LANGUAGE RIGHTS AS A *SINE QUA NON* OF DEMOCRACY

A COMPARATIVE OVERVIEW OF THE JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS AND THE COURT OF JUSTICE OF THE EUROPEAN UNION*

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ABSTRACT

This paper explains tendencies and common patterns in the implementation and interpretation of language rights in light of the case-law of the European Court of Human Rights and the Court of Justice of the European Union. The impact of the two courts on the evolution of language rights has been less significant than expected, especially when the users of minority languages are concerned. European jurisprudence reveals an almost exclusive focus on the instrumental function of language instead of its intrinsic value for both persons and societies. Furthermore, both courts have been reluctant to interfere with the language policies of States and when they have done so, they have mostly relied on the neutral principle of non-discrimination. This '*laissez-faire*' approach may have a detrimental effect on democracy: in order to effectively participate in the life of their communities, citizens need to have rights to communicate in their own language. The author urges a profoundly new solution for a better and stronger protection of language rights.

I WHAT ARE LANGUAGE RIGHTS AND WHAT DO THEY HAVE TO DO WITH DEMOCRACY?

LANGUAGE rights are commonly discussed in the broader framework of minority protection, and for many scholars the term 'language rights' is equivalent to the language rights of minorities. However, the author of this paper considers that language rights are *universal human rights* "protecting language-related values and acts"[1]. Language rights ensure that people can use their own language - or in some cases the language of their choice - in diverse areas of private and public life. The reasons for protecting language rights are manifold starting from the fact that languages are the core elements of personal and collective (national, minority, etc.) *identity*. Language rights are the legal safeguards preserving the very existence of *language communities*, *language diversity* and ultimately the *cultural heritage* of our continent - values held dear by both the Council of Europe and the European Union. Not least, language rights ensure the *peaceful coexistence* of different language groups.

In addition to their *intrinsic value* for both individuals and society, languages are also essential *tools* of human communication, social interaction and political participation. All major European documents recognize the special role of languages in contributing to the 'European project' based on the principles of, *inter alia*, democracy and pluralism. It is almost a commonplace that the European Union is united in its diversity, which is confirmed by the many references in the founding treaties to the obligation of the EU to respect linguistic diversity both within and between its Member States[2]. The Council of Europe's language charter declares that "the protection and promotion of regional or minority languages in the different countries and regions of Europe represent an important contribution to the building of a Europe based on the principles of *democracy* and cultural diversity" (emphasis added)[3].

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1 MANCINI, SUZANNE / DE WITTE, BRUNO: Language Rights as Cultural Rights: A European Perspective, *in:* FRANCESCO FRANCIONI / MARTIN SCHEININ (eds.), *Cultural Human Rights* (pp. 247-284), Leiden, Martinus Nijhoff, 2008, p. 247.

2 Treaty on the European Union (TEU), Art. 3; Treaty on the Functioning of the European Union (TFEU), Arts. 165 & 167; Charter of Fundamental Rights of the European Union (CFR), Art. 22.

3 European Charter for Regional or Minority Languages, ETS. No. 148, Strasbourg, 5 November 1992, preamble.

The creators of another Council of Europe treaty on national minorities also believe that "a pluralist and genuinely *democratic* society should not only respect the ethnic, cultural, *linguistic* and religious identity of each person belonging to a national minority, but also create appropriate conditions enabling them to express, preserve and develop this identity" (emphasis added)[4].

Orelus and Chomsky raise the provocative question: "Is democracy possible in a country where minority languages and cultures have pushed to the margins, where citizens are merely spectators of educational, socioeconomic, and political decision-making processes affecting their lives?"[5] The answer to the question should be a definite "no". In order to effectively participate in the life of their communities, citizens need to have language rights which enable them to communicate in their own language. But the active participation of citizens in politics and civic life is only one key element of democracy. According to Larry Diamond, democracy as a political system also includes free and fair elections, *protection of the human rights of all citizens*, and a rule of law where the laws apply equally to everyone[6]. If we take this broader definition, then it becomes obvious that language rights as human rights are a *sine qua non* of democracy[7]. This is why I will scrutinize the whole language-related jurisprudence of the two European courts and will make general conclusions, while at the same time I will single out individual cases connected to democracy in a narrower sense, such as in the case of the ECHR, electoral rights and the freedom of expression.

Language rights are still primarily recognized and protected at the domestic level. However, in the last two decades we have witnessed a legal development whereby "language rights are no longer only to be found in (some) national constitutions", but European law (comprising Council of Europe and European Union norms) "increasingly sets limits to national language policies in order to protect the language rights of individuals."[8] This paper focuses on this development of standard setting in light of the practice of the European Court of Human Rights (and the European Commission of Human Rights, while it still functioned), as well as the Court of Justice of the European Union. In their respective sections, the scope and nature of language rights as protected by the two courts will be presented, individual benchmark cases will be analyzed, and finally, tendencies and recurring patterns in the evolution of jurisprudence will be emphasized. Section IV explores the similarities, common denominators, discrepancies and possible interactions between the Strasbourg and Luxembourg courts, while Section V gives a few concluding remarks on the lessons to be learnt from the language-related case-law of the two European courts, also pondering the future prospects for language policies in a democratic Europe.

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4 Framework Convention for the Protection of National Minorities, ETS No. 157, Strasbourg, February 1995, preamble.

5 ORELUS, PIERRE W. / CHOMSKY, NOAM 2014. Democracy and Language Rights of Minority Groups, *in: Counterpoints*, Vol. 458 on Language, Democracy & Social Justice: Noam Chomsky's Critical Intervention, pp. 53-63, at p. 53.

6 DIAMOND, LARRY 2004. *What is democracy?* Lecture at Hilla University for Humanistic Studies January 21, 2004, at <http://web.stanford.edu/~ldiamond/iraq/WhaIsDemocracy012004.htm>.

7 For more information on the relationship of language rights and democracy, see STARKEY, HUGH 2002. *Democratic Citizenship, Languages, Diversity and Human Rights: Guide for the development of Language Education Policies in Europe - From Linguistic Diversity to Plurilingual Education.* Council of Europe, Strasbourg; and LIDDICOAT, ANTHONY J. 2003. Language planning, linguistic diversity and democracy in Europe, *in:* ANTHONY J. LIDDICOAT / KARIS MULLER (eds.), *Perspectives on Europe: language issues and language planning in Europe* (pp. 21-40), Language Australia Ltd., Melbourne.

8 DE WITTE, BRUNO 2011. Language Rights: The Interaction between Domestic and European Developments, *in:* ANNE LISE KJÆR / SILVIA ADAMO (eds.), *Linguistic Diversity and European Democracy* (pp. 167-89), Routledge, London, p. 167.

II. LANGUAGE RIGHTS IN THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

The European Court of Human Rights (ECtHR or Court, when referred to in this section), set up in 1959 and based in Strasbourg, rules on individual or State applications alleging violations of rights set out in the European Convention on Human Rights (ECHR or Convention) and its Protocols. Up until 1998, the Court was assisted by the European Commission of Human Rights (ECommHR or Commission) who decided on the admissibility of complaints before they reached the Court. In 1998 the Commission was abolished and since then individuals have had direct access to the Court.

In the Convention, there are two *explicit* rights related to language use, both within the framework of criminal proceedings. These are the right of everyone to be informed, in a language he understands, of the reasons for arrest (Art. 5.2 ECHR) and the nature of the criminal charges (Art. 6.3*a* ECHR), and the right of a free interpreter if the defendant cannot speak or understand the language used in court (Art. 6.3*e* ECHR). In addition, there are other provisions in the Convention and its Protocols which *implicitly* or indirectly provide for language rights. These are usually invoked in conjunction with the prohibition of discrimination on the ground of language (Art. 14 ECHR & Protocol No. 12). Language issues have been addressed by the Court in connection with, *inter alia*, the right to education (Art. 2 Protocol No. 1), freedom of expression (Art. 10 ECHR), and electoral rights (Art. 3 Protocol No. 1). In theory, language rights may play a role in relation to other provisions as well, since the exercise of practically all rights is inconceivable without language use. Although "linguistic freedom as such is not one of the rights and freedoms governed by the Convention"[9], the Court itself admitted as that "there is no watertight division separating linguistic policy from the field covered by the Convention, and a measure taken as part of such policy may come within one or more of the Convention provisions"[10].

The first case dealing with language rights is probably from 1962. Mr. Isop, an Austrian national of Slovene originality, introduced a complaint to the District Court of Rosegg (Charintia) but it was rejected for being drafted in Slovene. The applicant claimed a violation of his right to a fair hearing within the meaning of Article 6 of the ECHR, and that of Article 14 for having been deprived of his procedural rights by reason of a discrimination against him on grounds of language. Although both the Imperial Constitution of 1867 (still in force) and the State Treaty of 1955 explicitly guaranteed Slovene-speaking persons the right to use their mother tongue for public purposes in mixed areas in Carinthia (and Styria and Burgenland), an 'Act of 1959 concerning the use of the Slovene language in Court proceedings in Carinthia' authorized the use of Slovene in specific areas only - Rosegg was not included. The Commission reviewed not only the law but also the relevant court cases, and although expressed "certain doubts as to the actual legal situation in Austria", it did not concern itself with the matter. The only question it sought answer to was whether the applicant "had sufficient linguistic knowledge to permit him to lodge his complaint in the German language". In this regard, the applicant alleged that "although he understood and spoke German, he did not feel that his knowledge […] was sufficient for a successful pursuit of his claim". The Commission, considering the facts that Mr. Isop had previously given evidence in court in German and that he had had a German-speaking lawyer, was convinced otherwise and rejected the application[11].

Isop v. Austria is an object lesson of the Commission's logic in language issues. Applications regarding requests for the use of a minority language in criminal proceedings were consequently rejected as inadmissible[12], because - according to the standard account of the Commission - the linguistic guarantee of Article 6 "clearly applies only where the accused cannot understand or speak the language used in court"[13]. Articles 5 and 6 have been interpreted restrictively in several other ways, too. The right to an interpreter, *e.g.*, has been understood as applying only to the relations between the accused and the

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[9] ECtHR: *Mentzen v. Latvia*, Application no. 71074/01, decision on admissibility of 7 December 2004, point 2*(b)* of the Court's assessment. Judgments and decisions on cases under the ECHR are available at <https://hudoc.echr.coe.int>.

[10] *Ibid.*

[11] ECommHR: *Isop v. Austria*, App. no. 808/60, decision on admissibility of 8 March 1962.

[12] See, *e.g.*, ECommHR: *K. v. France*, App. no. 10210/82, decision on admissibility of 7 December 1983; *Bideault v. France*, App. no. 11261/84, decision on admissibility of 1 October 1986.

[13] *K. v. France*, *supra* note 12, p. 207.

judge, but not between the accused and his defense counsel[14]. Furthermore, the defendant cannot expect a general right to have all the Court files translated[15], only those necessary to have knowledge of the case and defend himself[16]. The series of cases invoking Articles 5 and 6 reveals the application of a purely functional test regarding the understanding of the accused: the Commission and the Court only decided in favor of the applicant when they were fully convinced that he had no sufficient knowledge of the language of the procedure[17].

As for language use in *education*, in the landmark *Belgian Linguistic Case* from the 60's, it has been established that the right to education only implies the right to be educated in the national language, and a right to education in a particular language cannot be derived from the Convention[18]. The obligation of the State to respect the right of parents to ensure education for their children in conformity with their 'philosophical convictions' does not encompass 'linguistic preferences'[19]. The Court has been reluctant to change its position over six decades[20]. The most it has been willing to do is to gracefully allow for the speakers of minority languages to open their own - unsubsidized - schools or to bus their children to schools that are more suitable for their linguistic needs[21]. Any attempts to challenge a state's educational policy have been strictly rejected[22].

In the instructive case of *Inhabitants of Leeuw-St. Pierre* the applicants challenged Belgian language law and claimed the right to use the language of their choice, or their mother tongue or usual language, in their relations with the authorities. They established their claim on Articles 9 and 10 ECHR since, in their view, freedom of thought and expression implied also linguistic freedom[23]. Despite their heartfelt argumentation, the Commission was uncompromising and found that "the guarantee of this right lies outside the scope of the Convention, in particular of Articles 9 and 10"[24]. It further reinforced the thesis already expressed regarding the first applications subsequently joined in the '*Belgian Linguistic Case*': "there is no article in the Convention or First Protocol that expressly guarantees 'linguistic freedom' as such"[25]. However, once the Court established that freedom of expression "protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed"[26], it was inevitable to include language under the protection of Article 10 as a *form* of expression. Indeed, in *Eğitim ve Bilim Emekçileri Sendikası* the Court recognized that "Article 10 encompasses the freedom to receive and impart information and ideas *in any language* which affords

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[14] ECommHR: *X. v. Austria*, App. no. 6185/73, decision on admissibility of 29 May 1975, p. 70.

[15] *Ibid*, p. 71.

[16] ECtHR: *Kamasinski v. Austria*, App. no. 9783/82, judgment of 19 December 1989. On the same point, see *Hermi v. Italy*, App. no. 18114/02, judgment of 18 October 2006. In both cases the Court found that a written translation of the indictment was unnecessary if sufficient oral information as to its contents was provided.

[17] See, ECtHR: *Ladent v. Poland*, App. no. 11036/03, judgment of 28 March 2008; *Nowak v. Ukraine*, App. no. 60846/10, judgment of 31 March 2011; *Baytar v. Turkey*, App. no. 45440/04, judgment of 14 October 2014. Applying the same functional test, no violation was found in *Čonka v. Belgium* (ECtHR, App. no. 51564/99, judgment of 5 February 2002), and the applicant's complaint was rejected as inadmissible in *Day v. Italy* (ECommHR, App. no. 34573/97, decision of 21 April 1998) and *Czukowicz v. Poland* (ECtHR, App. no. 15390/15, decision of 21 January 2017).

[18] ECtHR: *Case "relating to certain aspects of the laws on the use of languages in education in Belgium"*, Application nos. 1474/62 and others, judgment of 23 July 1968, p. 26.

[19] *Ibid*. p. 29.

[20] See ECommHR: *Stankov, Trayanov, Stoychev, United Macedonian Organisation "Ilinden", Mechkarov and others v. Bulgaria*, App. nos. 29221/95 and others, decision on admissibility of 21 October 1996; ECtHR: *Cyprus v. Turkey*, App. no. 25781/94, judgment of 10 May 2001; ECtHR: *Catan and Others v. the Republic of Moldova and Russia*, App. nos. 43370/04, 8252/05, 18454/06, judgment of 19 October 2012.

[21] *Cyprus v. Turkey* and *Catan and Others*, *supra* note 20.

[22] As it happened in two recent cases against Turkey which were eventually discussed in light of Art. 10 ECHR: ECtHR: *Döner and Others v. Turkey*, App. no. 29994/02, judgment of 7 March 2017, and *Çölgeçen and Others v. Turkey*, App. nos. 50124/07 and others, judgment of 12 December 2017.

[23] ECommHR: *Inhabitants of Leeuw-St. Pierre v. Belgium*, App. no. 2333/64, partial decision of 15 July 1965.

[24] *Ibid*, p. 360.

[25] *Ibid*.

[26] ECtHR: *Oberschlick v. Austria*, App. no. 11662/85, judgment of 23 May 1991, para. 57.

the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds"[27] (emphasis added). Although the Court has not gone so far as including language use with authorities under the scope of Article 10, it did show a certain generosity towards private and public (but not official) language use. For instance, a violation of Article 10 was found when a publisher's foreign-language books were seized by the authorities[28], when a judge was sanctioned for following minority-language media[29], when a political party chair was charged for failing to prevent congress delegates from speaking in their own language[30], and when parents were arrested for petitioning for the right of their children to receive education in their mother tongue[31]. Once again, official spheres of language use, such as a parliamentary assembly's working language[32], has been constantly held to fall outside the scope of Article 10.

Applicants, being aware of the Court's strongminded interpretation of Article 10, had to find another legal base for their claim to use their own language in administrative matters, and they found Art. 3 of Protocol No. 1 on the *right to free elections*. It comes as no surprise that the Commission stated at the outset that the Convention "does not guarantee the right to use the language of one's choice in dealings with the authorities"[33]. This applies for the context of elections as well, including the requirement to take the oath of office in a particular language[34], the use of languages at the meetings of a local council[35], the language of the registration of a list of candidates[36], and the choice of a national parliament's working language[37].

In terms of general tendencies, it can be concluded that the Court has restricted itself to the very minimum and adopted a narrow interpretation of the Convention: it has examined certain aspects of language use only to the extent absolutely necessary for the enforcement of (explicit) rights included in the Convention[38]. Yet, there could be ample space for expansion of the level and scope of protection, as the Court has proved so related to other issues including LGBT rights, euthanasia, or the rights of immigrants. In fact, the ECtHR has recently been compared to a high priest preaching about its Bible, the Human Rights Convention, forcing a categorical and ideological approach on European states[39]. Apparently, with language rights the situation is just the other way round. The traditional attitude of the Commission and the Court has been to carefully stay away from interfering with the language policy choices of the States, and to rely on their steady line of jurisprudence that States have a wide margin of appreciation in the design of their language regimes. This position remains unaltered even today. Due to this attitude of rejection, the number of ambitious applications that would be able to challenge States' language regimes has declined dramatically.

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[27] ECtHR: *Eğitim ve Bilim Emekçileri Sendikası v. Turkey*, App. no. 20641/05, judgment of 25 September 2012, para. 71.

[28] ECtHR: *Association Ekin v. France*, App. no. 39288/98, judgment of 17 July 2001.

[29] ECtHR: *Albayrak v. Turkey*, App. no. 38406/97, judgment of 31 January 2008.

[30] ECtHR: *Semir Güzel v. Turkey*, App. no. 29483/09, judgment of13 September 2016. Note that in this case the Court protected the chairperson's conduct (not to intervene), and did not acknowledge any right of the delegates to use the Kurdish language in congress.

[31] *Döner and Others*, *supra* note 22.

[32] ECtHR: *Birk-Levy v. France*, App. no. 39426/06, judgment of 6 October 2010.

[33] ECommHR: *Fryske Nasjonale Partij and others v. the Netherlands*, App. no. 11100/84, decision on admissibility of 12 December 1985, p. 240.

[34] *Ibid.*

[35] ECommHR: *Mathieu-Mohin and Clerfayt v. Belgium*, App. no. 9267/81, decision on admissibility of 2 March 1987.

[36] ECommHR: *Association "Andecha Astur" v. Spain*, App. no. 34184/96, decision of 7 July 1997.

[37] ECtHR: *Podkolzina v. Latvia*, App. No. 46726/99, judgment of 9 April 2002.

[38] Parry calls this the principle of linguistic necessity. PARRY, R. GWYNEDD 2012. Article 4. Existing regimes of protection, *in:* ALBA NOGUEIRA / EDUARDO J. RUIZ VIEYTEZ / IÑIGO URRUTIA (eds.): *Shaping language rights - Commentary on the European Charter for Regional or Minority Languages in light of the Committee of Experts' evaluation* (pp. 145-172), Council of Europe Publishing, Strasbourg, p. 155.

[39] MATHIEU, BERTRAND 2018. *The law against democracy?* Presentation held at the international conference "Democracy and law in European integration and in international relations", Szeged, 10 May 2018.

III. Language Rights in the Case-law of the Court of Justice of the European Union

The judiciary of the EU has been reorganized several times since its inception. It was originally established in 1952 as a single court, then in 1998 an additional Court of First Instance was created. A Civil Service Tribunal also functioned from 2005 to 2016. In 2009 the court system was renamed as the Court of Justice of the European Union (CJEU), which currently consists of the Court of Justice and the General Court. For the sake of simplicity, the term 'CJEU' will invariably be used throughout this paper (or 'Court' when referred to in this section).

The CJEU oversees the interpretation and uniform application of the whole EU law including the founding treaties and an enormous amount of secondary legislation, so the researcher has a hard time when trying to locate language-related court cases. In practice, the relevant cases appear in the procedure for annulment and in the context of preliminary rulings. The *first* branch of cases deals with the *language use of EU institutions and EU officials*, or more often, *prospective* EU officials (as in the several cases related to notices of competition). Here the basic legal norms include the very first regulation of the Council, *i.e.* Regulation 1/58 on the use of languages by the Community institutions[40], Articles 20(2)*d* and 24 of the Treaty on the Functioning of the European Union (TFEU), and more recently, Article 41(4) of the Charter of Fundamental Rights (CFR). These norms provide explicit language rights for citizens regarding the use of official languages of the EU. In particular, citizens have the right to correspond with EU institutions in any of the official languages (currently 24), furthermore, EU regulations and other documents of general application as well as the Official Journal have to be published in all official languages. If the Court finds that an EU institution violates such a language right, it will annul the underlying legal act[41]. This branch of language rights and the related case-law have a direct relevance for democracy since they empower citizens to participate in the affairs of the European Union in their own language - at least if they are lucky enough to have one of the official languages as their own language.

The *second* branch of language-related cases concerns the *language laws of the Member States*. The Court may come to scrutinize these laws when a domestic court is in doubt about the proper interpretation of EU law and whether the national law is compatible with it (preliminary ruling procedure)[42]. In this regard EU law does not create language rights as such: the many references to the protection of linguistic diversity[43] and the provision prohibiting discrimination on the ground of language[44] provide only loose guidelines for the language policies of Member States. To the extent we can talk about language rights here, they exist in the legal systems of the Member States themselves, and all the Court has done is to *enlarge* the scope of language rights that are provided for citizens of a Member State to include citizens of other Member States, too.

As far as the first branch of EU language law, *i.e.* the official language regime is concerned, there is a frequent misunderstanding among scholars that this is built on the principle of equality of languages[45]. Actually, as the Court clarified in the landmark *Kik* case, the provisions of Regulation No. 1 and the many references in the Treaties to the use of languages in the EU "cannot be regarded as evidencing a general principle of Community law that confers a right on every citizen to have a version of anything that might affect his interests drawn up in his language in all circumstances"[46]. Under certain circumstances official languages of the Community may indeed be treated differently[47], in fact, Art. 6

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[40] All legislation referred to in this section is available at <https://eur-lex.europa.eu>.

[41] *Cf.* TFEU, Arts. 263-4.

[42] *Cf.* TFEU, Art. 267.

[43] *Supra* note 2.

[44] CFR, Art. 21.

[45] See, for example, Iñigo Urrutia / Iñaki Lasagabaster 2008. Language rights and Community law, *in: European Integration Online Papers*, 12(4), at <http://eiop.or.at/eiop/texte/2008-004a.htm>.

[46] *Christina Kik v. OHIM (Kik II)*, C-361/01 P, judgment of the Court of 9 September 2003, paras. 82 and 74. See *mutatis mutandis*, *Italy v. Commission*, T-185/05, judgment of the Court of First Instance of 20 November 2008, para. 116 and *Italy v. European Economic and Social Committee*, T-117/08, judgment of the General Court of 31 March 2011, para. 71.

[47] *Kik II*, *supra* note 46, para. 63.

of Regulation No. 1 expressly allows EU institutions to stipulate in their rules of procedure which of the languages are to be used in specific cases[48].

Probably the first language-related court case in the EU was *Lassalle v. Parliament* (1964)[49] which paved the way for many subsequent applications related to notices of vacancy or competition. Mr. Lassalle, a European Parliament official, wanted to apply for a post of Head of Division. Sadly, the notice of competition required a perfect knowledge of Italian which he as a French national did not possess. The applicant alleged that the language condition was a disguised method of reserving the vacant post for an Italian official. He referred to the Staff Regulations which stated that no posts shall be reserved for nationals of any specific Member State (Art. 27[3]) and that recruitment must be made on the broadest possible geographical basis from among nationals of Member States (Art. 27[1]). The defendant did not deny its intention to apply an Italian to the post, in fact, it did so exactly in light of Art. 27(3) in order to keep a balance of nationalities among Parliament officials. In its decision, the Court laid down important principles: "The interests of the service and regard for the eligibility of officials would be compromised if the administration, in order to secure a geographical balance, could reserve a post for a specific nationality without such action's being justified on grounds connected with the *proper functioning of the service.* However, it is not incompatible with these requirements or with the *prohibition of discrimination on the grounds of nationality* that, where the qualifications of the various candidates are approximately equal, the administration should allow *nationality* to play a decisive role when it is necessary to maintain or to reestablish a geographical balance among its staff" (emphasis added)[50]. In this specific case, the Court found that the language condition was not justified by the proper functioning of the department, therefore the vacancy notice had to be annulled.

Lassalle is a crucial judgment for at least two reasons. First, it shows that the prohibition of discrimination is not absolute in nature but it may be limited: in case of language conditions imposed upon staff it is enough to prove the interests of the service. Second, it perfectly illustrates the Court's false perception that language knowledge (or, in other cases, mother tongue) and nationality coincide. This is nothing else but the old-fashioned doctrine of 'one nation-one language' which became famous after the French revolution in the 19th century and which entirely disregards the speakers of minority languages. We find the very same reasoning ten years later in *Küster v. Parliament*[51].

A similar logic appears in those cases that reached the Court *via* the preliminary ruling procedure. As a matter of principle, the Court does not interfere with the language policy choices of the Member States unless national provisions "discriminate against persons to whom Community law gives the right to equal treatment or restrict the fundamental freedoms guaranteed by Community law"[52]. This means that the Court's protection of language rights is strictly connected to the market freedoms, and discrimination on the grounds of nationality. This approach was understandable at the initial stage of the European integration process when nationals of Member States came into contact with Community law primarily with a view to benefiting from the common market. In order to ensure the smooth running of the market, it was of the utmost importance to oblige Member States to treat citizens of other Member States availing of their market freedoms in the same way as their own nationals[53]. The inherent connection between the protection of language rights and market freedoms is underlined by the Court itself: "In the context of a Community based on the principles of free movement of persons and freedom of establishment the protection of the linguistic rights and privileges of individuals is of particular

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[48] As the Court recalled in *Bonaiti Brighina v. Commission*, T-118/99, judgment of the Court of First Instance of 7 February 2001, para. 13. On the same point see, *Italy v. Commission*, *supra* note 46, para. 118.

[49] *Lassalle v. European Parliament*, C-15/53, judgment of the Court of 4 March 1964.

[50] *Ibid*, p. 31.

[51] "Whilst the Staff Regulations prohibit the reserving of a post for nationals of a specific Member State, the appointing authority may make its selection, when recruiting an official, depending upon specific knowledge required in the interests of the service. Where a thorough knowledge of a language, other than that of the mother-tongue, is required for ultimate appointment, the level of knowledge required must be one appropriate to the actual requirements of the service". *Küster v. European Parliament*, C-79/74, judgment of the Court (First Chamber) of 19 June 1975, p. 725.

[52] *Bickel and Franz*, C-274/96, judgment of the Court of 24 November 1998, para. 17.

[53] LÁNCOS PETRA LEA 2012. A nyelvi diszkrimináció tilalma az Európai Bíróság és a Törvényszék joggyakorlatában, *in: Jogelméleti Szemle*, 3, pp. 30-52. at p. 31.

importance."[54] Issues raised before the CJEU range from language use in criminal proceedings[55] to language conditions imposed on applicants in order to get a job, either public[56] or private[57] (free movement of persons); from the language of labelling of food products[58] (free movement of goods) to linguistic requirements related with the freedom of establishment[59]. In all these cases[60], language was considered *within* the framework of discrimination on the basis of nationality, and unnecessary linguistic restrictions were seen as an *indirect* form of discrimination (although the Court itself never used this term).

As the economic union had gradually developed into a political one, and the institution of EU citizenship has become ever more significant, language rights started to lose their free market determination[61]. Language discrimination has increasingly become independent in the CJEU's practice which was supported by legislation (the Charter of Fundamental Rights adopted in 2000). In particular, the Opinion of Advocate General Maduro in 2004 was very promising by making explicit reference to discrimination based on language *per se* (Art. 21 CFR), the principle of linguistic diversity (Art. 22 CFR), and the role of language in personal and national identity[62]. Unfortunately the case was dismissed by the Court[63], but the Advocate General's arguments were well used by Italy in its application against the Commission[64]. Unfortunately the Court neglected most of these considerations, but it did accept the existence of language discrimination *on its own*: "although the Commission is entitled to adopt measures [when] recruiting its senior management staff, the fact remains that those measures must not result in discrimination on grounds of language between the candidates for a specific post"[65]. Láncos considers this as an important step forward in the process of recognizing language rights as fundamental rights in EU law[66].

It is regrettable that no signs for furthering this tendency can be revealed in cases from the past few years. The CJEU has simply been reluctant to move beyond the rhetoric of discrimination. The principle of linguistic diversity and the nature of language rights as fundamental rights have been ignored in cases related to competition notices (challenging the EU's official language regime)[67] as well

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[54] *Ministère Public v. Mutsch*, C-137/84, judgment of the Court of 11 July 1985, para. 11. See, *mutatis mutandis*, *Groener v. Minister for Education and the City of Dublin Vocational Educational Committee*, C-379/87, judgment of the Court of 28 November 1989, para. 19.

[55] *Mutsch*, *supra* note 54; *Bickel and Franz*, *supra* note 52.

[56] *Groener*, *supra* note 54.

[57] *Angonese v. Cassa di Risparmio di Bolzano SpA*, C-281/98, judgment of the Court of 6 June 2000.

[58] *ASBL Piageme and Others v. BVBA Peeters*, C-369/89, judgment of the Court (Fifth Chamber) of 18 June 1991 (*Piageme I*); *Groupement des Producteurs, Importateurs et Agents Généraux d'Eaux Minérales Etrangères, VZW (Piageme) and Others v. Peeters NV* (*Piageme II*), C-85/94, judgment of the Court (Fifth Chamber) of 12 October 1995; *Goerres*, C-385/96, judgment of the Court (Fifth Chamber) of 14 July 1998; *Geffroy and Casino France*, C-366/98, judgment of the Court of 12 September 2000.

[59] *Haim v. Kassenzahnärztliche Vereinigung Nordrhein*, C-424/97, judgment of the Court of 4 July 2000.

[60] Except those related to food labelling (supra note 58) where the issue of discrimination was not raised at all. In these cases the point was to prevent Member States from laying down stricter language requirements than those provided in the relevant Council directive, in order not to hinder the free movement of goods.

[61] LÁNCOS, *supra* note 53. *Cf. Kik II*, *supra* note 46.

[62] *Spain v. Eurojust*, Opinion of Advocate General Poiares Maduro, 16 December 2004, paras. 24, 34-38, 40, 43, 45-46, 48, 56, 62 and 64.

[63] *Spain v. Eurojust*, C-160/03, judgment of the Court (Grand Chamber) of 15 March 2005.

[64] *Italy v. Commission*, T-185/05, judgment of the Court of First Instance (Fifth Chamber), 20 November 2008, paras. 84-96.

[65] *Ibid*, para. 127.

[66] LÁNCOS, *supra* note 53, pp. 43-44.

[67] *Cf. e.g., Italy v. European Economic and Social Committee* (2011), *supra* note 46; *Italy and Spain v. Commission*, T-124/13 and T-191/13, judgment of the General Court (Eight Chamber) of 24 September 2015. In the most recent competition case, *PB v. Commission*, T-609/16, judgment of the General Court (Ninth Chamber) of 14 December 2017, the Court did not even get to the assessment of the legality of the language arrangements for the competition because it found the applicant's plea inadmissible. Nevertheless, it confirmed its long-standing

as preliminary rulings (challenging individual Member States' language regimes)[68], even if judgments in the first category of cases are more generous than in the second one. The attitude of the Court is all the more perplexing in light of the fact that the Charter of Fundamental Rights became binding in 2009 by the entry into force of the Lisbon Treaty, therefore providing a sound legal basis for linguistic claims. Another disappointment is the total absence of cases related to minority language rights, especially that - again, since 2009 - the rights of persons belonging to minorities are cherished as one of the values of the Union (Art. 2 TEU), and discrimination on the basis of membership of a national minority is prohibited by primary EU law (Art. 21 CFR).

IV. Comparison of the Language-related Jurisprudence of the Two European Courts

At first sight, it seems that the Strasbourg and Luxembourg courts have not much in common as far as their practice on language rights is concerned. It looks like the two courts have a complementary jurisprudence in respect of one another: they deal with different material and personal scope of language rights. While minority language rights are, to a small extent, protected by the ECtHR, they are totally neglected by the CJEU. Conversely, language rights of European citizens related to the official language regime of the European Union are, understandably, irrelevant for the purposes of the ECHR and therefore to the ECtHR. In addition, judgments of the CJEU have an explicit economic perspective - the European Communities were, after all, created for economic purposes - while the ECtHR has a clear human rights stance. However, as the European Communities evolved into an 'ever closer union', and the protection of human rights gained an increasingly important goal for the EU, a more determined change in the rhetoric of language-related CJEU judgments would have been appreciated. Especially after the Charter of Fundamental Rights became part of primary EU law by the entry into force of the Lisbon Treaty on 1 December 2009, there was good reason for hoping that language rights would eventually get a human rights cloak. Unfortunately, this is not what happened.

As for the interaction between the two Courts in language issues, it seems practically non-existent. Although "the decades long practice of the [CJEU] regarding fundamental rights was actually mostly based on the ECHR and the related practice of the ECtHR"[69], no such collaboration is seen between Strasbourg and Luxembourg in the field of language rights. In fact, the opening of a 'channel of communication'[70] got further delayed by the CJEU in preventing the EU from joining the European Convention on Human Rights[71].

In other respects, the two European courts have more in common than it would first appear. Most importantly, they are both reluctant to intervene in the language policies of the States. The reasons for this attitude have not been investigated in this paper, but I tend to accept Paz's opinion about the Courts' functional interest in stability[72]. They are simply not "prepared to force states to swallow the dramatic cost, financial and otherwise, associated with a robust diversity-protecting regime"[73]. Instead,

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view on the matter: "The General Court consequently held that the competition language regime gave rise to discrimination, in that the Commission had favored candidates who had greater ease in one of three languages that could be chosen as a second language than the other candidates […] whose knowledge of the languages of the competition was less good" (para. 33).

[68] *Cf., e.g., Anton Las v. PSA Antwerp NV*, C-202/11, judgment of the Court (Grand Chamber) of 16 April 2013; *Rüffer v. Pokorná*, C-322/13, judgment of the Court (Second Chamber) of 27 March 2014; *New Valmar BVBA v. Global Pharmacies Partner Health Srl*, C-15/15, judgment of the Court (Grand Chamber) of 21 June 2016.

[69] Sándor-Szalay, Elisabeth / Mohay, Ágoston 2014. Multilevel Protection of Fundamental Rights in the European Union and in Hungary, *in:* Marcel Szabó / Petra Lea Láncos / Réka Varga (eds.), *Hungarian Yearbook of International Law and European Law 2013* (pp. 403-), Eleven International Publishing, The Hague, at 411.

[70] *Ibid*, p. 404.

[71] CJEU: Opinion 2/13 of the Court (Full Court) of 18 December 2014. On the relationship between the two Courts and how it has been affected by Opinion 2/13, see Glas, Lize R. / Krommendijk, Jasper 2017. From Opinion 2/13 to *Avotiņš*: Recent Developments in the Relationship between the Luxembourg and Strasbourg Courts, *in: Human Rights Law Review*, 17, pp. 567-587.

[72] Paz, Moria 2014. The Tower of Babel: Human Rights and the Paradox of Language, *in: The European Journal of International Law*, 25(2), pp. 473-496, at p. 475.

[73] *Ibid*, p. 476.

they follow a *linguistic laissez-faire policy*[74] where the emphasis is put on the *communicative* or *instrumental* function of language and not on language as a core element of identity and culture which would demand a stronger protection of language rights as universal human rights. When language is considered as a mere *tool* - whether in exercising other rights or in accessing the common market -, then it is indeed enough to protect it case-by-case, weighing the particular circumstances of the individual issue.

A second common feature in the practice of the two European courts is strongly related to the previous one and it entails an almost exclusive reliance on the rather neutral principle of *non-discrimination*. Moreover, both the Strasbourg and Luxembourg courts construe non-discrimination in negative terms, and they only expect States (and in the case of the CJEU, also EU institutions) to apply language-related provisions (which are otherwise provided for in their legal systems) *equally* to citizens. No positive obligations are ever imposed to provide for the active protection of language diversity or minority languages. Indeed, none of the two Courts have used their full potential in protecting language rights.

V. CONCLUDING REMARKS

We know from research[75] and the monitoring documents of the European Charter for Regional or Minority Languages and the Framework Convention for the Protection of National Minorities that in terms of language rights and the protection of linguistic diversity there is an *overall* evolution at the national level: an enlarged legal recognition and an increasingly effective implementation in practice. However, the impact of the two European courts on this process has been less significant than expected. The issue of the language rights is rather different from other areas, such as the rights of immigrants or LGBT people, where the role of litigation has been more prominent, and where the ECtHR and EU law occupy a more central position[76].

The European Court of Human Rights, the 'watchdog' of the ECHR, while progressive in other matters, has adopted a restrictive approach towards language rights: it has considered language issues only insofar as necessary to guarantee the enforcement of (explicit) Convention rights. During the several decades of the practice of the ECtHR and the Commission we find a stubborn repetition of statements such as "no article of the Convention or the First Additional Protocol expressly recognizes 'linguistic freedom' as such"[77]; "no right to the use of a particular language is guaranteed by the Convention to citizens in all their contacts with the authorities"[78]; "the Convention does not, as such, guarantee the right to use any particular language in the context of elections"[79], etc. The traditional attitude of the Commission and the Court has been to carefully stay away from interfering with the language policy choices of the States, and reiterate the standard account that States have a wide margin of appreciation in the design of their language regimes. This position discourages applications that would be able to challenge the language regimes of individual States and leaves the 'language rights potential'[80] of the ECHR far from exploited.

As for the language-related jurisprudence of the Court of Justice of the European Union, it was for a long time driven by an internal market approach: the protection of language rights was linked to the exercise of the market freedoms, and discrimination on the grounds of nationality. Language was

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[74] *Ibid*.

[75] See, MANCINI / DE WITTE, *supra* note 1, and NAGY, NOÉMI 2015. *A hatalom nyelve – a nyelv hatalma: Nyelvi jog és nyelvpolitika Európa történetében*. Doktori értekezés [*Language of Power - Power of Language: Linguistic Legislation and Language Policy in the History of Europe*. Doctoral Thesis]. PTE ÁJK, Pécs.

[76] DE WITTE, BRUNO: Linguistic Minorities in Western Europe: Expansion of Rights Without (Much) Litigation?, *in:* DIA ANAGNOSTOU (ed.), *Rights and Courts in Pursuit of Social Change. Legal Mobilisation in the Multi-Level European System* (pp. 27-52), Oñati International Series in Law and Society, Hart Publishing, 2014, at p. 27.

[77] ECommHR: *Inhabitants of Leeuw-St. Pierre v. Belgium*, App. no. 2333/64, decision on admissibility of 16 December 1968 (in French only, author's translation).

[78] *Stankov and others*, *supra* note 20, para. 11.

[79] *Association "Andecha Astur"*, *supra* note 36.

[80] MANCINI / DE WITTE, *supra* note 1, p. 271.

relevant only as it was considered a correlate of nationality. As the economic union had gradually developed into a political one, and the institution of EU citizenship has become increasingly significant, the prohibition of language discrimination eventually appeared as independent from discrimination on the grounds of nationality. In the last decade, there were some signs which gave reason for guarded optimism for the advocates of language rights: language rights becoming fundamental rights seemed a real possibility. However, recently, this tendency seems to have stopped, and the protection of language rights are still essentially related to the prohibition of discrimination. Furthermore, the jurisprudence of the CJEU has nothing to offer for speakers of minority languages, they can only avail themselves of the - modest - protection of the ECtHR.

While the two European courts have been operating without paying much attention to the judicial practice of one another, they have more in common than one would think. First of all, they are both unwilling to interfere with the language policies of the States and rely on the standard account according to which language issues primarily belong to State sovereignty. Secondly, if they do interfere, they do it with reference to the overarching but neutral principle of non-discrimination. Thirdly, both of them focus on the instrumental function of language instead of protecting it for its intrinsic value. This low-key approach may have a dangerous effect on the fate of minority languages and on European democracies as a whole, as well.

Whereas both Courts are far from living up to their full potential in protecting language rights, it is difficult to ascertain whether they intend to extend the level and scope of their protection any further in the near future. It appears that legislation is one step ahead of adjudication in the language issue (let us think of the Language Charter and the Framework Convention) but there seems to be an irresolvable antagonism between the functional/neutral v. identity-based/value-oriented lines of thinking and their defenders. In my opinion, only a radically new, out-of-the-box solution can reconcile the two conceptions and lead to a better and stronger protection of language rights which requires the cooperation of various disciplines now more than ever.