part of a state’s sovereignty and could never be touched by the process of European integration. From the Union’s constitutional viewpoint, however, all those provisions mean the normative assumption of the existence of a variety of cultures (and languages) and a constitutional duty to maintain and safeguard them and the constitutional rejection of a single European culture or language. In other words, being the

²⁹ See Bruno de Witte, “The Cultural Dimension of Community Law”, 4(1) *Collected Courses of the Academy of European Law* (1995), 229-299 and id., “The Impact of European Community Rules on Linguistic Policies of the Member States”, in Florian Coulmás (ed.), *A Language Policy for the European Community – Prospects and Quandaries* (Gruyter, Berlin, 1991), 163-177.

³⁰ In the constitutional doctrine, a clear distinction is traditionally drawn between the State as a legally organized structure of public power (State as an institution) and the State as a community of people subject to specific norms and determining that norms (State as a community).

³¹ Roberto Toniatti, “Los derechos del pluralismo cultural en la nueva Europa”, 58(II) *Revista Vasca de administración pública*, (2000), 17-47.

³² Oppermann, *Das Sprachenregime ...*, at 21.

³³ This duty derives, according to some scholars, from the principle of fair cooperation between the Community and the Member States (Article 10 TEC). Meinhard Hilf, “Europäische Union und nationale Identität der Mitgliedstaaten”, in Albrecht Randelzhofer, Rupert Scholz and Dieter Wilke (eds.), *Gedächtnisschrift für Eberhard Grabitz* (C.H. Beck, München, 1995), 157-170, at 167.

Union built by (national) states and being thus indivisible from them, by no constitutional means can the “ever closer Union” ever really melt into a monolingual (mono-national) polity.³⁴

Consequently, only the member states can represent the different cultural/linguistic communities that (must) constitute Europe, and the linguistic pluralism of the Union coincides with the linguistic pluralism of the states, including, of course, the sub-national level (as in Finland, Spain, Italy and, to some extent, Austria and even the United Kingdom). The European (cultural and) linguistic pluralism is determined by the free choice of each member state regarding (internal) linguistic and cultural pluralism,³⁵ and is the sum of the identities (culturally and linguistically plural or not) of all Member states. Indeed, because the member states are solely responsible for the legal recognition (of the existence) of a language, the EU cannot by definition – have minorities in a classical sense. Similarly to countries made up of different “regional” or “constituent” peoples (and not minorities) like Switzerland, Belgium, Bosnia-Herzegovina, and to some extent Canada, but also like countries which do not recognize (the existence of) minorities at a central level, attributing culture and language to the regional sphere of power (Germany),³⁶ in the context of the European Union, each member state is and represents at the same time a minority³⁷ and a constituent people.³⁸ Consequently, the Community cannot even claim competence in the field of (linguistic) minority protection (a classical “internal issue” of member states, minorities being primarily defined in

³⁴ Albert Bleckmann, “Die Wahrung der ‘nationalen Identität’ im Unions-Vertrag”, 52 *Juristen Zeitung* (1997), 265-269.

³⁵ As Hilf points out, apart from being the term “national” in Article 6 TEU legally and culturally problematic, the identity that the Union shall respect is only the one of the Member States and by no means that of their territorial units, their peoples, their nations (Hilf, “Die Europäische Union ...”, at 164). It might be added, however, “only as long as the States decide that it must be so.”

³⁶ In Germany the issue was raised in the frame of the debate on the constitutional emending process of 1994. The proposal to introduce a new Article 20a in the Basic Law to grant a federal protection of minorities was rejected on the basis of the exclusive competence of the Länder in cultural matters. See Michael Kloepfer, *Verfassungsänderung statt Verfassungsreform. Zur Arbeit der gemeinsamen Verfassungskommission (Nomos, Baden Baden, 1995)* and Anja Siegert, *Minderheitenschutz in der Bundesrepublik Deutschland – Erforderlichkeit einer Verfassungsänderung* (Duncker & Humblot, Berlin, 1999).

³⁷ Bruno de Witte, “Politics Versus Law in the EU’s Approach to Ethnic Minorities”, 4 *EUI Working Paper RSC* (2000) and Toniatti, *Los derechos* Interestingly, also the then President of the Commission Prodi, in his speech at the opening session of the Convention on the Future of Europe (28th February 2002) defined the EU “a Union of minorities”.

³⁸ At present, the only truly multinational State belonging to the EU is Belgium. However, the groups (and the languages) that are “constituent” in Belgium are at the same time “national” languages in other Member States (Netherlands, France and to some extent Germany), and therefore the issue of a “constituent multinational State” never properly arose in the EU.

the group-state relationship) without changing its constitutional nature of a multinational and multi-state polity.

The EU, indeed, integrates several nations on the basis of forms of consociational democracy and “segregation” between the different nations (e.g. granting a differentiated representation in the European institutions on grounds of nationality, veto rights and even derogation to the enjoyment of the free movement of workers where the public administration is concerned, Article 39(4) TEC). In constitutional terms, this model of co-existence between different peoples (nations, states), based on segregation and free cultural choice of the entities, is usually defined as “multinational”. This means that the system is the sum of the different nations and nationalities which constitute it, and it does not have any power in this field but that to regulate nationality-based issues at central level (representation in central organs, use of languages, etc.).³⁹ Nevertheless, the EU shows also some (embryonic) features of the second model of co-existence, based on integration and imposing an active role on the central level in nationality issues (some organs must represent only the Community’s interests, there is a common citizenship, whatever that means, and in principle the fundamental freedoms are enjoyed without any discrimination on the ground of national origin). This opposed model is normally called “multiethnic”. In this particular case, dealing with linguistic and thus cultural aspects, it should be spoken of a “multicultural” approach.

Put in these terms, it must be concluded that the EU is still a multinational polity, although showing relevant and increasing characteristics of a multicultural (or, better, intercultural) one.⁴⁰ The same goes for language regulation: the EU is linguistically the sum of the official languages of the member states (multinational), even though the practice shows some features of multiculturalism. It is well known that some official languages in the member states do not enjoy the same status at Community level

³⁹ See Marko, *Autonomie und Integration ...* ; and id., “n welcher ‘Verfassung’ ist Europa? Einheit – Gleichheit + Differenz als juristisch-konstruktives Problem”, in Ulfried Terlitzta, Peter Schwarzenegger and Tomislav Boric (eds.), *Die internationale Dimension des Rechts* (FS Pösch, Wien 1996), 207-222.

⁴⁰ The concept of interculturalism puts the existence of a common domain to the fore, while respecting cultural diversity. See e.g. Jagdish S. Gundara, *Interculturalism, Education and Inclusion* (Paul Chapman, London, 2000). In this sense, it seems more adequate for our purposes than multiculturalism, even though the terms are still used as synonymous here.

(e.g. Luxembourgish, Irish,⁴¹ Maltese); that many regional languages do not have any formal recognition in Europe (e.g. Catalan, Basque, etc.)⁴²; that European institutions are free to decide how to deal with their working languages (Article 5 regulation 1/1958) and even with their official languages,⁴³ that some pieces of legislation cannot even be passed because of language problems;⁴⁴ and that in practice, almost all institutions can modulate the concrete application of the principle of equal status of the languages.⁴⁵

⁴¹ Irish was recently upgraded to an official and working language of the EU, even though with an “asymmetrical status”. Council Regulation (EC) No. 920/2005 of 13 June 2005, amending Regulation No. 1/1958, provides that from 2007 Irish enjoys the status of full official language, with no additional costs for the Community. The Irish government bears the training costs for interpreters and translators. Not all documents, however, will be available in Irish: like for the case of Maltese, only regulations adopted under the co-decision procedure will be available in Irish.

⁴² The picture is getting ever more complex also in this regard. The Kingdom of Spain signed administrative agreements with the Commission and the Council (respectively in OJ C 40/2 of 17-2-2006 and in OJ C 73/14 of 25-3-2006), according to which Spanish citizens can address the European institutions in all official languages of Spain, without additional costs for the Community.

⁴³ See the Kik doctrine of the (Court of First Instance and of the)ECJ, *Christina Kik v. Office for Harmonisation in the International Market*, judgment of 2-9-2003, case C-361/01. For more details, Niamh Nic Shuibhne, *EC Law and Minority Language Policy*. Culture, Citizenship and Fundamental Rights (Kluwer International Law, The Hague, 2002).

⁴⁴ This is the case, for example, of the European trademark. For practical reasons (especially to compete in the international market) the European trademark shall be written in English, but many States, such as France and Germany, claimed their national languages as official too, and as a result the regulation proposal on trade marks was for a long time blocked by cross-veto. An agreement was reached in March 2003, according to which from 2010 on European trademarks will be registered by the EU in only three official languages (English, French, German) and, if required, in the original language (see http://www.ige.ch/E/jurinfo/pdf/EU-Council_Common_political_approach_e_03-03-07.pdf).

⁴⁵ So does the Council, where, as a matter of fact, documentation is in many cases only drafted in English, French and sometimes German. Similarly, the Commission’s debates are mainly drawn up in only a few official languages. See for more details Manuel Alcaraz Ramon, “Languages and Institutions in the European Union”, 5 Mercator Working Paper (2001), at http://www.ciemen.org/mercator/Menu_nou/index.cfm?g=gb). The Parliament formally recognizes the general principle that all documents shall be drafted in all official languages. Nevertheless, for practical reasons, translation is made only into English and French, and from there back into the other official languages. This causes, as it is easy to understand, serious problems where the legal certainty is concerned (for this concern see also Antoni Milián i Massana, “Le régime linguistique de l’Union Européenne: le régime des institutions et l’incidence du droit communautaire sur le mosaïque linguistique européen”, 3 *Rivista di diritto europeo*, 1995. For further examples from the translator’s point of view see Domenico Cosmai, *Tradurre per l’Unione europea. Il regime linguistico della UE* (Hoepli, Milano, 2003). 485-512, at 501. Concrete language use no longer even depends on the territory where the institutions are located: for example, the languages used by Eurostat (based in Luxembourg) are English, French and German (see <http://europa.eu.int/comm/eurostat/>). See further Andrea Ortolani, “Lingue e politica linguistica nell’Unione europea”, 21 *Rivista critica del diritto privato* (2002), 203-216 and at <http://www.jus.unittn.it/cardozo/Review/>

The constitutional nature of the EU in language issues is thus that of a multinational polity, formally deferential to the overwhelming role of the member states, but functionally aiming to improve its multicultural elements.

In the coming pages, the intensity of the EU's tendency towards multiculturalism shall be tested, and it must be analyzed whether, on the basis of recent developments in European constitutional law, the present language regulation is still in line with the new constitutional scenario of European integration.

4. Who is the Ultimate Guardian of Linguistic Diversity? The Role of the “Integrated Constitutional Space”

The language issue in Europe is certainly – as we have seen – one of the most state-based subjects. The states decide, the EU recognizes and respects, and cannot even change its role because this would imply a change in its constitutional nature, which can be modified only by the states acting unanimously. The influence of the Union in the language sphere is limited to its own organization, and even in this field the states retain a veto right (Article 290 TEC). From a legalistic/formalistic point of view, the Community level shall simply surrender to the exclusive state competence in the language field. However, there are at least two main reasons, deriving from the theory of the constitutional nature of member states (4.1.) and from the analysis of the jurisprudence of the ECJ (4.2.1.), respectively, that demonstrate why the previous statement cannot be true. Also, the Charter of Nice addresses – although quite vaguely – the language issue, and will therefore be analyzed from the perspective (of the equality principle and) of its peculiar position in the new legal system of constitutional language law of the European Union (4.2.2.).

4.1. The Integrated Constitutional Space and “Non Binding – Binding” Constitutional Law

A state is not the same as a member state. A definition of the kind of state we are referring to (4.1.1.) is necessary in order to understand the real meaning of the mentioned almost exclusive role of the state in the language sphere (4.1.2.). Subsequently, two crucial fields will be analyzed, in which the emergence of this new constitutional law becomes particularly clear (4.2.).

4.1.1. THEORETIC FOUNDATIONS

Unlike the (federal) state-formation process, where the federalizing entities can determine the ideological underpinnings and the constitutional values of the federation-in-the-making only before the so called “federal

big bang"⁴⁶ takes place – i.e., before the federal constitution enters into force, transforming their original sovereignty into mere autonomy – in the constitution-making process of Europe the permanent nature of the process influences and limits the “constitutional way of being” and “form of the power”⁴⁷ of both the member states and the Union.⁴⁸ For this reason, in the present European constitution there are many reciprocal “non binding bindings” regarding the constitution of the states and the Union.

This bundle of reciprocal influences, in spite of not being (yet) directly justiciable by a court and thus not immediately binding, has enormous legal relevance⁴⁹. Being a member state can thus imply that for every state, some consequences result from its language policy. Although the ECJ cannot rule that the use of an official language must be guaranteed on the basis of a fundamental right deriving from the common constitutional tradition of pluralism, it can reach the same result through the principle of non-discrimination.

In general terms, in the context of European integration every state must rely on the others as well as the Union⁵⁰. This implies the establishment of common principles that do not reach the same effectiveness as the common constitutional traditions (and are thus not immediately enforceable by the courts) but are of great importance in shaping relations between member states and the Union: Something which lies in-between soft law and constitutional traditions common to the member states. Like conventions in the British constitution, it might be said the mentioned common principles are “the flesh which clothes the dry bones of the law”.

⁴⁶ This term is used by Roberto Toniatti, “Federalismo e potere costituente”, in “Proceedings of the Conference ‘Regionalismo e federalismo in Europa’”, Trento, 6-7 June 1997, 171.

⁴⁷ The term “form of the power” is used by Francisco Rubio Llorente, *La forma del poder Estudios sobre Constitución* (CEC, Madrid, 1997).

⁴⁸ See, in general, Neil McCormick, *Questioning Sovereignty* (Oxford University Press, Oxford, 1999).

⁴⁹ It is not by chance that the machinery set up in Article 7 TEU for the case of breach by a Member State of the principles laid down in Article 6(1) TEU (liberty, democracy, respect for human rights and fundamental freedoms, rule of law) provides for a highly political control and it does not involve the Court of Justice. It is worth noting, in addition, that the procedure under Article 7 TEU (which is legally formalized, in spite of being of very political nature) has never been applied, not even during the ‘Austrian crisis’ in 2000, which was settled by means of merely political actions. On the Austrian crisis and Article 7 TEU see Gabriel Toggenburg, “La crisi austriaca: delicati equilibrismi sospesi tra molte dimensioni”, 2 *Diritto Pubblico Comparato ed Europeo* (2001), 735-755; as well as Peter Pernthaler and Peter Hilpold, “Sanktionen als Instrument der Politikkontrolle – der Fall Österreich”, 2 *Integration* (2000), 105-119.

⁵⁰ Already stated in the Declaration on democracy adopted by the European Council in Stuttgart on 7-8 April 1978 is the idea that in the European system, every State must trust all the others, not only in the economic field, but also as far as the protection of fundamental rights is concerned.

The existence of common principles and their effectiveness derive from the integration among states as well as between them and the EC/EU. Thus, even in fields where states retain exclusive competence, the constitutional nature of each state and its policies are very much determined by their integration with other member states and by their membership in the Union.⁵¹ On the other hand, the states (acting together) guarantee that the Union respects both the constitutional values they imposed upon it and those to which they subordinated themselves by becoming Members of the Union. In this process, then, no federal big bang occurs, but a continuous mutual influence is constantly in place.

This phenomenon of “voluntary obedience” or “non binding-binding constitutional law”, based on the reciprocal influence between the member states and the Union, is similar to what Weiler calls “constitutional tolerance”.⁵² Very correctly, Weiler states that the member states

accept [the European constitutional discipline] as an autonomous voluntary act, endlessly renewed on each occasion, of subordination, in the discrete areas governed by Europe to a norm which is the aggregate expression of other wills, other political identities, other political communities. Of course, to do so creates in itself a different type of political community, one unique feature of which is that very willingness to accept a binding discipline which is rooted in and derives from a community of others.⁵³

Here we should wonder, however, whether this phenomenon is only a matter of fact (or practice, or politics), or if it is also a matter of law. For this purpose, it might be useful to make reference to old theories that have been developed having regard to the issue of (state) federalism. The first is the so called “integration doctrine” (Integrationslehre), elaborated by Smend,⁵⁴ according to which the state only exists because of integra-

⁵¹ Bruno de Witte, “Les implications constitutionnelles, pour un Etat, de la participation à un processus d’intégration régionale”, in Ewoud H. Hondius (ed.), *Netherlands Reports to the Fifteenth International Congress of Comparative Law – Rapports néerlandais pour le quinzième congrès international de droit comparé* (Intersentia, Antwerpen, 1998, 379-393).

⁵² Joseph H.H. Weiler, “Federalism and Constitutionalism: Europe’s Sonderweg”, 10 *Jean Monnet Working Paper* (2000), at <http://www.jeanmonnetprogram.org/papers/index.html>

⁵³ *Ibid.*, at 9. To make an example, he adds: The Quebecois are told: in the name of the people of Canada, you are obliged to obey. The French or the Italians or the Germans are told: in the name of the peoples of Europe, you are invited to obey. In both, the constitutional obedience is demanded. When acceptance and subordination is voluntary, and repeatedly so, it constitutes an act of true liberty and emancipation from collective self-arrogance and constitutional fetishism: a high expression of Constitutional Tolerance.

⁵⁴ Rudolf Smend, *Verfassung und Verfassungsrecht* (Duncker & Humblot, Berlin, 1928), at 121; *id.*, “Integration” (1956); in *id.*, *Staatsrechtliche Abhandlungen und andere Aufsätze* (Duncker & Humblot, Berlin, 1994), 475-489; and *id.*, “Integration”, 1 *Evangelisches Staatslexikon* (Kretzschmar-Verlag, Stuttgart, 1987), 1354-1368

tion at the personal, functional and material levels.⁵⁵ For Smend, “the State exists only, because and insofar it integrates constantly”⁵⁶. The most powerful instrument for societal integration is the federal state, where the central state (composed of the Federation and its Member States) works as a vehicle for integration of the state entities, whereas member states are the means for integration of individuals into the state structure.⁵⁷ Thus the (federal) state, integrating individuals and states, cannot be static and clearly defined, because it must be constantly adapting itself to the societal changes occurring in the process of integration. The same applies, according to Smend, where international integration is concerned. This is, in his view, just the second step of (domestic) institutional integration, also contributing to the permanent process of modification through integration of state entities. It follows, in Smend’s theory, that integration (both internal and international) is a constitutional duty of the state,⁵⁸ and the pre-condition for its very existence.⁵⁹

The second theory to refer to is that of the so-called “federal State with three elements” (Dreigliedrigkeitslehre), developed by Kelsen⁶⁰ and Nawiasky⁶¹. This conceptualization points out that the federal state is composed by Gesamtstaat (general state), Zentralstaat or Oberstaat (central state) and Gliedstaaten (member states). The “general State” includes (and is composed by) both the central state and the member states, and is hierarchically in a higher position. The general state has its own institutions and its own constitutional system, separated from (although integrated into) that of the other two levels. The key (and maybe the only) institution of the general state is the Constitutional Court, whose primary task is to settle conflicts between the central state and member states.⁶² In other words, the very fact of integration produces the existence of a new

⁵⁵ Stephan Hobe, *Der offene Verfassungsstaat zwischen Souveränität und Interdependenz* (Duncker & Humblot, Berlin, 1998), 77.

⁵⁶ Smend, *Verfassung und Verfassungsrecht...*, 138.

⁵⁷ *Ibid.*, 229.

⁵⁸ *Id.*, “Integration”, 1355.

⁵⁹ See also Ingolf Pernice, “Carl Schmitt, Rudolf Smend und die Europäische Integration”, 120 *Archiv des öffentlichen Rechts* (1995), 100-120.

⁶⁰ Hans Kelsen, *Allgemeine Staatslehre* (Julius Springer, Berlin, 1925; Österreichische Staatsdruckerei, Wien new ed. 1993), 199.

⁶¹ Hans Nawiasky, *Bundesstaat als Rechtsbegriff* (Mohr, Tübingen, 1920); and *id.*, *Allgemeine Staatslehre*. Vol. 3 (Benziger, Einsiedeln, Zürich, Köld, 1945-1958), 151.

⁶² Kelsen, *Allgemeine Staatslehre ...*, 201. Thus, the federative element is the Gesamtstaat, whereas the Zentralstaat (Oberstaat) only performs coordination of the Member States, being separated from them but not in a higher constitutional position. It is worth noticed that this theory was originally adopted by the German federal constitutional court (BVerfGE 6, 309), but was then abandoned in favor of the presently prevailing theory of the federal State composed by only two elements, the Federation (Bund) and the Member States (BverfGE 13, 54).

constitutional space, created by the interaction between constitutional spheres.

Adapting these theories to the new reality, the new way of integration within the European constitutional space, rather intuitive in political terms, results more clearly even from a legal perspective. The very existence of the new constitutional law deriving from the interaction between EU and Member states is based on their reciprocal acceptance of willingness to integrate states (and, through them, their citizens) into a larger constitutional, state-like space, which is not only the EU, but the constitutional sum of the EU and the fifteen member states. Moreover, this integration has been guided and shaped by the very organ of the integrated space, the ECJ.

It seems appropriate to call the product of this new kind of constitutional relations (between member states and EU/EC, mostly based on “non binding-binding” elements or constitutional tolerance) the “integrated state”⁶³ or to speak of “integrated statehood”. More precisely, avoiding the long -lasting debate on the essential elements of sovereignty and statehood, the term to be used shall be “integrated polity” or “integrated constitutional space”. This new concept is based on the consideration that European integration is not merely a sum of the constitutional spheres of both the states and the Union, but that a constitutional dimension is produced by their mutual integration. Such a constitutional sphere of integration, which emerges from their shared contacts and influences, is shaped by the reciprocal acceptance of the non-binding – binding nature of their respective behaviours.

To be more precise, where states are concerned, it seems necessary to distinguish between “integrated” and “Community”-State⁶⁴. The latter is just part of the first. In Europe, integration is a larger phenomenon that indicates the constitutional interrelation and dependency between the states and the various “geo-juridical” areas they belong to, e.g. the European Union, the Council of Europe, and the OSCE.⁶⁵ In this sense, “Community-States” are the states whose constitutional nature is affected by their membership in the European Union/Communities. Their member-

⁶³ This term is also used (but not explained in its meaning) by Francisco Rubio Llorente, “Constitutionalism in the ‘integrated’ States of Europe”, 5 Jean Monnet Working Paper (1998), at <http://www.jeanmonnetprogram.org/papers/index.html>

⁶⁴ See Andrea Manzella, *Lo Stato “comunitario”*, 2 Quaderni costituzionali (2003), 273-294.

⁶⁵ The concept of three “geo-juridical” areas in Europe (EU/EC, Council of Europe and OSCE) has been developed by Toniatti, *Los derechos del pluralismo cultural...*, 22.

ship as a constitutional duty is already formalized (more or less explicitly) in all member states⁶⁶.

The integrated state is a state that must – by its very nature – be integrated. Accordingly, the member state is a state that must be member (of the EU). The constitutional duty to be integrated derives above all from the indivisible interaction between the constitutional spheres of the member states and the EU/EC within a common integrated constitutional space, and the mutual guarantee of this duty is provided by the reciprocal influence in determining their nature much more than by the justiceability before a court.⁶⁷

Thus, integration is not only a social phenomenon; it has more and more a legal significance, although in a non-traditional (i.e. judiciable) way. Integration does not merely describe what happens in the relationship between the member states and the Union, but prescribes how this relationship ought to be. Indeed, as has been explicitly recognized by some constitutional courts, the distinction between the internal and the community dimension of the states is increasingly obsolete.⁶⁸ Therefore, the theory of the integrated constitutional space challenges the dualistic

⁶⁶ The constitutions of all Member States contain provisions which “open” the domestic constitution to the Membership in the EU (and to other “geo-juridical” areas). See Article 23 Austrian federal constitution, Article 34 Belgian constitution, Article 20.1 Danish constitution, Article 23 German Basic Law, Article 93 Spanish constitution, Article 28 Greek constitution, Article 29 Irish constitution, Article 11 Italian constitution, Article 49-bis Luxembourg constitution, Article 92 and 94 Dutch constitution, Article 7(6) Portuguese constitution, Article 5 chap. 10 Swedish constitution, Article 88 French constitution. No explicit mention in the Finnish constitution, but the norm is derived by the scholars. See further Bruno de Witte, “Direct Effect, Supremacy and the Nature of the Legal Order”, in Paul Craig and Gráinne De Búrca (eds.), *The Evolution of EU Law* (Oxford University Press, Oxford, 1999), 177-214. The role of integration clauses in the constitutions of the Member States is analyzed also by Ingolf Pernice, “Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?”, 36 *CMLR* (1999), 703-750. As far as the British constitution is concerned, it seems that the constitutional duty of membership can be derived from the European Community Act of 1972 and from the subsequent accession to a system based on specific principles and rules. See the reasoning of Lord Bridge in *Factortame II* (1991, 1 AC, 603, 658), quoted and commented by Paul Craig, “Sovereignty of the United Kingdom After *Factortame*”, 222 *Yearbook of European Law* (1991), Article 88 French 234-240.

⁶⁷ Josef Isensee and Paul Kirchhof, *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, vol. III (C.F. Müller Verlag, Heidelberg, 1988), at 131, describe this phenomenon as “integration through diffuse promises (Integration durch diffuse Verheissung).

⁶⁸ See Spanish Constitutional Court, judgment no. 165/1994 of 26 May and German Federal Constitutional Court, *BVerfGE* 2, 347 (374). Contrary, Italian Constitutional court, decision no. 428/1997.

approach of some constitutional jurisdictions,⁶⁹ because even the issue of supremacy is more and more diluted into the integration of the constitutional spheres.

4.1.2. INTEGRATED CONSTITUTIONAL SPACE AND LINGUISTIC PLURALISM

What are the consequences of this theory applied to linguistic pluralism in the European integrated constitutional space? Given that linguistic pluralism cannot be imposed by formal rules of the Community, can this occur by means of the integrated nature of (member) states and Community?

Having regard to Article 290 TEC and to Article 8 of regulation no. 1/1958⁷⁰, the compromise between the double reciprocal imposition within the integrated system appears clear. “Linguistic pluralism within the EU does not go beyond a mere interstate pluralism. However – taking into account the domestic rules on language of each member state and thus confirming that language regulation still remains within the realm of member states – the linguistic pluralism of the EU could also comprise the infra-state linguistic pluralism. At least on the basis of the text [of Article 8] and of the reference to state rules contained in it, it does not seem that the official status of all languages must be referred only to the state and to all the state’s territory (as in the case of Belgium). On the contrary, it seems that linguistic pluralism can (even though it does not necessarily must) also be a territorial or minority pluralism (as it could be in the case of Finland, Italy or Spain)”⁷¹.

In addition, within the integrated constitutional space, the role of the “constitutional elements” stemming from other (less integrated) geo-juridical areas like the Council of Europe and the OSCE, is of paramount importance in the issue of language.⁷² In simpler terms, it can be said that what cannot be “imposed” by the EU about linguistic pluralism of the states is increasingly “recommended” by the Council of Europe and by the OSCE, slowly ratified and implemented by the states, and by this

⁶⁹ Followed particularly by the Italian Corte costituzionale (Costa, Frontini, and Granital judgments), the German Bundesverfassungsgericht (Solange and Maastricht), the Danish Supreme Court (Maastricht) and the French Conseil constitutionnel (Maastricht II and Amsterdam). A new monistic interpretation can be derived also from the integration clauses of the Member States’ constitutions. See Pernice, *Multilevel Constitutionalism*...

⁷⁰ “If a Member State has more than one official language, the language to be used shall, at the request of such State, be governed by the general rules of its law.”

⁷¹ Toniatti, *Los derechos pluralismo cultural*...44. (translation by the author).

⁷² See, in particular, the Council of Europe’s instruments which have a decisive influence on the internal linguistic pluralism of the States, like the European Charter of Regional and Minority Languages, the European Framework Convention on the Protection of National Minorities, etc. And of course the case law of the European Court of Human Rights.

means becoming part of the integrated space and thus also of EU constitutional law.

A clarifying analogy can be seen with the emergence of territorial pluralism in Europe: For a long time, the EC/EU was considered to be “blind” where the internal territorial setting of the member states was concerned but, also due to the role played by some crucial acts of the Council of Europe (like in particular the Madrid Outline Convention on Trans-frontier Co-operation between Territorial Communities or Authorities of 1980), the “communitarian status” of the Regions⁷³ increasingly emerged, and became enshrined in the Treaty (Article 263-265), recognized by the courts⁷⁴ and addressed by the legislation.⁷⁵

It can be concluded that the “integrated state” is a state that can no longer freely decide, without considering the existence of the other constitutional levels, upon issues affected by different layers of governance, even if they formally fall into its exclusive sphere of competence. states are still the masters of the language rules within the EU, but only insofar as they are integrated. Linguistic pluralism is thus a constitutional consequence of the integrated nature of the member states, which the Union first contributes to influence, and then imposes on itself to respect.

4.2. How does the “Integrated Constitutional Law” Operate? Applications

4.2.1. THE ROLE OF THE ECJ

The role of the (integrated) states as the absolute masters of the language issue in Europe must be read and can be better understood in the light of the jurisprudence of the ECJ.

The phenomenon of massive intervention of the ECJ in shaping the concrete contents of European law is well known,⁷⁶ being part of the overall expansive tendency of the role of courts in modern societies (judi-

⁷³ Giandomenico Falcon, “La ‘cittadinanza europea’ delle Regioni”, 2 *Le Regioni* (2001), 327-342.

⁷⁴ Cf. in particular, CFI, judgment of 15 June 1999, case T-288/97, *Friuli-Venezia Giulia v. Commission*, ECR at 1871 and judgment of 15 December 1999, cases T-132/96 and T-143/96, *Freistaat Sachsen and Volkswagen AG and Volkswagen Sachsen GmbH v. Commission*, ECR, at 3663, when the Court recognized an autonomous locus standi for Regions.

⁷⁵ See, in particular, the whole regional policy of the EU. This is even clearer taking into consideration the role of Regions in the context of the new European governance, as recognized also in the Commission’s White Paper of 2001. See Roberto Toniatti et al., *European Governance* (European Academy, Bolzano/Bozen, 2002).

⁷⁶ Martin Shapiro, “The European Court of Justice”, in Paul Craig and Gráinne de Búrca, *The Evolution of EU Law* (Oxford University Press, Oxford, 1999), 321-347.

cial creativity, or judicial activism).⁷⁷ This is even more evident when examining the tendency of the ECJ to include fields within the scope of the treaty that were originally excluded from it: a phenomenon that can be called “judicial spill-over”.⁷⁸ As far as language rights are concerned, the ECJ has already considered them “instrumental” to the enjoyment of other individual rights and freedoms, and only by this means they can be protected under European law. Although so far the constitutional commitment to (linguistic) pluralism has never been challenged in the European court system and the ECJ has guaranteed the right to use one’s own language only on the basis of the principle of non-discrimination and not on the principle of linguistic pluralism,⁷⁹ one could argue that the ECJ could hypothetically guarantee the use of an official minority language (to a citizen of the EU, a regional government, a member of a minority, etc.) as a fundamental right enshrined in the common constitutional heritage of pluralism.⁸⁰ Indeed, the jurisprudence of the ECJ in language issues shows that the respect of the choice of linguistic pluralism of member states can go so far that it prevails in practical terms even over the freedoms of the Treaty, as it results from the Groener doctrine.⁸¹

It thus follows that (linguistic) pluralism is not (yet) a common constitutional tradition, but certainly a common principle of the integrated

⁷⁷ See Carlo Casonato, “Judges and Rights: Creativity, Restraint and Legitimacy”, in *id.* (ed.), *The Protection of Fundamental Rights in Europe: Lessons from Canada* (Università degli Studi, Trento, 2003), 27-53.

⁷⁸ The term “judicial spill-over” indicates a phenomenon according to which the decision of the ECJ to extend its jurisdiction over a subject which did not (or not clearly) fall within its competence determines in practice the “communitarization” of that subject. The case *Angonese* could be an example: as admitted also by the advocate general’s conclusion, the jurisdiction of the ECJ over that case was at least doubtful, given that an Italian citizen residing in Italy sued an Italian bank in front of an Italian judge contesting an Italian law. In addition, the diploma required for the job had no relevance with Mr. *Angonese*’s studies in Austria, being conferred by an Italian high-school. Surprisingly, the ECJ simply declared its jurisdiction on the case because “it is far from clear that the interpretation of the community law [the national judge] seeks had no relation to the actual case or to the subject matter of the main action” (ECJ, *Angonese*, at 19). Another recent example of a mere internal issue in which the Court affirmed its jurisdiction can be found in the case *Guimont*, judgment of 5 December 2000, case C-448/98.

⁷⁹ In two more relevant cases dealing with the right to use a language, *Mutsch* (ECJ, judgment of 11 July 1995, case 137/84, *Mutsch*, ECR 1985, 2681 – see Anthony Arnall, “Social Advantages and the Language Barrier”, *European Law Review* (1985), 346-348; and Bruno de Witte, “Il caso *Mutsch*: libera circolazione dei lavoratori e uso delle lingue”, *IV Il Foro italiano* (1987), 8-13 and *Bickel/Franz* (ECJ, decision of 24 November 1998, case C-274/96, *Bickel-Franz*, ECR 1998, I-7637 – see Gabriel Toggenburg, “Der EuGH und der Minderheitenschutz”, 1 *European Law Reporter* (1999), 11-15) the Court ruled merely on the basis of the freedoms granted by the Treaty 8NOW Articles 39 and 40).

⁸⁰ Toniatti, *Los derechos pluralismo cultural...* at 44.

⁸¹ ECJ, case 379/87, *Groener v. Ministry of Education*, ECR 1989, 3867. See also case *Angonese*.

constitutional space which is enforceable also under European law, but only as far as the states decide to be pluralistic and therefore to include (linguistic) pluralism within their national (i.e. constitutional) identity (Article 6(4) TEU).

However, as long as linguistic pluralism cannot be considered part of the common constitutional traditions, given the fact that in some member states the recognition of linguistic diversity is explicitly denied (France⁸², Greece, the Baltic States) or simply nonexistent (Sweden, Netherlands, Portugal), the practical consequence of the absence of any Community provision (and competence) in the field of language use within the states is paradoxically not the absence of jurisdiction by the ECJ, but “merely” the coverage of the language issue by the Treaty’s freedoms. Since language in the European context is very much linked to free movement, it can be concluded that language obstacles shall be removed every time they constitute a barrier for the enjoyment of the Treaty freedoms.

In addition, as language promotion is often an exception from the principle of equality⁸³ (which is something greater and wider than the mere principle of non-discrimination), many national rules can collide with European principles aiming to ensure equal conditions to all European citizens in enjoying the fundamental freedoms granted by the Treaty without any discrimination. This because minority (and language) protection could mean (positive) discrimination based on the principle of (substantive) equality, and this may imply a violation of the principle of non-discrimination (formal equality).

In other words, being the ECJ limited in its interpretation by the lack of Community competence in the field of language, it cannot consider the legitimate aims of the states in protecting language diversity if state rules run counter the freedoms of the Treaty (unless the member states recognize (internal) linguistic pluralism as part of their national identity). The ECJ case law in linguistic issues illustrates, in the absence of substantial normative European rules in this field, that the lack of competence at the

⁸² See, in particular, the judgment of the Constitutional council on the ratification of the European Charter for Regional and Minority Languages, no. 99-412 DC of 15 June 1999 and, more recently, the decision on the law granting new autonomous powers to Corsica, no. 2001-454 DC of 17 January 2002. Some interesting indicators of possible future changes are now emerging. See Françoise Benoit-Rohmer, “Les langues officielles de la France”, 45 *Revue française de droit constitutionnel* (2001), 3-29.

⁸³ Sergio Bartole, “Minoranze nazionali”, *Novissimo Digesto* (UTET, Torino, 1985), Appendix V, at 44.

EU level by no means prevents the ECJ from scrutinizing the compatibility of national rules on language with the Treaties.⁸⁴

Thus, the competence of member states in language issues is by no means exclusive, but increasingly determined by the integrated nature of the European constitutional space (which recognizes the existence of a principle of linguistic pluralism) and by the jurisprudence of the ECJ (which excludes the existence of a common constitutional tradition of linguistic pluralism).

Paradoxically, insofar as rules on multiculturalism (e.g. minority protection, linguistic rights, etc.) are still outside the sphere of European regulation, the EU cannot determine how far special provisions can go and how legitimate the aim of protecting minorities or languages can be, simply because no European (Community) standard exists. Therefore, as far as the mere functional-economic dimension of EC-law prevails (the four ECT-freedoms), the Court will always be forced to give preference to current, prevailing European principles, which are economically oriented and aim to grant the same conditions to all European citizens without any discrimination on the grounds of nationality (formal equality). On the contrary, only if some general standards in favour of linguistic diversity become enshrined in EC-law will the ECJ be able to balance principles like legitimate protection of differences with equal conditions for all European citizens. Until recently, the ECJ could only apply the principle of non-discrimination (formal equality) when dealing with language-related issues, though these at least potentially collide with the principle of substantive equality. The latter principle has very limited recognition in EC-law, and applies, in practice, only in the field of equal treatment of men and women (Article 141 ECT).⁸⁵ It is not by accident that the jurisprudence of the ECJ in this regard is much more benevolent where the legitimacy of exceptions to the principle of non-discrimination is concerned.⁸⁶ In some fields that affect linguistic diversity, where there is a competence of the Community (e.g. language requirements on labels for some products or trademarks), this balancing has already been, if not reached, at least pursued with some

⁸⁴ See Francesco Palermo, "The Use of Minority Languages: Recent Developments in EC-law and Judgments of the ECJ", 8(3) *Maastricht Journal of European and Comparative Law* (2001), 299-318.

⁸⁵ Cf. Uwe Kischel, "Zur Dogmatik des Gleichheitssatzes in der Europäischen Union", 1 *EuGRZ* (1997), 1-11.

⁸⁶ 28 March 2000, case C-158/98 (Badeck) and others.

success: even if the Court were to rule against special provisions, the attitude seems to be much more open and tolerant regarding diversity.⁸⁷

Thus, the more the EU has explicit competence in the fields affecting multiculturalism, the less danger for national provisions to be withdrawn because in contrast to the principles of the treaties.⁸⁸ This is due to the fact that protection of diversity is implemented by rules that constitute an exception, if not a (legitimate) violation, of the principle of formal (*de jure*) equality, aiming to pursue the substantive (*de facto*) equality, whereas the freedoms laid down in the Treaty are committed to non discrimination and thus to formal equality.

All this means, in other words, that the case law of the ECJ somehow regarding language issues will always constitute an obstacle for national rules aiming to improve multiculturalism (e.g. minority protection) as long as EC-law does not expressly allow the Court to also apply the principle of substantive equality and thus establish a balance between principles that are equally protected by the treaties. As already stated above, if member states want to effectively protect their special legislation on linguistic/cultural diversity, and therefore to affirm their internal pluralism, they must provide the EU with at least some competence in this regard. By doing so, they will enable the ECJ to take into consideration and to balance not only economic freedoms, but also the protection of diversity as an European value.

⁸⁷ A quite interesting jurisprudence has been recently developed by the ECJ on this regard. This is mostly due to the fact that the EC has passed some pieces of legislation on that, aimed to guarantee also the respect for linguistic diversity among Europe. Therefore, also the jurisprudence of the ECJ can take this aim into due consideration, balancing it with the economic-inspired freedoms laid down in the Treaty. Thus, the decisions of the ECJ on linguistic requirements in labeling of products and trade marks are paying much more attention (at least formally) to the specific needs of multiculturalism than the judgments given in “pure” minority issues. See the landmark decisions in *Piageme* (case C-369/89, ECR 1991, I-2971) and *Piageme II* (case C-85/94, *Groupement de producteurs, importateurs et agents généraux d’eaux minérales étrangères*), affirming and interpreting the concept (already enshrined in the directive 79/112) of “understandable language”. More recently ECJ, judgment of 3 June 1999, *Colim NV v. Bigg’s Continet Noord NV*, case C-33/97, ECR 1999, I-3175 (cf. Arianna Vidaschi, “L’uso della lingua nelle etichette dei prodotti alimentari e la giurisprudenza della Corte di giustizia”, VI DPCE (1999), 1633-1636); ECJ, judgment of 21 September 1999, *BASF AG v. Präsident des Deutschen Patentamts*, case C-44/98, ECR 1999, I-6269 (cf. Elisabetta Palici di Suni Prat, *Brevetti europei e uso delle lingue in Europa*, I DPCE (2000), 117-120) and ECJ, judgment of 12 September 2000, *Geffroy*, case C-366/98, ECR I-6579.

⁸⁸ See e.g. the explicit coverage of national affirmative actions laid down in Article 5 of directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ L 180, 19/07/2000).

4.2.2. THE ROLE OF THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

In this context, it could be argued whether the “solemn proclamation”⁸⁹ of the Charter will play a role in the described process of mutual influence between member states and EU in language issues. Also considering the normative sense of Article 6(3) TEU, described above, it can be said that Article 22 of the Charter, which states that the Union respects “cultural, religious and linguistic diversity”, contains a positive obligation: the Union is obliged to respect, among other things, linguistic diversity.⁹⁰

This provision is contained in a document – the Charter – which generally does not recognize collective rights or, better, “complexity rights” such as direct democracy rights, cultural rights, language and minority rights, rights of future generations, etc. Certainly, the Western legal tradition⁹¹ “places the individual at the heart of [States’] activities” (preamble of the Charter), and this is precisely what the ECJ constantly affirmed in its jurisprudence regarding what can be named “complexity rights”.⁹² And there is no doubt that the Charter, by making rights “more visible”, refers almost exclusively to individual rights.⁹³

In simple words, European society is (and claims to be) much more complex than it appears in the Charter. Leaving aside the different forms of government and governance, direct and indirect democracy, etc., it cannot be stressed enough that within the territory of the EU there is

⁸⁹ Bruno de Witte, “The Legal Status of the Charter: Vital Question or Non-Issue?”, 1 *Maastricht Journal of European and Comparative Law* (2001), 81-89.

⁹⁰ Aalt Willem Heringa and Luc Verhey, “The EU Charter: Text and Structure”, 1 *Maastricht Journal of European and Comparative Law* (2001), 11-32, at 28.

⁹¹ Harold Berman, *Law and Revolution, I- The Formation of the Western Legal Tradition* (Harvard University Press, Cambridge, MA., 1983).

⁹² “Complexity rights” are e.g. collective rights or individual rights to be used only collectively, like some minority rights, rights of democratic participation, etc. See for this approach ECJ, judgment of 17 October 1995, Kalanke case C-450/93, in ECR, I-3051, where the Court, examining an affirmative action policy for women’s employment, states that every “derogation from an individual right [...] must be interpreted strictly” (at 21). Similarly decision of 15 May 1986, case 222/84, Johnston, in ECR, 1651 (at 36) and many others.

⁹³ See Stefano Rodotà, “La Carta come atto politico e documento giuridico”, in Andrea Manzella, Piero Melograni, Elena Paciotti and Stefano Rodotà, *Riscrivere i diritti in Europa* (Il Mulino, Bologna, 2001), 57-89, at 87.

a considerable number of ethnic and linguistic minorities,⁹⁴ and that language is most definitely an issue⁹⁵. But the Charter seems to ignore all the “complexity rights” that a complex society requires.

This is particularly evident if one considers the equality principle, which is the typical parameter for constitutional interpretation and is of paramount importance in the language issue. It is well known that the absence of a general clause on equality in the Treaties has limited the intervention of the ECJ, even though the Court derived it from the spirit of the Treaty.⁹⁶ The Charter’s provision on equality is limited to the very general statement of Article 20 (“everyone is equal before the law”), whereas the subsequent principle of non-discrimination (Article 21) includes a wide range of protection.⁹⁷

Up to this point, the limits of the Charter in regulating the language issue have been detailed. But for the purpose of this paper, the legal nature of the Charter is of particular significance.

The Charter has (still) no binding character. Nonetheless, its relevance in non-legal analysis can, at least in a short- to medium-term perspective, imply significant consequences also in legal terms. Firstly, the Charter shows a strong “psychological-symbolic” dimension: it somehow represents the “state of art” in the process of constitutionalization of Europe, as it derives from the name “Convention” given to the body that elaborated it, as well as from some provisions which, in spite of being legally redundant, represent milestones of constitutional European identity (prohibition of the death penalty, bio-ethics, etc.). Secondly, the Charter has a significant “sociological” dimension. It contributes to the development of a common

⁹⁴ See on minorities and EU Law de Witte, *Politics Versus Law ...*; id., “The European Community and its Minorities”, in Catherine Brölmann, René Lefebvre and Morjoleine Zieck (eds.), *Peoples and Minorities in International Law* (Martinus Nijhoff Publishers, Dordrecht, 1993), 167-185; Department “Ethnic Minorities and Regional Autonomies”, *Package for Europe. Measures for Human Rights, Minority-protection, Cultural Diversity and Economic and Social Cohesion* (European Academy, Bolzano/Bozen, 1998) and Gabriel N. Toggenburg, “A Remaining Share or a New Part? The Union’s Role vis-à-vis Minorities after the Enlargement Decade”, 15 *EU Working Papers* (2006), at

⁹⁴ <http://cadmus.iue.it/dspace/bitstream/1814/4428/1/LAW+2006.15.pdf>

⁹⁵ See Philippe Van Parijs, “Should Europe Be Belgian? On the Institutional Design of Multilingual Polities” in Karl Hinrichs, Herbert Kitschelt and Helmut Wiesenthal (eds.), *Institutionenkonflikt in kapitalistischen und postsocialistischen Gesellschaften* (Campus Verlag, Frankfurt am Main, 2000), 59-77.

⁹⁶ ECJ, decision of 17 April 1997, case C-15/95, EARL, in ECR, I-1961.

⁹⁷ The grounds for non discrimination mentioned in Article 21 are: “sex, race, color, 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”. For a different interpretation, see Rodotà, *La Carta come atto politico ...*, 82, who mentions the necessity to reach a political compromise within the Convention.

European identity through the self-identification of the Union as a legal-constitutional community and by overcoming the “democratic deficit” of the European integration⁹⁸ by means of the new procedure for its elaboration. In other words, the Charter is a crucial step for the development of a European *Verfassungspatriotismus*, based on the effectiveness of symbols in the integrated constitutional space.

What are the consequences for the legal system? To answer this question, it is useful to refer to the case of France, which is considered the cradle of human rights. As in the legal order of the Community, under France’s 1958 constitution the protection of fundamental rights was developed without a general bill of rights, and was the result of a process of judicial incorporation of different sources of fundamental rights (*bloc de constitutionnalité*).⁹⁹ The French Constitutional Council ruled on the basis of acts that were no longer in force (the 1789 Declaration of Human and Citizen’s Rights) and had no binding character (the preamble of the 1946 Constitution). In the same way, the jurisprudence of the ECJ on fundamental rights was originally based on quite vague sources of law (the common constitutional traditions) or on sources that were not even part of the Community’s own legal system (the ECHR).

Therefore, it can be argued that the Charter potentially represents, alongside with the common constitutional traditions, the ECHR, the case-law of the ECJ and the legal norms of the Community, part of the *bloc de constitutionnalité* of the EU/EC, regardless of its non-binding legal nature.¹⁰⁰ This is already confirmed by the references made in some recent decisions by advocate generals (even though not yet in decisions of the Court)¹⁰¹ in a judgment of the Court of First Instance¹⁰² and even by the Italian Constitutional court¹⁰³.

⁹⁸ Against the rhetoric of the “democratic deficit” see Joseph H.H.Weiler, “The Transformation of Europe”, 100 *Yale Law Journal* (1991), 2403-2483.

⁹⁹ See in particular decision of the Conseil constitutionnel no. 71-44 DC of 16 July 1971.

¹⁰⁰ The analogy between the evolution of human rights in the Community system and the theory of the *bloc de constitutionnalité* has been made by Bruno de Witte, “The Past and Future of the European Court of Justice in the Protection of Human Rights”, in Philip Alston (ed.), *The EU and Human Rights* (Oxford University Press, Oxford, 1999), 865-897.

¹⁰¹ The Charter was mentioned for the first time by advocates general Alber (case C-340/99, *TNT Traco*) and Tizzano (case C-173/99, *BECTU*), even though the Court, in its decisions, did not make any reference to the Charter. References are to be found in several other conclusions (case C-270/99, *Z v. Parliament*, case C-49/00, *Commission v. Italy*, case C-377/98, *The Netherlands v. Council*).

¹⁰² CFI, judgment of 20 February 2001, case T-112/98, *Mannesmannröhren-Werke v. Commission*.

¹⁰³ Judgment no. 135/2002. This fact might be of particular interest in the perspective of “integrated constitutional law”.

To conclude, the Charter can be considered a pivotal example of the new law of integration, which we have called “non-binding binding constitutional law”. Its role can become relevant even in the field of language, although its normative contribution to the issue is apparently very modest.

Who is then the ultimate guardian of language diversity: The European Union (assuming the cultural/linguistic citizenship of individuals and the multicultural character of the polity) or the state (transferring its cultural identity at European level)? From the perspective of the positive Treaty law (and of the text of the Charter) as well as the viewpoint of the ECJ, the states are still “the masters of the language rules”. However, from a broader constitutional perspective including the new “integrated constitutional law” and of which the substantive role of the Charter is an example, this assumption shall be mitigated in the light of the theory of the integrated constitutional space. Thus, it can be said that the law of language in the European Union is basically (formally) determined by the states, but the constitutional nature of the states (and therefore their decisions) is determined by the process of integration and by its new constitutional law, of which member states are at the same time “masters and servants”.

5. Concluding Remarks

5.1. Integrated Constitutional Law of Language

In spite of the wording of EU primary and secondary law, it is thus simply far from realistic to affirm that the member states are the sole “masters of the language(s)” in the European Union. The EU and the other protagonists of the integrated constitutional space (especially the Council of Europe) also play crucial roles in this regard and, more generally, language law in Europe is ever more a matter of integrated constitutional law rather than the product of autonomous choice by “sovereign” states. Moreover, it must not be forgotten that language and language rules basically evolve outside the law, and thus the role of law is basically (although not exclusively) to formalize what reality has already spawned. In addition, the paper showed that, as far as the predominant role of member states is still in place, the functionally and formal-equality-oriented case law of the ECJ can represent a danger to linguistic pluralism within the member states (and thus indirectly, by means of integration, within the EU itself).

The constitutional reality of the integrated constitutional space radically challenges the traditional system of the sources of law, as

well as the theory of division of power between the EU and its member states. Consequently, even the principle of the states' exclusive competence in the field of language is put into question. The active role of the Community in this regard, already in place as a matter of fact (with serious consequences also in the realm of law), needs now to be formalized, especially considering the possible negative consequences of the ECJ-jurisprudence for the development of pluralism in the constitutional law of the EU.

For both practical (efficiency, practices already followed by the institutions) and theoretical reasons (the role of the integrated constitutional space and mutual interdependencies between the member states, European Union, Council of Europe, etc.) the formal principle of complete parity of all languages is cosmetic,¹⁰⁴ utopian and in many aspects even misleading. This has largely been recognized by the doctrine, which advocates a separation between the official languages – which shall be the official languages of the member states – and the working languages – which can be reduced to only some of them on the basis of a functional choice.¹⁰⁵

Does this separation resolve the problems, or is a further step necessary? The mere distinction between official and working languages can be a viable compromise, even though it would leave both the delicate issue of regional and minority languages and the problem of factual inequality among languages unresolved.

5.2. Towards a Functional and Multicultural Approach to Language Equality?

Presently, the final decision in language issues remains with the member states, but this decision is determined by the integrated character of those states into a system that tends to promote mobility and equal linguistic rights for citizens, rather than the mere equality of the languages among

¹⁰⁴ Miriam Aziz, "Multi-Level Linguistic Governance and the Modesty of the Constitutional Moment" (Paper prepared for the Trento Workshop on European Governance, 2002, unpublished) affirms that in the realm of language rights "the danger is that constitutional provisions will be merely cosmetic and, by implication, rhetorical".

¹⁰⁵ See, recently, Oppermann, *Das Sprachenregime der Europäischen Union ...*; and Alcaraz Ramos, *Languages and Institutions in the European Union ...* Most of the proposals advocate either a distinction between official and working languages, or a simplification of the language regime reducing working languages to two (English and French), three (English, French and German), five (including Spanish and Italian), or, in the view of enlargement, to a couple of languages representing each linguistic family (Germanic languages: English and German; Latin languages: French, Italian and Spanish; Slavic languages: Polish). For this last proposal see Beniamino Caravita di Toritto, "How many Languages will the Europeans Speak?", in *federalismi.it* (2002), available at <http://dederalismi.it>.

themselves. The conclusion to be drawn is that the EU/EC, although showing increasing consideration for the language issue, is at this very moment, from the constitutional point of view, still a multinational and not a multicultural polity. In other words, from a strictly legal perspective, the (multinational) nation-state approach is still prevailing, even though the “integrated” nature of the member states and the individual-rights-based approach adopted by the ECJ (and, for the future, by the Charter) is paving the way towards an increasing consideration of the substantive equality of the citizens instead of the formal equality of languages.

As a matter of fact (and of integrated constitutional law), the principle of formal equality of all (official) languages in the European Union is often neglected, and mirrors a quite hypocritical concept of equality, as is often the case when equality is based solely on formal (and formalistic) non-discrimination instead of considering substantial elements. In this regard, the clear statements of the CFI (and of the ECJ) in *Kik* show that legal reality also differs from what is generally believed or assumed (as in the case of the “Emperor’s new clothes”). There is, in other words, an increasing distance between the law in the books and the law in action.

A more viable approach, taking into due consideration the multicultural elements “imposed” by the integrated nature of the European constitutional space, should leave room for a more substantive understanding of the equality principle between languages. This means, in simple terms, that equal situations must be treated equally, and different situations differently. Now, it is evident that languages are not equal within the European constitutional space, given on the one hand the social and economic privilege that some languages enjoy and, on the other hand, the non-recognition or only partial recognition of several languages (e.g. regional or minority languages) by the member states and thus by the Community. Why, then, insist on a paradox?

Languages – and the right to use a certain language – are not equal, but, in order to respect and maintain diversity, deserve equal protection and equal treatment. This implies the duty to treat equally only what is equal and to treat differently what is different, like the languages. Paradoxically, the increasing attention paid in EC law to the principle of substantive equality could lead to the consequence that the present fiction of equal treatment of non-equal languages could even be assumed as a violation of the principle of equality.

Like every other fundamental right, the right to use a language must be balanced with other fundamental rights in the pursuance of the general

objectives of the “State” (in our case, of the “integrated constitutional space” and, in particular, of the EU). No right enjoys absolute protection, and no right is always prevailing over other constitutionally protected rights. More correctly, every right must be balanced with others, and the concrete level of guarantee is the result of this interpretation. In many constitutional contexts, for example, the constitutionally protected right to language gives the floor to other rights in case of possible contrast. This is the case, for example, of the right to use one’s own language in court proceedings, which in some circumstances is “sacrificed” in favour of other fundamental rights, such as the speed of the trial, the territorial principle (connected with the costs of judicial proceedings) or other prevalent economic interests.¹⁰⁶

Accordingly, many fundamental rights – like environmental rights – are constantly balanced with others, such as economic rights or freedom of movement, and sometimes the enjoyment of those rights is “sold” in order to better achieve the enjoyment of other rights.¹⁰⁷ Today, “language-points” (analogous to “eco-points”) might be a mere provocation, but in

¹⁰⁶ An interesting example is the quite complex regulation of the use of languages in the South Tyrolean court system (presidential decree no. 574/1988 as modified by decree no. 283/2001). The preference for speed of the trial is reflected e.g. in Article 17, which states that the language of the trial can be changed only once during the same stage of the trial; the preference for the territorial principle in connection with the costs of judicial proceedings is contained in Article 13, which limits the right to conduct proceedings in German exclusively to the territory of South Tyrol (or of the Region Trentino-South Tyrol); the preference for other prevalent economic interests is shown by Article 20, which contains the principle of the free renounce to language in order to speed up the proceeding.

¹⁰⁷ A provoking (and for many reasons negative) example comes from the recent and not yet fully concluded litigation of the so-called ‘eco-points’ in Austria. The fundamental right to environmental integrity and the Austria’s compelling national interest to preserve it have been balanced with the benefits deriving from the European free movement of persons and goods: in practice, the right to transit through Austria (and thus to pollute the environment) has been ‘sold’ to a certain degree to heavy transport vehicles. After the annual bonus had always been rapidly consumed by the drivers, Austria was forced to negotiate a higher number of eco-points. With its order of 23 February 2001, case C-445/00, *Austria v. Council*, ECR, I-1461 the ECJ admitted the urgency of the question raised on this regard and provisionally suspended the application of the provision limiting the transit of heavy goods vehicles. The ECJ stated (at 116) that the decision must be adopted through “the balancing of the interests for which the applicant seeks protection and the damage to the internal market which the Council [...] claim would result if suspension of operation were granted”. A very convincing comparison between language rights and environmental rights in the viewpoint of “public goods” is now made by Idil Boran, “Global Linguistic Diversity, Public Goods and the Principle of Fairness”, in Will Kymlicka and Alan Patte (eds.), *Language Rights and Political Theory* (Oxford University Press, Oxford, 2003), 189-209.

the not too distant future, they may become a reality.¹⁰⁸ This would mean, for instance, that in the context of the presumption of equal treatment of all languages (which can be maintained by adapting the presently quite popular proposal to distinguish between official and working languages), the renouncement of some linguistic rights by some states (not necessarily by the citizens) can be accepted on the basis of other (especially economic) concessions and privileges within the European arena.

It seems appropriate to treat language like any other fundamental right, and not like a “taboo” of the member states’ increasingly questionable sovereignty. Like many other features of their national identities, language rights, too, should thus be (and in fact already are) “negotiable” to a certain degree, balancing the equality between the (national identity of the) member states (multinational element) with the freedoms of the Treaty (functional element) and the rights of citizens (multicultural element). Both citizens and, above all, states may prefer to effectively enjoy other rights than ineffectively insist on the formally equal status of the states’ languages, which is often a mere idol of the states’ sovereignty. The functional scenario for language rights in the integrated European constitutional space seems to be the preservation and enforcement of the equality of the speakers (based on the “free”, although maybe economically supported choice) rather than the equality of the languages (based on “imposition”).¹⁰⁹

However, as this paper has demonstrated, the distinction between free choice and imposition in the integrated constitutional space is very subtle, and in some cases is even fading. A citizen can presently use his or her language (assuming that this coincides with the official language of his/her

¹⁰⁸ In a report by the Council of the EU of 6 December 2002 on the “Use of languages in the Council in the context of an enlarged Union” (no. 15334/1/02 REV 1, CAB 23 ELARG 415), the Presidency suggests possible approaches “in order to tackle the difficulty of reconciling the objective constraints [...] with needs for interpreting in Council preparatory bodies after enlargement”. Starting from the broad support already existing for moving away from full language interpreting (at least in certain areas), one of the proposals seems particularly interesting from the perspective of this paper. The Presidency proposes the “introduction of some form of “requests and pay” system under the Council budget”, which includes the allotment to each Member State an equal allocation of funds under the Council budget. “Member States would then be charged on the basis of requests for interpretation on a fair basis [...], with the incentive that any unused amounts would be reimbursed to the Member State in question”. In September 2006 the European Parliament adopted an initiative on interpretation expenditure, urging the Parliament, the Council and the Commission to endeavour to reduce “implicit or explicit standby duty”. The Parliament supports multilingualism but urges for “pragmatic solutions” over rising interpretation costs (see <http://www.europarl.europa/oeil/file.jsp?id=5303102>).

¹⁰⁹ To continue the example of the previous footnote, the States could then find it convenient to send functionaries to European meetings who are able to fluently use some foreign languages rather than use the funds for translation.

state, which is not the case for 1/8 of the entire European population...) with the European institutions (free choice), but every time he or she crosses a state (and in some cases even a regional) border, he or she must use a different language (imposition). And this occurs within the same integrated constitutional space, determining language rights and thus the present paradoxical situation.

The integrated constitutional dimension urges the EU to bring its multicultural elements more to the fore, by making its pluralistic deficit clearer. In a short- to medium-term perspective, it thus seems unavoidable to leave the purely state-centric approach behind and, consequently, the EU's merely multinational character. Concretely, this does not mean to adopt one sole official (and maybe artificial)¹¹⁰ language in Europe, but at least to attenuate the absolute parity of languages (which is still the formal rule in the Community) and to improve the number of cases in which languages can enjoy a differentiated treatment at Community level as well (as it is in fact already the case within many institutions and maybe already the factual rule in the Community).¹¹¹ In simple terms, a "transformation from 'integral' to limited multilingualism" will be required.¹¹² As a consequence, the EU will cease to be a multinational polity, and will become instead a multicultural (and still multilingual) one, having minorities and majorities within itself, and also being formally enabled to contribute (together with the member states and the other actors of the integrated constitutional space) to protect them. By this means, it will be possible and even necessary to give up the (absolute) parity of the languages, thus allowing the ECJ to strengthen its jurisprudence on substantive equality and to enforce the principle of pluralism within the integrated constitutional space.

Maybe the Danish proposal made during the accession negotiations should finally be taken seriously.

¹¹⁰ Like e.g. the funny "common" language invented by an Italian translator, Diego Marani, called *Europanto*, derives from by an original and fuzzy mixture of all European languages. In the author's definition "*Europanto esse keine lingua, aber rather eine provocatione contra linguistische integralisme*". See Diego Marani, "Glossario analfabetico dell'eurolingua?", 1 *liMes* (2002), 99-110, at 109.

¹¹¹ See, on this subject, the pivotal judgment of the CFI of 12 July 2001, *Kik v. Office for Harmonisation in the Internal Market*, case T-120/99, and *supra*, note 43. See further Milian i Massana, *Le régime linguistique de l'Union Européenne...*

¹¹² Peter A. Kraus, "Political Unity and Linguistic Diversity in Europe", 1 *XLI Archives Européennes de Sociologie* (2000), 137-162.

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