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# Editorial

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The present thematic issue of the *International Journal on Multicultural Societies* (IJMS) continues a recently established thematic thread by focussing on the governance of linguistic diversity. In fact, language has been one of the most pertinent factors contributing to the cultural diversity of societies throughout the world. Linguistic diversity constitutes a particularly prominent policy-challenge for democratic polities, since traditional notions of democracy have often presumed the existence of a linguistically homogenized demos as epitomized in the classical model of the nation-state. However, the increasing recognition of linguistic human rights in international law has contributed, along with other social and economic factors, to a far-reaching transformation of the model of the nation-state, providing new normative yardsticks for democratic modes of governing multi-lingual societies. These include, not least, the recognition of the human rights of linguistic minorities.

In a previous issue of this Journal, we have addressed legal aspects of linguistic diversity and, particularly, of the protection of linguistic minorities by focussing on the emerging law of European institutions, including the Council of Europe and the European Union. This issue, edited by Fernand de Varennes, analyzes linguistic rights from a comparative perspective. It emphasizes the similarity of problems faced by governments in adopting linguistic legislation in different regions; at the same time, it highlights specific historical conditions leading to regional differences in the governments' regulation of language use.

In sum, the articles collected in this issue highlight context-specific problems of effectively implementing the human rights of linguistic minorities. To achieve a more comprehensive picture of political responses to linguistic diversity, it would certainly be necessary to include even more geographical areas with other socio-linguistic characteristics, and it is precisely in this direction that we aim to develop this thematic thread of the IJMS. Thus, an up-coming issue on endangered languages will focus on the manifold interrelations between language policies and language shift. As always, readers are invited to contribute to this debate by sending their comments to the mailing list attached to this Journal.

# Thematic Introduction

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The themes of language and linguistic diversity introduced in Volume 3 are continued in this second issue of the *International Journal on Multicultural Societies* (IJMS). Having already identified the rights of minorities in language matters, the focus of this edition turns to recent legal developments in the field of linguistic rights; the manner in which they have been incorporated into legislation and the legal protection afforded them.

The analyses undertaken by contributors to the IJMS of language laws developed in four regions of disparate social and cultural history reveal the common priority and urgency that governing entities have accorded the development of such legislation; the process of drafting and promulgating linguistic legislation has often been completed remarkably rapidly, as governments have sought to harness the practical and symbolic influence of language in order to reshape society and redress historical power imbalances between its composite groups.

Manipulation of societal structure through language policy and legislation is not a new phenomenon. Rather, the central role that language plays in terms of identity, opportunity and allegiance has long been recognised. The tradition of government regulation of language use first became a discernible trend in the fifteenth century as laws requiring proceedings to be conducted in "the common tongue" were passed with increasing frequency.<sup>1</sup>

Today, as the texts collected in this edition reveal, the societal influence of language remains, as do attempts by governments to appropriate it. In the post-Cold War world order, newly emergent states have scrambled to develop their own linguistic legislation so as to redistribute societal power and control and incorporate their new national objectives and ideals. Even in those nations whose statehood has continued unchanged, language laws have been reclaimed and redrafted in order to project a new national image to the world. This trend has not always been felicitous: instead of laws which reflect the actual linguistic makeup of a country's population, legislation has sometimes been adopted in complete

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<sup>1</sup> de Varennes, F. 1996. *Language, Minorities and Human Rights*. The Hague: Martinus Nijhoff Publishers, p.8.

disregard of the presence of large linguistic minorities and their claims that the state must also accommodate their language, not just represent that of the majority.

Alongside the traditional tendency of government to employ language as a tool of societal change and control has appeared, in recent times, the recognition in many states and at the international level of a number of human rights that affect language. The ability of contemporary governments to regulate language has thus been limited to a certain extent by such rights. Further, the manner in which these rights are to be incorporated into legislation or granted legal recognition has become another facet to the language issue with which contemporary governments have to contend.

Given the potential for differential regulatory treatment which preferences one language over another to confer an enormous advantage, both practical and psychological, on certain groups, the issue of linguistic legislation is an intensely politicised one, and one which incites highly charged debate. Indeed, the issue of the government regulation of language involves the meeting of two entirely divergent considerations: that of practicality, in that there is a legitimate need for government to use a limited number of languages in order to properly perform its functions, with the entrenched and intimate sentiments which are inevitably aroused where language, one of the most visible expressions of culture and history, is at issue. When rights discourse is added, a complex and polarising debate is inescapable. Issue 1, Volume 3 of the *International Journal on Multicultural Societies* contains texts which explore these more theoretical matters.

This issue of the Journal focuses more on the attempt by governments to strike a balance between the conflicting forces of their desire for convenience and to effect social change and language rights. The texts included cover the legislative action undertaken by governing entities in the field of linguistic rights across four regions so as to enable the reader to arrive at a comparative understanding of some of the considerations, difficulties involved with, and, indeed, the divergent motivations behind the promulgation of linguistic legislation.

In this, the European Year of Languages, Niamh Nic Shuibhne provides a comprehensive overview of the status of the rights of linguistic minorities within the European Union. Although her preliminary conclusion is that minority languages are absent from any "official" language policy of the European Union, Nic Shuibhne argues that there is an unofficial policy governing minority language rights which is discernible in resolutions of the European Parliament, the evolving cultural policy, funding and research of the European Commission and the increasingly open consideration of minority language rights by the European Court of Justice. Nic Shuibhne concludes with an examination of the Union's capacity to extend in the future the legal protection it affords minority language rights, in terms of the legal basis upon which such protection could be founded.

The contribution from Kristin Henrard examines the degree of protection afforded linguistic minorities in South Africa. Her analysis begins with definition of the minority concept and its application to the unique South African language situation, characterised as it is by an enormous diversity of languages. The shifting emphases of language policies throughout South Africa's history are also explored before the focus turns to the provisions contained in the 1996 South African Constitution which pertain to minority language rights and to the objections raised before the Constitutional Court concerning these clauses. Henrard concludes with an honest comment on the level of protection in reality that the South African language policy represents and situates it against the backdrop of the international framework for the protection of language rights. Her comparative analysis reveals the divergence between the protection promised minority linguistic rights in theory and that delivered in reality.

John Packer and Sally Holt of the Office of the Organisation for Security and Co-operation in Europe (OSCE) contribute a detailed overview of the work carried out by the institutions of the OSCE relevant to the topic of this issue, namely the protection of linguistic rights. Language is an issue of central concern for the OSCE by reason of the organisation's conflict prevention perspective. Indeed, the authors indicate that linguistic rights are one of the most common sources of dispute in many OSCE States and, as their contribution reveals, opportunities for the OSCE to become involved in raising minority language issues with member states during this post-Soviet era of state formation have been numerous.

Packer and Holt outline the object of the OSCE in relation to language, namely that of promoting the integration of diversity in accordance with international standards amongst its member states, and the benefits of such an approach. A frank analysis of state practice in the face of OSCE values is then undertaken before the authors turn to the role of the OSCE institutions in addressing specific language-related issues. Holt and Packer provide pertinent examples of actual involvement by the OSCE in situations involving minority language issues which illustrate the way the organisation assists States in adopting policy and law affecting language rights which is in line with international standards. Their analysis reveals an organisation which achieves a high level of involvement and input in State-member practice in the area of linguistic rights through the provision of assistance, recommendations and "quiet diplomacy".

The analysis provided by Birgit Schlyter entitled "Language Policies in Present-day Central Asia" begins at the date of proclamation of the five Central Asian languages – Tadjik, Kazakh, Kirghiz, Uzbek and Turkmen as official languages of their respective would-be sovereign states more than a decade ago. As the author explains, the elevation of these languages and simultaneous eschewing of Russian by the States involved was perceived as an important symbolic and practical step towards achieving independence. The author then turns to the language policies or strategies which the newly-independent Central Asian states subsequently created and implemented. She compares the emphasis and objectives contained in the

States' early legislative attempts to regulate language which were primarily concerned with the use and choice of language in specific public contexts, with language legislation developed more recently which appears to focus on influencing the proficiency of the population in the given State language.

"Development of the Language Legislation in the Baltic States", a paper by Boris Tsilevich, traces the remarkable change in the linguistic make-up of the Baltic states following the collapse of the USSR in 1990 and the linguistic legislation passed by the newly independent states in response to those changes. In his comparative analysis of the legislative provisions which affect the use of minority languages in Latvia, Lithuania and Estonia, the author frankly confronts the motives behind such legislation which effectively isolate minority language speakers, and more specifically Russian speakers, from many sectors of public life. Of particular interest is the link he identifies between the proportion of Russian speakers present in the Baltic states and the stringency of the linguistic containment policy. Tsilevich intimates that the conflict between the current preferential Baltic language policies and minority language rights as enshrined in international instruments and elsewhere seems certain to escalate as the states become more actively involved with entities such as the European Union, and the international community generally.

### **About the Authors**

Fernand de Varennes is a Doctor of Law and Director of the Asia-Pacific Centre for Human Rights and the Prevention of Ethnic Conflicts at Murdoch University, Australia. He has written and published in eleven languages on the issues of human rights, minority rights and ethnic conflicts. His seminal work on "*Language, Minorities and Human Rights*" places him as one of the world's leading experts on linguistic rights, and he has worked with numerous international organisations such as the United Nations' Working Group on the Rights of Minorities, UNESCO and the OSCE's High Commissioner on National Minorities on these issues. He is on the advisory board of numerous research centres and journals around the world and has been a research fellow at the European Academy in Bolzano, Italy, Seikei University, Tokyo. He recently held the prestigious Tip O'Neill Peace Fellowship at INCORE (Initiative on Conflict Resolution and Ethnicity) in Derry, Northern Ireland. His most recent publications include a two-volume series on human rights documents on Asia. He is currently collating a three-volume series on peace agreements involving ethnic and internal conflicts worldwide.

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# The European Union and Minority Language Rights<sup>1</sup>

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*The European Community has pledged respect for the cultural and linguistic diversity of its Member States and has recognised minority languages as an inherent constituent in this regard. In turn, minority language groups turn to "Europe" in response to grapple with minority language issues when perhaps domestic response to their concerns is either not forthcoming or simply not enough. This paper submits, however, that while there is a justifiable role for EC involvement in minority language issues, this competence is necessarily limited by the function and capacity of the EC more generally.*

The European Union (EU) is something of a transformed entity, bearing in mind that its origins lie in the regulation of the coal and steel industries of just six European states. Membership of the Union impacts extensively on its current fifteen Member States, in terms both of the breadth of issues now covered by the Treaties and the way in which European Community (EC) law can seep directly into the domestic legal corpus. The character of the Union thus defies the descriptive criteria which might be appropriate when talking about other international organisations. An impression of the EU as a purely economic entity is no longer an accurate one, if indeed it ever was. Equally, however, the extent to which the Union should continue to evolve in a non-economic and constitutional sense is hotly debated and far from settled.

Any discussion of EU involvement in minority language issues must take place against this backdrop. While it may no longer seem incongruous to contemplate the EU as an actor in the domain of minority language rights, this must be weighed against an awareness of the nature of the EU as a governing entity and, more

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<sup>1</sup> It is important to distinguish at the outset between the European Union (EU) and the European Community (EC); the former is governed - on a largely intergovernmental basis - by the Treaty on European Union (TEU) while the Community (commonly referred to as the 'first pillar' of the Union) is for present purposes the more relevant entity, given that it is action by the EC and not the EU that has impacted most greatly on minority language rights. The Community is regulated by and responsible for the implementation of the EC Treaty; for more details on the structure of the EU and EC, see Curtin (1993) and Everling (1992).

particularly, of the scope - in terms of both potential and limitations - of EC law. This paper seeks primarily to trace the involvement of the Community in minority language matters. The language policy of the EC in a general sense will first be outlined; the position of minority languages within this framework will then be located. After considering the ways in which the Community has dealt - both directly and indirectly - with minority language issues to date, the reach of EC law will be discussed more fully so that Community action to date might better be understood and possibilities for the future more fairly assessed.

## 1. Summary of EC Language policy<sup>2</sup>

Although not codified as such in either the EC Treaty or in secondary legislation, it is possible to derive what might be described as a Community official languages policy. There are eleven working and official languages of the EC: Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish and Swedish - a language group that includes at least one of the official languages of all of the EC Member States. Crucially, all of the eleven languages are considered to be equally authentic in a legal sense, as derived from Article 314 EC which provides for the equality of all language versions of the Treaty.<sup>3</sup>

Regulation 1/58 sets out guidelines for communications between Member States and the EC institutions, and for the language practice to be followed by the institutions in a general sense.<sup>4</sup> A Member State (or a person subject to its jurisdiction) may write to the institutions in any of the official EC languages and must receive a reply in that language;<sup>5</sup> similarly, documents sent by a Community institution to a Member State (or a person subject to its jurisdiction) must be in the official language of that State.

In the domain of secondary legislation, regulations and other legislative documents having general application must be drafted in all of the official languages (and again, each language version is considered to be equally authentic).<sup>6</sup> In the same

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<sup>2</sup> It is assumed here that the language policy of the European Community applies equally for the European Union, since there is no provision to the contrary in the TEU. For more detail on EC language policy - and on the issues raised generally in this paper - than space here allows, see Nic Shuibhne (2002).

<sup>3</sup> Article 314 EC makes reference also to Irish, which is not an official EC language but a 'Treaty language', discussed further below. The equality of the Community languages in a legal sense is, however, in some doubt following the recent decision of the Court of First Instance (CFI) in Case T-120/99 *Kik v. OHIM* [2001] ECR II-2235, although an appeal is currently pending before the ECJ (as Case C-361/01).

<sup>4</sup> Regulation 1/58, [1952-1958] OJ Special English Edition 59.

<sup>5</sup> For EU citizens (that is, persons holding the nationality of an EU Member State), this right is now expressed separately in Article 21 EC and in Article 41(4) of the EU Charter of Fundamental Rights.

<sup>6</sup> See the decision of the Court of Justice in Case 283/81 *CILFIT v. Ministero della Sanità* [1982] ECR 3415 at 3430, para. 18. The Court has developed a purposive rather than literal approach to the interpretation of various language versions of legislative texts, so that it might discern the most likely intended interpretation of a disputed term or phrase where necessary: see Case 61/72 *Mij*.

vein, the *Official Journal of the European Communities* is required to be published in all of the official EC languages. While there is no formalised distinction between the "working" and "official" functions of the EC languages, the institutions work actually through a reduced number of languages in terms of their internal administration (typically, through French, English and, to a lesser extent, German) while respecting the equality of the eleven EC languages for communications that impact in an external sense on the Member States and on natural and legal persons subject to their jurisdiction.<sup>7</sup> But despite this reduction in respect of a considerable amount of internal functions, the implications of the equality of all eleven EC languages remain obviously considerable in terms of translation and interpretation resources. The extent to which these services (and associated costs) are already stretched has long been a matter of debate; and these are questions that are heightened still further in light of imminent EU enlargement, which will bring potentially almost double the number of languages to the Community's existing regime. While the Intergovernmental Conference held in 2000 and the resulting Treaty of Nice did not grapple with the "language question" from this perspective, it is difficult to see how serious contemplation of both present arrangements and the need for reform can, in real terms, be postponed for much longer.

The use of language in the institutions as outlined above represents, in a sense, the primary manifestation of EC language policy. But the way in which language is relevant to almost all other Community policy areas should also be noted. For example, the EC Treaty guarantees freedom of movement for workers within the Community (Article 39 EC); but when someone moves from his/her native country to another Member State, it is probable they s/he will cross language as well as geographical frontiers. The EC has addressed the linguistic dimension of free movement from two main perspectives: it supports a number of preparatory language education programmes<sup>8</sup> and tries also to anticipate and deal with difficulties that might arise *after* resettlement in the new State (*e.g.* working towards the education of children of migrant workers in both their native languages and in the language(s) of the host State). The Court of Justice (ECJ) has confirmed that a worker from another EC Member State may legitimately be affected by

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*PPW International v. Hoofdproduktchap voor Akkerbouwprodukten* [1973] ECR 301. Decisions of the Court of Justice are also published in all eleven official languages, but only the version in the language of the case (see note 7 below) is considered to have legal effect in this instance.

<sup>7</sup> For detailed rules on the language regime of the key EC institutions, see the Rules of Procedure of the Court of Justice, [1991] OJ L176/9, as corrected ([1992] OJ L383/117) and amended ([1995] OJ L44/61, [1997] OJ L103/1 and Council Decision 97/419, [1997] OJ L103/3); Article 16 of the Commission's Rules of Procedure (the Rules presently in force were adopted on 17 February 1993, [1993] OJ L230/16); and rule 117 of the European Parliament Rules of Procedure (amended version, [1999] OJ C175/95; renumbered version in [1999] OJ L202/1). The language policy of other EC bodies and offices is less certain. The Office for the Harmonisation of the Internal Market (OHIM), for example, has specified just six working languages, but this is the regime currently being challenged in the *Kik* series of cases (see note 3 above).

<sup>8</sup> The most comprehensive of these is *LINGUA*, established by Decision 89/489, [1989] OJ L239/24; for information on this and other language education programmes, see McMahon (1995 Chapter 2). For details on updates to the various programmes, see the Community's Education and Culture Directorate General website, at <http://europa.eu.int/comm/education/newprogr/index.html>.

language policy requirements of the host state, so long as the basic principles governing free movement more generally - non-discrimination and proportionality - are respected.<sup>9</sup>

Furthermore, language rights granted by a Member State to its nationals must be extended to other Community nationals where appropriate.<sup>10</sup> It is important to stress that this does not, of course, require Member States to introduce a language rights regime *per se*; rather, it means that there must be non-discriminatory implementation where such rights have already been provided for internally.<sup>11</sup>

As regards the right of establishment and the freedom to provide services - covered by Articles 43-48 and 49-55 EC respectively - the same general principle applies: Member States may still impose linguistic competence conditions on the exercise of trades and professions but such requirements must apply equally to nationals and non-nationals; they must also comply with the principle of proportionality (*i.e.* the measures adopted by a Member State must be proportionate to the objectives of the language policy pursued).<sup>12</sup>

Finally, concerning the free movement of goods, the key issue from the linguistic perspective has been the regulation of product labelling so as to avoid creating barriers to trade in light of the Internal Market, but equally bearing in mind the principle of consumer protection and the right to information on the functions and properties of products available on the EC market. The compromise enforced consistently by the Court of Justice demands that product labels must be "in a language easily understood" by the consumer, which may not necessarily equate to a Member State's official language(s).<sup>13</sup> This begs the question of competing values, those of consumer protection and linguistic diversity, and their attempted

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<sup>9</sup> See Case 379/87 Anita Groener v. Minister for Education and the Dublin Vocational Education Committee [1989] ECR 3967 and Case C-281/98 Angonese v. Cassa di Risparmio [2000] ECR I-4139.

<sup>10</sup> For the Court's reasoning in respect of Community workers, see Case 137/84 *Ministère Public v. Mutsch* [1985] ECR 2681; in respect of tourists, service recipients and EU citizens more generally, see Case C-274/96 *Criminal Proceedings against Bickel and Franz* [1998] ECR I-7637.

<sup>11</sup> In certain circumstances, however, EC law may require that EU citizens be granted language rights not typically extended to all groups of 'home' nationals within a Member State: see *Bickel and Franz*, cited *ibid.*

<sup>12</sup> The most recent ECJ decision to consider these issues is Case C-424/97 *Haim v. Kassenzahnärztliche Vereinigung Nordrhein* [2000] ECR I-5123, which relates to freedom of establishment.

<sup>13</sup> Some examples of ECJ jurisprudence on the labelling question include its decisions in Case C-315/92 *Verband Sozialer Wettbewerb v. Clinique Laboratories and Estée Lauder* [1994] ECR I-317; Case C-51/93 *Meyhui v. Schott Zwiesel Glaswerke* [1994] ECR I-3879; Case C-85/94 *Groupement des Producteurs, Importeurs et Agents Généraux d'Eaux Minérales Etrangères VZW (Piageme) v. Peeters NV* [1995] ECR I-2955; Case C-385/96 *Goerres* [1998] ECR I-4431; and Case C-33/97 *Colim v. Bigg's* [1999] ECR I-3975.

balancing by the various Community institutions - given that there are a number of EC Directives as well as ECJ decisions governing the labelling question.<sup>14</sup>

Overall, the examples outlined here do suggest an "indirect" EC language policy, demonstrating just how even *prima facie* economic law can impact on languages and on their speakers. Taken together, it is clear that while the EC may not currently have a codified language policy (beyond that laid down in skeletal form in Regulation 1/58), there are a multitude of EC policy areas actually affected by language issues with which the Community has grappled in at least an incidental or sectoral manner, if not a more directive or coherent fashion.

## **2. The Evolution of Community Activity in Minority Language Issues**

Having outlined above the language policy of the EC in a general sense, it is now necessary to locate the position of minority languages within that framework. The European Bureau for Lesser Used Languages (EBLUL) has classified the minority languages spoken within the EC as follows:

- (1) the national languages of two Member States which are not official languages of the EU (*i.e.* Irish and Letzeburgesch);
- (2) languages of communities residing in a single Member State (*e.g.* Breton in France; Welsh in the United Kingdom);
- (3) languages of communities residing in two or more Member States (*e.g.* Basque in France/Spain; Occitan in France/Italy/Spain);
- (4) languages of communities which are minorities in the state in which they live but are the majority languages of other Member States (*e.g.* German in Belgium; Swedish in Finland);
- (5) non-territorial languages (*e.g.* Roma, Yiddish).

Although data does vary, it is probable that over fifty million EU citizens speak a minority language (approximately one-seventh of the EU population as currently estimated). At present, however, minority languages are not recognised within Community language policy to any material extent.

A distinction may be drawn at the outset between two "groups" of minority languages in the EC context. First, two languages - Irish and Letzeburgesch - are

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<sup>14</sup> See principally, Directive 2000/13 OJ 2000 L109/29; this Directive - on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs - consolidates in a single text the much-amended and now redundant Directive 79/112 (OJ 1979 L33/1). See also Directive 83/189, [1983] OJ L109/8, as amended by Directive 88/182, [1988] OJ L81/75; and Directive 99/44, [1999] OJ L171/16. See also Directives 92/159, [1992] OJ L228/24 and 94/10, [1994] OJ L100/30.

national languages in their respective Member States but neither language has been accorded full status as an official Community language. This slight grouping may be broken down further still, however, in recognition of the particular status of Irish. First, it is mentioned in Article 314 EC and so versions of the treaties are required to be made available (and thus also have legal effect) in Irish. This has subsidiary implications for other aspects of language policy. For example, the rights of EU citizens when writing to various EC institutions and bodies (now codified in Article 21 EC) relate to languages "mentioned in Article 314" - thus including Irish - rather than the eleven "official" languages only. Second, Irish is a working language of the Court of Justice and of the Court of First Instance (CFI), although it has not actually been used in any proceedings to date. Finally, Irish has been included in a number of EC language education programmes (including *LINGUA*). Letzeburgesch - though constitutionally recognised as the national language of Luxembourg - has not been endorsed as a "Treaty language" to a similar extent, although it has been included in some EC language education programmes.

As regards minority languages more generally, however, they have neither working nor official status in the European Community (although, in a very limited and incidental sense, special provision may be made in the course of ECJ and CFI proceedings for those who feel unable to express themselves adequately in any of the official EC languages). It is arguable that this apparent dismissal of minority languages hardly fits with the Community's commitment to multilingualism and to maintaining the equality of its official languages; on the other hand, it would simply be impossible to include all minority languages in the official EC language regime.

However, it would be misleading to conclude that the absence of minority languages from the "official" EC language policy implies an absence of Community activity in the field. To this end, the following sections trace various key developments initiated in the EC institutions which, taken together, could be said to establish an "unofficial" minority language policy. The idea of Community competence more generally will then be explored briefly, thus allowing both action taken to date and the potential for progress in the future to be evaluated more completely.

### *2.1 Leading the Charge: The European Parliament*

The European Parliament is often considered to be the key player in the field of EC minority language rights, reflecting its function as a directly elected institution which brings to the fore the concerns of its electorate. The political atmosphere within Parliament in the late 1970s saw a renewed commitment to the idea of European integration,<sup>15</sup> but alongside an awareness of minority concerns. In a series of Resolutions in the 1980s, the Parliament called for cooperative

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<sup>15</sup> See, in particular, the Tindemans Report on European Union, [1976] EC Bull. Supp. 1.

EC/Member State protection of minority languages throughout the Community, grounded in respect for the diversity of cultural identities and the realisation of free expression.<sup>16</sup> These (non-binding) measures concentrated on the language domains of education, the media/communications and public life, always distinguishing a coordinating role for the Community and a more proactive responsibility for the Member States; the need to collect information on (and to coordinate and fund research projects in respect of) minority language communities throughout the EC was also stressed.

Examples of practical results that can be traced to the work of the Parliament include the founding of the European Bureau for Lesser Used Languages (EBLUL) in 1981, and the report of the *Istituto della Enciclopedia Italiana* on linguistic minorities in the EC, produced in 1986.<sup>17</sup> Although, as noted above, its resolutions are not legally binding in any case, it is especially striking to note that the European Parliament took responsibility to address minority language matters at all, since it could not draw on any substantive provisions of EC law to bolster its calls for action at this time. The ratification of the TEU is significant on this point; Article 151 EC, for example, codified a Community competence in the field of culture for the first time (explored further below); and Article 6(3) TEU requires the Union to respect the national identities of its Member States. It is not surprising, then, that the Parliament's 1994 Resolution - while similar in its basic aims and objectives - is somewhat bolder and more comprehensive than its predecessors.<sup>18</sup>

Overall, what can be drawn from the work of the European Parliament is a sense that while the Community has a different role from the Member States in the field of minority language protection, the responsibilities identified in terms of coordination and encouragement had taken root. Minority language rights were seen as more than just an internal or domestic matter.

It has already been demonstrated above that substantive EC policy areas can impact on language issues, and thus on languages and on their speakers; in addition, the process of intensified European integration (with its consequential effects on languages not typically associated with either economic or political advancement at EC level) must be taken into account. Crucially, the European Parliament placed these matters directly on the agenda for Community action.

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<sup>16</sup> See Resolution on a Community Charter of Regional Languages and Cultures and on a Charter of Rights of Ethnic Minorities (Arfé Resolution), 16 October 1981, [1984] OJ C287/106; Resolution in favour of Minority Languages and Culture (Arfé Resolution No. 2), 11 February 1983, [1983] OJ C68/103; and Resolution on the Languages and Cultures of Regional and Ethnic Minorities in the European Community (Kuijpers Resolution), 30 October 1987, Doc. A 2-150/87.

<sup>17</sup> Istituto della Enciclopedia Italiana/European Commission (1986).

<sup>18</sup> Resolution on Linguistic and Cultural Minorities in the European Community (Killilea Report), 9 February 1994, [1994] OJ C061/110.

## 2.2 *Towards Implementation: The Work of the Commission*

While the European Parliament had called consistently on the Commission to implement the objectives of its minority language resolutions, it seems that very little concrete action was actually taken. What should be borne in mind, however, is that the question of employing a substantive Treaty provision on which binding measures could actually be based presents quite a different challenge for the Commission, which would obviously have to work more definitely in the legal and not just political sphere.

Neither would it be true to conclude that the Commission was inactive in the field of minority language policy. In reality, well before the inclusion of Article 151 EC in the Treaty via Maastricht, the EC had committed itself to cooperation in cultural matters, as an aspect of political cooperation more generally. Bringing together various statements on a role for the Community in this policy domain,<sup>19</sup> the Commission began to codify the underlying intentions of the other institutions, issuing a series of official communications on EC action in the cultural sector. The early versions of these documents are understandably cautious, limited in both scope and intended effect; in light of the absence of an explicit cultural competence at this time, the Commission developed instead something of a sectoral approach, identifying elements of cultural policy that related to more general Community competences (such as free trade in cultural goods, and free movement and establishment for cultural workers).<sup>20</sup> In other words, the Commission did not attempt either to design or implement an autonomous cultural policy; rather, it made more visible a sector-specific application of the general trade principles established by the Treaty of Rome.

With the added incentive of completing the internal market by 1992 (as a consequence of the Single European Act), *A Fresh Boost for Culture in the European Community* was issued by the Commission in 1987.<sup>21</sup> The role of the Community in the audio-visual and technological sectors was strengthened significantly; but efforts on behalf of the book trade were also intensified and here, we find specific reference to minority languages (regarding the translation into and from minority languages of significant literary works).<sup>22</sup> In 1988, the Commission established the Committee on Cultural Affairs, to monitor the implementation of actions decided by the Council. The Commission also established a Commissioner for Cultural Affairs and a Department for Cultural Affairs, within (then) DGXXII (which covered the audio-visual sector, information, communication and culture);

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<sup>19</sup> See for example, Resolution of the European Parliament calling for a Community policy on culture ([1974] OJ C62/5); statement issued by the Summit of Heads of State and Government at The Hague in 1969, recognising the need to preserve Europe as 'an exceptional seat of development, culture and progress' (EC Bulletin I-1970, Part One, Ch. 1); the European Council's *Solemn Declaration on European Identity* (EC Bulletin 1983/6).

<sup>20</sup> See Community Action in the Cultural Sector, EC Bulletin Supp. 6/77; Stronger Community Action in the Cultural Sector, EC Bulletin Supp. 6/82.

<sup>21</sup> EC Bulletin Supp. 4/87.

<sup>22</sup> This action was supplemented by a separate resolution in the Council - see [1987] OJ C309/3.

following the reorganisation of the Commission in 1999, cultural policy (including minority language policy) is now dealt with by the Education and Culture Directorate General.

In its final communication on culture before the ratification of the TEU,<sup>23</sup> the Commission anticipated the effect of Article 151 EC, which commits the Community to contributing to "the flowering of the cultures of the Member States", although it is arguable that the post-Maastricht cultural programmes are not substantively different from the Commission's earlier work.<sup>24</sup>

The current cultural framework (operative from 1 January 2000 to 31 December 2004) is contained in the *Culture 2000* programme.<sup>25</sup> It was devised primarily to channel and coordinate the provision of finance for cultural projects, for example, and is largely a continuation of the Commission's long established blueprint in this policy domain. Minority languages do feature in the programme; for example, the sixth recital of the preamble provides that "special attention should be devoted to safeguarding the position of Europe's small cultures and less widely-spoken languages". Annex 1 ("Activities and Implementing Measures") attempts to set out the types of projects that can be supported by *Culture 2000*; section 1.2 lists subject areas that can form the basis of "cooperation agreements, including projects aimed at the highlighting of cultural diversity *and of multilingualism*, promoting awareness of the history, roots, common cultural values of the European peoples and their common cultural heritage" (emphasis added). More specific guidelines on how multilingualism should feature in Community cultural policy can be found with respect to the book sector (see, for example, section 1(b) of Annex 2).

Significantly, a separate Commission funding programme for minority language projects exists in addition to the possibilities available under *Culture 2000*.<sup>26</sup> However, in light of an ECJ decision on Community expenditure more generally (discussed below in the context of legal basis), the continuation of this budget line is not necessarily secure. It is hoped that Article 151 EC will be drawn from to establish a multiannual programme (known at this stage as *Arcipelago-Archipel*) to secure and coordinate EC funding for minority language projects.<sup>27</sup> However, despite repeated deadlines and assurances, formal legislative proposals have yet to be introduced by the Commission.

<sup>23</sup> i.e. New Prospects for Community Cultural Action, COM(92) [1992].

<sup>24</sup> See for example, the *Kaleidoscope* (Decision No. 719/96/EC of the European Parliament and Council, 29 March 1996, [1996] OJ L99/20), *Ariane* (Decision No. 2085/97/EC of the European Parliament and Council, 6 October 1997, [1997] OJ L291/26) and *Raphael* (Decision No. 2228/97/EC of the European Parliament and Council, 13 October 1997, [1997] OJ L305/31) programmes, on cultural cooperation in the arts, literature and cultural heritage fields respectively (now replaced by *Culture 2000*, see below).

<sup>25</sup> Decision No. 508/2000/EC of the European Parliament and Council, 14 February 2000, [2000] OJ L63/1.

<sup>26</sup> Details on the most recent version of this programme can be found in Support from the European Commission for measures to Promote and Safeguard Regional or Minority Languages and Cultures (2000), 16 September 2000, [2000] OJ C266/07.

<sup>27</sup> See (2000) vol. 16:2 *Contact Bulletin* 1, and 4-5.

In a joint project undertaken by the EU and the Council of Europe, 2001 was designated European Year of Languages.<sup>28</sup> The rationale behind the project was presented as a celebration of diversity and multiculturalism, and its objectives were set firmly in the promotion of language education. Regional and minority languages were included in the scope of the project to a certain extent. Finally, the 1996 *Euromosaic Report*, which was prepared by selected language centres on behalf of the Commission, should be noted;<sup>29</sup> it is one of the few empirical studies to examine the economic dimension to minority language issues in the EC, concluding that diversity is a source of (economic) possibility rather than (traditionally assumed) hindrance, and finding corollary responsibilities for the EC to take appropriate action in favour of minority language groups.

From all of the above, it can be concluded that the Commission has certainly been involved with minority language issues, both as an element of its evolving work on cultural policy and as an independent matter in terms of the provision of funds and the assignment of research. The Commission might thus be said to deal primarily with the practical - and especially, financial - side of language policy, although not necessarily focusing on minority languages or their speakers in terms of minority language rights. To ascertain whether this latter question is addressed at all at Community level, it is necessary to look now at the relevant jurisprudence of the Court of Justice.

### 2.3 *Jurisprudence of the Court of Justice*

The way in which the ECJ has handled language issues in the context of basic Community freedoms has already been outlined. This section looks specifically at the reasoning of the Court when the language in question has been a minority language, and to ascertain whether it has drawn from the discourse of "rights" in such instances.

In *Mutsch*, as noted above, the Court classified the right to use a particular language in domestic courts as a social advantage,<sup>30</sup> meaning that it should therefore be available to workers from other Member States under the same conditions as for nationals of the host state; the Court attached significance also to the prohibition of discrimination on grounds of nationality in (what is now) Article 12 EC. The circumstances of the case related to linguistic arrangements in Belgium for a German-speaking municipality. In a brief but important statement, the Court declared that "[i]n the context of a Community based on the principles of free

<sup>28</sup> See, <http://www.eurolang2001.org>. See also, from the perspective of the Council of Europe, <http://culture.coe.fr/AEL2001EYL/>, and the website of the European Commission at <http://europa.eu.int/comm/education/languages/actions/year2001.html>.

<sup>29</sup> European Commission, *Euromosaic: The Production and Reproduction of the Minority Language Groups in the European Union*, (Luxembourg: Office for Official Publications of the European Communities, 1996).

<sup>30</sup> Within the meaning of Article 7(2) of Regulation 1612/68, [1968] OJ Special English Edition L257/2, p. 475.

movement of persons and freedom of establishment, the protection of the linguistic rights and privileges of individuals is of particular importance."<sup>31</sup>

A more overt (although inconclusive) discussion of (minority) language rights can be found in the Opinion of Advocate General Lenz; on the one hand, he stressed that linguistic discrimination based on nationality was not in keeping with the establishment of a "Citizen's Europe".<sup>32</sup> He then concluded, however, that minority rights criteria could not be used in the present case since the languages referred to in the Belgian legislation - Dutch, French and German - were not classified expressly as minority languages therein. This narrow interpretation, relying on the domestic classification of languages as a precondition to the application of minority rights standards, is at odds with thinking on international rights standards more generally.<sup>33</sup>

The scope of the judgment in *Groener* is similarly unclear.<sup>34</sup> This case examined a precondition attached to certain teaching posts in Ireland *i.e.* the requirement to demonstrate competence in the Irish language (recognised constitutionally as the national and first official language of Ireland but a *de facto* minority language). As part of the Community framework on the free movement of workers, linguistic competence requirements are permitted by Article 3(1) of Regulation 1612/68; and the ECJ reasoned in *Groener* that they may be imposed on nationals of other Member States so long as the requirement is justified by reason of the nature of the post to be filled, is applied in a non-discriminatory manner and is proportionate to the linguistic aim to be achieved.<sup>35</sup> However, the Court referred to the constitutional status of the Irish language when confirming that "[t]he EEC Treaty does not prohibit the adoption of a policy for the protection and promotion of a language of a Member State which is both the national language and first official language."<sup>36</sup> It is not altogether clear, however, that the "nature of the post" could be said to justify the linguistic competence requirement being challenged without recourse to minority rights ideology, since it was accepted that the successful candidate was unlikely to be required actually to teach through Irish. Again, analysis in this vein is more evident in the Opinion of the Advocate General than in the decision of the Court.<sup>37</sup>

More recent ECJ jurisprudence seems to reflect a more comfortable attitude towards the terminology of minority language rights within the Court (and the

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<sup>31</sup> Case 137/84 *Ministère Public v. Mutsch* [1985] ECR 2681 at 2695, para. 11.

<sup>32</sup> *ibid.*, p. 2689.

<sup>33</sup> The United Nations Report on Ethnic, Religious and Linguistic Minorities, for example, (Capotorti 1979, 121 para. 61) concludes the opposite, stressing that the absence of domestic recognition of minority languages does *not* prevent the application of international protection mechanisms.

<sup>34</sup> Case 379/87 *Anita Groener v. Minister for Education and the Dublin Vocational Education Committee* [1989] ECR 3967.

<sup>35</sup> This approach was confirmed recently in Case C-281/98 *Angonese v. Cassa di Risparmio* [2000] ECR I-4139.

<sup>36</sup> *Groener*, p. 3993, para. 19.

<sup>37</sup> *Ibid.*, in particular, pp. 3982-3, paras. 21-24.

interim evolution of the Community, both legally and politically, is surely relevant here). The decision in *Bickel and Franz* advances Community law in a substantive sense, in that the right to use a particular language in criminal proceedings was dealt with in terms of receiving services in a Member State and on the basis of movement as an aspect of EU citizenship - thus extending the remit of protection significantly beyond that granted to workers in *Mutsch*.<sup>38</sup> And from the perspective of minority language rights, the Court confirmed here that which it had implied in *Groener* - that protection of an "ethno-cultural minority" was *prima facie* a legitimate policy aim (although it did not find that extending to the applicants in the present case the right to use German in the courts for criminal proceedings in Bolzano would undermine the achievement of that aim).<sup>39</sup>

Once again, then, we find that a Member State enjoys discretion in determining its internal language policy, but only up to a point: where relevant, language rights provided for domestically must be extended on a non-discriminatory basis to nationals of other EC Member States; furthermore, the overriding Community test of proportionality is material. And it is now beyond question that this applies equally for minority language rights.

Another feature of the decision in *Bickel and Franz* worth noting here is its manifestation of a truly "European" citizenship, in that German-speakers - individuals residing typically in Bolzano and the two applicants in the case (from Austria and Germany respectively) - were treated similarly and thus formed something of a transnational grouping, quite apart, for example, from Italian citizens who resided outside Bolzano. The converse of this, however, is that language arrangements made for a particular geographical area - with the incentive of preserving regional cultural autonomy - were effectively overridden by the Court of Justice. This highlights something of an anomaly in the Community legal order - on the one hand, EC law has obvious implications at regional as well as national level, but the channels through which sub-national authorities may participate in EC decision-making are determined by domestic constitutional structures.

To conclude, then, it seems fairly clear from the cases outlined above that responsibility for the substantive implementation of minority language rights is considered to reside at Member State level in the first instance. But equally, the ECJ will review national practices in this field where the principles of free movement have been activated. In a basic sense, the Court will assess a Member State's language policy against the Community benchmarks of non-discrimination and proportionality; this is nothing new, established since the decisions in *Mutsch* and *Groener*.

However, there is also an emerging approach less discernible in the early decisions, in that the Court seems more willing now to examine the substantive issues raised -

<sup>38</sup> Case C-274/96 Criminal Proceedings against Bickel and Franz [1998] ECR I-7637.

<sup>39</sup> *Ibid.*, pp. 7658-9, para. 29.

still from an EC perspective on free movement but one which is fused with a more open consideration of minority language rights. To date, the results of this interpretative method have benefited the individuals concerned and have, as a result, promoted the use of the minority languages in question.

Overall then, it is clear that EC action in the field of minority languages is varied in both scope and effect, and not always readily visible as a coherent policy ambition. Whether initiatives put in place by the various institutions should be gathered together more rationally is obviously something to be considered, and it is an exercise performed most recently in the context of EU human rights protection more generally.<sup>40</sup> Equally valid is the question of whether and how Community minority language policy should be developed still further, beyond the boundaries established to date. Before looking directly at this question, it is first necessary to step back and explore the competence of the EC more generally, because before we prescribe what the Community should do from a political or even moral perspective, we must first ask: what *can* it do in legal terms?

### **3. Limitations: The Concept of Community Competence**

The European Union is obviously not a "state"; but nor is it an entirely inter-governmental organisation in the vein of international organisations more generally. In particular, the EU cannot be compared to international organisations like the United Nations or Council of Europe, which have a specific mandate in respect of setting international human rights standards. Its primary focus was - and remains - economic integration. But as its character evolved, so too did the recognition that economic integration on its own is not really feasible - it is usually argued that this more complete integration was always the ultimate ambition of the EEC founding fathers, but one which was deliberately staggered in terms of capacity of achievement and what could actually be realised in political terms. The degree to which the Member States should or intend to integrate still further is a matter of ongoing debate.

As outlined above, the EC institutions have been dealing with minority language issues for some time now, both as a secondary dimension of the fundamental Treaty freedoms and as an evolving independent policy domain (especially as regards the coordination and provision of funding). It would not simply be a good thing if the Community continued to consolidate and develop this work; it is a more of a responsibility to be fulfilled, in light of the unique character of the EC as a governing entity.

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<sup>40</sup> See the European Union Charter of Fundamental Rights, Charter 4487/00, Brussels, 28 September 2000. The Draft Charter was presented for consideration by the Biarritz European Council in October 2000 and proclaimed by the Parliament, Council and Commission on 7 December 2000, after European Council approval at the Nice Summit. Decisions as to its future status have been postponed as a matter for the agenda of the next Intergovernmental Conference (IGC), to take place in 2004. Significantly, Article 22 of the Charter provides that "[t]he Union shall respect cultural, religious and linguistic identity."

Yet despite the recognition and realisation of minority language rights in the internal legal systems of many of the Member States, despite the enunciation of international standards in this sphere by various international organisations (as detailed in other contributions to this volume), there remains an evident trend among minority language groups to lobby the EC institutions, to seek more from them than has already been achieved in terms of minority language rights recognition. In truth, what is probably hoped is not so much that the EC will take action beyond the way in which it has to date, but that it might somehow secure greater protection for minority language rights in the Member States. To examine the viability of an EC role along such lines, it is essential to set out first some basic limitations on the Community's capacity to act.

The most basic starting point here is that the Community can act only where legal basis can be grounded in a provision or provisions of the EC Treaty (or in secondary legislation, which must itself be grounded originally in the Treaty in any event). Thus, the Community is not an autonomous entity that can create competences for itself; rather, the Member States retain control ultimately in their capacity as the masters of the Treaty. This principle is codified in Article 5 EC, the first line of which provides that "[t]he Community shall act within the limits of the powers conferred on it by this Treaty and of the objectives assigned to it therein."

The principle of non-interference by the EC in the internal affairs of its Member States (*i.e.* in areas not covered by the Treaty) is the converse expression of this idea. It is fair to say that the division of competence between the Community and the Member States is not clear-cut, however, a fact which becomes especially problematic in those areas known as areas of shared or concurrent competence. Article 151 EC on cultural policy is an example of this. Few would argue that action in this domain should not be taken primarily by the Member States acting autonomously; but a Community "contribution" to the "flowering" of their cultures (with more specific areas in which action may be taken by the EC listed also in the provision) has been set down in the Treaty. The resulting ambiguity takes on heightened significance for present purposes, given that cultural policy - even more than education, fundamental rights protection and rights linked to EU citizenship<sup>41</sup> - is probably the key Treaty provision as regards the development of EC minority language policy.

In particular, as noted above, the *Arcipelago-Archipel* funding programme is most likely to draw on Article 151 as its legal basis. The need so to do is clearly illustrated by considering the (in)security of present funding arrangements at EC level. Budget line B3-1006, dedicated to the provision of funds for minority language initiatives (including, for example, funding for the European Bureau for

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<sup>41</sup> For discussion of the potential for developing EC minority language policy in respect of these competence areas, see Nic Shuibhne (2001 Chapters 3-5). It should be noted in particular here, however, that the Community does not have an 'autonomous' human rights jurisdiction; EC fundamental rights standards (gathered together now in the Charter of Fundamental Rights) bind the EC institutions and Member States only when they are implementing EC law.

Lesser Used Languages) was established in 1982, as a direct consequence of the first Arfé Resolution. It was not, however, authorised by a legislative act; and it is difficult to suggest a Treaty provision in which the Commission could have grounded the allocation at that time. The security of this arrangement has never been taken for granted; the reduction of the budget line for the first time in 1997 was considered to highlight its precarious foundation.<sup>42</sup> However, the most serious threat to its continued existence was brought about by the ECJ decision in *United Kingdom and others v. Commission*, where the Court of Justice held that every "significant" EC expenditure must be grounded in the prior adoption of a legislative act.<sup>43</sup> As a direct consequence of the decision, minority language funding continues to be provided on an annual basis - presumably, on the logic that such amounts would not be classed as "significant". But the need to consolidate this practice on a more secure footing, grounded in the Treaty as legally required, is patently clear.

The question still remains, however, as to the respective roles of the Community and the Member States in the area of shared or concurrent competence generally, and as regards cultural policy more specifically. First, it should be pointed out that, as also urged by the European Parliament in its series of related minority language resolutions, Article 151 EC embodies the idea of the Community as coordinator rather than main actor; this is evidenced by reference to the terminology used throughout the various sections of the provision ("... shall contribute ... encouraging cooperation ... supporting and supplementing ... incentive measures ... excluding any harmonisation ..."). Emphasis on coordination, cooperation and non-harmonisation is probably, in fact, the best way in which cultural pluralism can be protected in any case; it encourages the development of basic incentive standards on which Member States may then take more comprehensive action, in the ways best suited to their diverse cultural identities. What is essential, however, is that the Community's role as coordinator is actually taken on board and realised effectively.<sup>44</sup>

Finally, as regards the division of EC/Member State action in practical terms, the principle of subsidiarity, as codified in Article 5 EC, should be noted. The second paragraph of Article 5 provides that:

In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far

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<sup>42</sup> See (1997) vol. 14:1 *Contact Bulletin* 6-7.

<sup>43</sup> Case C-106/96 *United Kingdom and others v. Commission* [1998] ECR I-2729 at 2755, para. 26; the Court did not, however, provide definitive guidelines on what constitutes a 'significant' Community expenditure, and what does not; it did state, however, that 'significant' Community action *can* entail limited expenditure or have effects for only a limited period; furthermore, 'the degree of coordination to which action is subject at Community level' does not determine whether it is significant or not (see p. 2758, para. 36).

<sup>44</sup> As regards the impact of Community law more generally on cultural matters, Article 151(4) should be noted; this policy integration clause requires that "[t]he Community shall take cultural aspects into account in its action under other provisions of this Treaty, in particular in order to respect and to promote the diversity of its cultures."

as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can, therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

Guidelines to be followed when determining the application of these criteria can be found in the EC Treaty Protocol on the Application of the Principles of Subsidiarity and Proportionality. The codification of subsidiarity (via the Maastricht Treaty) has spawned a wealth of academic literature and commentary, most of which points to the difficulty in practice of quantifying tests like "sufficiently achieved" and "scale or effects", which call for political rather than legal judgment. However such quandaries are to be resolved in practice, it is worth pointing here to the elasticity of the principle: it might limit the capacity of the EC, preventing it from taking action on certain matters even where competence to act can actually be found in a Treaty provision. Equally, however, where the tests set out in Article 5 can be satisfied, the Community is not only permitted but required to act and how this pans out in any given situation can only be determined on an individual basis for each proposed Community measure. The delimitation of competence between the EC and its Member States is, at best, complex, and it is a question that has been touched upon only superficially here.<sup>45</sup> Many of the problematic aspects of this debate arise more in political than legal terms, but it is a debate worth tracking, given that it is likely to affect fundamentally the development of EC minority language policy in the future.

#### 4. Conclusion

The recognition and realisation of minority language rights are rooted in considerations of equality and non-discrimination, effective participation and cultural democracy. This holds true at both the national and international level and applies equally to the EU as a governing entity which creates both rights and duties for those subject to its jurisdiction. Although outwith its official language policy more generally, it is fair to say that there exists something of an 'unofficial' EC language policy insofar as minority languages are concerned and, as outlined in this paper, the institutions have addressed these issues both directly and indirectly.

To increase the visibility of its achievements to date, the work of the EC on minority language matters should be both consolidated and developed, drawing from the various legal bases in the Treaty that have been mentioned here; the proposed *Arcipelago-Archipel* programme could be especially significant in this regard. However, the extent to which the EC can influence minority language rights protection within its Member States is a more problematic concept. Ambitions towards this end must be tempered by an appreciation and understanding of the capacity of the Community to act, and of the purpose and functions of the EU more generally - at least for now. How the EU might yet

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<sup>45</sup> It can be noted, however, that the delimitation of competence in a more coherent manner has been set as one of the items on the agenda for IGC 2004.

evolve may call for a reassessment of this type of competence. However, in the interim, we can only speculate in the realm of aspiration.

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# Language Rights and Minorities in South Africa

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*South Africa contains numerous linguistic population groups, all of which can be considered linguistic minorities, with the possible exception of the English-speaking group. Between 1910 and 1994 South Africa had two official languages, English and Dutch (later Afrikaans). Simultaneously, the indigenous and Indian languages were given a grossly inferior status. During the negotiations for a constitution for post-apartheid South Africa, the status of the languages spoken in South Africa proved particularly sensitive. Several constitutional provisions are relevant in this respect. Although the constitutional framework concerning the accommodation of South Africa's linguistic diversity is rather promising, practice reveals a de facto denial of several constitutional principles concerning the status of languages and multi-lingualism, which goes hand in hand with the emergence of English as lingua franca. However, most linguistic policies in South Africa are still at the developmental stage and promising developments seem under way.*

This paper will be divided into seven parts and will focus on the degree of protection afforded linguistic minorities in South Africa. First, a brief analysis of the minority concept and its application to the South African situation will be undertaken. Second, historical developments in South Africa relevant to the focus of this article will be discussed. Third, an overview of the constitutional negotiations will be given and the ensuing constitutional provisions will be analysed. After a brief analysis of the certification judgements of the Constitutional Court of South Africa, a succinct overview is presented in part 5 of the overall practice and policy development since the adoption of the Constitution. Finally, the South African experience is examined against the background of international and European standards pertaining to language rights for minorities.

## **1. Definition of the Minority Concept and its Application to the South African Population.**

Although there is no generally accepted definition of the minority concept (Thornberry 1991, 164) it is possible to distinguish certain essential components, some of which are objective and others subjective, (Deschênes 1986, 289) which contribute to a better understanding of the minority concept. The objective components of the minority concept can be listed as possessing ethnic, religious or linguistic features which are different from those possessed by the rest of the population, comprising a minority position numerically as compared to the rest of the population, that is comprising less than 50% of the total population, and fulfilling the so-called "non-dominance" requirement, namely that the minority should not have a dominant position over the rest of the population. The subjective component refers to the collective wish of the minority group to preserve and develop its own, separate identity.

The reference in the above definition to "the rest of the population" implies that the reference point does not have to be one monolithic bloc but can itself consist of several population groups. Thus, the minority concept can be applied in plural societies where there is no clear majority population. This understanding also colours the meaning of the non-dominance requirement: non-dominance does not necessarily imply being subordinate or oppressed, it merely denotes that the group concerned is not dominant. It is precisely in situations in which the numerical minority rules the state that the need for this third criterion becomes apparent: the criterion of non-dominance denies the qualification "minority" to such groups which are obviously not in need of special protection (Ramaga 1992, 104). A case in point was that of the Afrikaner minority during apartheid.

It should be noted that the nationality requirement for the members of a population group, which used to be considered an essential component before the group would be considered a minority, has been met with mounting criticism (Nowak 1993, 488-489). The Human Rights Committee has also explicitly rejected the nationality requirement in its General Comment on Article 27 International Covenant on Civil and Political Rights (ICCPR).<sup>1</sup>

On the basis of the above extrapolation, the following working definition of the minority concept can be formulated :

"a minority is a group numerically smaller than the rest of the population of the state. The members of this non-dominant group have ethnic, religious or linguistic characteristics different from those of the rest of the population and show, even implicitly, a sense of mutual solidarity focused on the preservation of their culture, traditions, religion or language." (Henrard 2000, 48)

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<sup>1</sup> General Comment, § 5.2. See also General Comment 15, The Position of Aliens under the Covenant, § 7.

It is of particular importance to underline that, following the above working definition, all population groups in a plural society that are less numerous than the rest of the population of the society concerned (thus less than 50 percent of that population), that have separate, distinct characteristics and the wish to preserve these, can be considered "minorities" in so far as they are non-dominant (Capotorti 1991, 96).

The application of this definition to South Africa, using *inter alia* the results of the census conducted in 1996,<sup>2</sup> reveals that all population groups of South Africa that can be distinguished on ethnic, religious and linguistic grounds constitute minorities, with the possible exception of the English language group (Sacks 1997, 681). The most numerous linguistic group in South Africa is the Zulu, comprising 23 % of the national population, while Ndebele is spoken by only 1.3 % of the national population. In view of the increasing dominant status of English ("*lingua franca*") in the public domain, the population group possessing English as mother tongue might be considered as no longer able to fulfil the non-dominance requirement of the minority concept. It follows that it is possible to question whether the English-speaking group can be afforded linguistic minority status.

South Africa is characterised by an enormous diversity as to languages. The current general provision on languages contained in the South African Constitution (section 6, 1996 Constitution) reveals that in addition to Afrikaans, English and several indigenous languages (Khoi, Nama, San, Sepedi, Sesotho, Setswana, Siswati, Tshivenda, Xitsonga, isiNdebele, isiXhosa and isiZulu), there are several other European and Asian languages spoken in South Africa (German, Greek, Portuguese, Hindi, Gujarati, Tamil, Telegu, Urdu, Arabic, Hebrew and Sanskrit). Furthermore, it is clear from the wording of the above clause that this list of languages is not exhaustive in that it refers to "all languages commonly used by communities in South Africa including ...". Moreover, whereas all language groups are scattered throughout the territory, most of them do have relative territorial concentrations in a certain province or in certain provinces. Striking examples in this regard are the Eastern Cape which consists of 83.3 % Xhosa's and Kwazulu-Natal which comprises 79.8 % Zulu's.<sup>3</sup>

## 2. Relevant Historical Events and Developments

Historically, the battle between the two groups of colonisers, namely those speaking English and Dutch (later Afrikaans), and the ensuing language regulations, has enduring legacies for contemporary linguistic policies and regulations. The old struggle (see *inter alia* the Great Trek<sup>4</sup> in the 1830s and the Anglo-Boer War<sup>5</sup>

<sup>2</sup> See [www.statssa.gov.za/RelatedInverseSites/census96/HTML/default.htm](http://www.statssa.gov.za/RelatedInverseSites/census96/HTML/default.htm).

<sup>3</sup> Census 1996 in Brief 1998, 2.8.

<sup>4</sup> From the mid 19<sup>th</sup> century the Dutch speaking Afrikaners in the Cape faced a twin assault on their cultural and spiritual values in the form of the so-called "liberal tendency" and intensified British cultural imperialism. Examples of the latter include the requirement of verbal English skills in order to gain employment in the civil service and the abolition of Dutch as medium of instruction in

1899-1902) still forms the ideological foundation for Afrikaner nationalism and the source of the strong emotional reactions from a sector of the Afrikaner population towards rules which, purportedly aimed at multi-lingualism, they consider to be a veiled attempt to move towards English *lingua franca*.

Since the union of South Africa in 1910, South Africa has had two official languages, namely Dutch (later Afrikaans) and English, which have equal status in public business as reflected in the bilingual public service (Davenport 1991, 231). The result of such an arrangement meant that the development and promotion of the indigenous languages and the Indian languages was simultaneously neglected, thus giving these languages an inferior status (Currie looseleaf, 37.1).

Further, it should be emphasised that the language policy regarding education has been and remains today a very sensitive issue in South Africa. During apartheid, the policy regarding the African population was constructed in such a way as to promote ethnic identity while hampering proficiency in the official languages in order to limit access to employment (Desei and Taylor 1997, 169). It can even be argued that "the language-in-education plan"<sup>6</sup> became a central component of apartheid education. The principle of mother-tongue education was "conveniently applied to further the political interests of division amongst all communities" (Heugh 1995, 42). Moreover, the sudden change from the mother-tongue medium of instruction to the double medium or "50/50 policy" (English/Afrikaans) caused a great deal of educational disadvantage among African students (Heugh 1995, 43). Students were simply not able to grasp the meaning of what was written in the syllabus because of the language hurdle. This difficulty was compounded by the fact that the shift away from mother-tongue education to Afrikaans and English occurred at a stage when the students did not have adequate proficiency in these two languages.

### **3. Constitutional Negotiations and Analysis of the Relevant Provisions of the 1996 Constitution of South Africa**

The transformation process began with President de Klerk's speech on 2 February 1990. Subsequently several attempts at negotiation between the apartheid government (National Party), the ANC and several other political parties can be identified.

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the public schools. The Great Trek was made by a group of about 15 000 Afrikaners, escaping British rule in the Cape and eventually resulted in the creation of two Boer republics to the north, namely the Transvaal and the Orange Free State. See Giliomee 1989, 21 and Pelzer 1980, 6.

<sup>5</sup> Ongoing tensions between the two Boer and the two British republics and attempts to expansion led eventually to the Anglo-Boer War. The war lasted for three years and resulted in strained relations between the two groups which has ongoing implications in the 21st century. Notably the British concentration camps for the Afrikaner women and children resulted in a great deal of resentment on the part of the Afrikaners. See Pelzer 1980, 6.

<sup>6</sup> The language in education plan refers primarily to choice as to the medium of instruction for the distinctive population groups. In concrete terms, it meant that all the population groups received mother-tongue education, which after a few years switched to double medium Afrikaans/English (the precise number of years of mother tongue education shifted over time).

An important issue for all sides to the negotiations was the process envisaged for achieving a constitution to govern the post-apartheid, democratic South African State. For the National Party Government it was important to be able to secure a certain level of protection in the future and limit the damage incurred as a result of relinquishing power. For the ANC, however, it was crucial that "the Constitutional Assembly should be bound as little as possible by the non-elected negotiating forum" (De Villiers 1994, 38).

Eventually a two-stage process was agreed upon. The first stage entailed the drafting of an interim Constitution by the negotiating political parties before any democratic election. That Constitution would govern the country during the period covering the first democratic elections and during negotiations leading up to the adoption of the so-called "final" Constitution. As Chaskalson and Davis have identified, "in order to give greater comfort to all parties, it was agreed that the final Constitution could not erode the fundamental values and principles contained in the interim Constitution. Agreement was reached on a series of 34 Constitutional Principles with which the final Constitution had to comply" (Chaskalson and Davis 1997, 340). Constitutional Principle XI is of particular relevance to the focus of this article as it requires the protection and promotion of the diversity of cultures and languages. The ensuing discussion will be limited to an analysis of the 1996 ("final") Constitution and its implementation, although incidental reference to the interim Constitution will be made.

Two issues that remained outstanding until the very last moment concerned the provision contained in the Bill of Rights concerning the status of languages<sup>7</sup> and education, particularly language in education. This sensitivity has to be analysed in the context of the history of apartheid and the increasingly emerging practice of English as *lingua franca*, despite the proclamation contained in the 1993 or interim Constitution that the State had to promote the equal use of the 11 official languages.

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<sup>7</sup> Section 6, 1996 Constitution:

The official languages of the Republic are Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu.

Recognising the historically diminished use and status of the indigenous languages of our people, the state must take practical and positive measures to elevate the status and advance the use of these languages.

(a) The national government and provincial governments may use any particular official languages for the purposes of government, taking into account usage, practicality, expense, regional circumstances and the balance of the needs and preferences of the population as a whole or in the province concerned; but the national government and each provincial government must use at least two official languages; Municipalities must take into account the language usage and preferences of their residents. The National government and provincial governments, by legislative and other measures, must regulate and monitor their use of official languages. Without detracting from the provisions of subsection (2) all official languages must enjoy parity of esteem and must be treated equitably. A Pan South African Language Board established by national legislation must promote, and create conditions for the development and use of all official languages; the Khoi, Nama and San languages; and sign language; and promote and ensure respect for all languages commonly used by communities in South Africa, including German, Greek, Gujarati, Hindi, Portuguese, Tamil, Telegu and Urdu; and Arabic, Hebrew, Sanskrit, and other languages used for religious purposes in South Africa.

The proclamation of 11 official languages in the 1996 Constitution (section 6(1)) has important symbolic value, particularly for the speakers of the nine African languages, who were formerly deprived of such status.<sup>8</sup> It is nevertheless striking that the 1996 Constitution no longer has the equal treatment of the 11 official languages as an objective, albeit distant, but "merely" the equitable treatment and parity of esteem of these languages (section 6(4) 1996 Constitution). "Equitable" treatment can be interpreted as strengthening the internal reference to subsection 2 and the need expressed by that clause for positive measures by the state to elevate the status of the official indigenous languages. "Equitable" makes explicit that there is, in view of the "history of official denigration and neglect" of these indigenous languages, a need for differential and preferential treatment and not merely formally equal treatment (Currie looseleaf, 37.5). However, "equitable treatment" can also be understood as an acknowledgment that not all 11 official languages should or can be used for all purposes. "Parity of esteem" would then imply that "considerations of practicality aside, a sincere attempt must be made to ensure that particular languages do not dominate while others are neglected" (Ibid, 37.6).

The National Party strongly favoured the retention of the non-diminishment provision contained in the interim Constitution, which ensured that the status of Afrikaans (and English) would not be reduced as compared to the pre-1994 situation. For the ANC it was vital that the constitutional possibility should exist to improve the indigenous languages by reducing the status of Afrikaans so as to reach an equitable use of overall and status for all 11 official languages. Ultimately, the National Party was only prepared to agree that the non-diminishment provision be dropped on condition that the section dealing with "use of language for purposes of government" at the national and provincial levels would require that there be use of more than one language. The party felt that such a provision would at least go some way to countering its greatest fear, namely that only English would be used at these levels.

Finally, when compared to the 1993 Constitution, the 1996 Constitution modifies the Pan South African Language Board's obligations in two respects. The overall mandate of the Board remains "to provide for the recognition, implementation and furtherance of multi-lingualism in the Republic of South Africa, and the development of previously marginalised languages".<sup>9</sup> However, it was seen as important to include three highly marginalised indigenous languages, namely Khoi, Nama and San, among the languages that needed to be promoted and further developed along side the official languages. Secondly, there is no longer a development requirement regarding "(i) all languages commonly used by communities in South Africa, including German, Greek, Gujarati, Hindi, Portuguese, Tamil, Telegu and Urdu; and (ii) Arabic, Hebrew, Sanskrit and other languages used for religious purposes in South Africa" (section 6(5) 1996 Constitution). This

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<sup>8</sup> The actual implementation and measures taken to give meaning to the status of official language will be discussed *infra*.

<sup>9</sup> Cf. Long title of the Pan South African Language Board Act, No 59 of 1995.

second change was justified on the basis that it would affect languages that were mainly spoken in Europe and Asia and which were already sufficiently developed. In view of the scarce resources and multiple transformation projects in South Africa, it seems reasonable to focus the funds for the promotion of multi-lingualism on the indigenous languages, which are, in any event, numerous. This view is further supported by the Board's remaining obligations to promote and ensure respect for "all languages commonly used by communities in South Africa".

These provisions of section 6 of the 1996 Constitution are clearly aimed at promoting multi-lingualism and protecting the speakers of the languages named in the section, particularly those speakers of the nine indigenous languages that have been granted official status. Furthermore, the special tasks of the Language Board with regards Khoi, Nama and San and the Asian and European languages spoken in South Africa require numerous forms of special protection for (members of) the corresponding language groups. Given the fact that all language groups in South Africa can qualify as linguistic minorities (with the possible exception of the English language group), the respective constitutional clauses amount to measures of minority protection. This method of indirectly protecting linguistic minorities is comparable to the approach of the European Charter for Regional or Minority Languages of the Council of Europe, which similarly does not give rights to speakers of minority or regional languages but is focused on the languages and their use *per se*.

Two other provisions of the 1996 Constitution are relevant to the issue of minority language rights. Negotiations relating to a "right to self-determination for a community sharing a common language and cultural heritage" eventually led to a three-dimensional agreement requiring:

- (1) a provision guaranteeing cultural rights such as Article 27 of the International Covenant on Civil and Political Rights (the "ICCPR"), the most basic international norm concerning minority rights;
- (2) a provision creating a Commission for the Protection and Promotion of the Rights of Cultural, Religious and Linguistic Communities (section 185 of the 1996 Constitution); and
- (3) a provision concerning self-determination.

The similarities between section 31 of the 1996 Constitution<sup>10</sup> and Article 27 ICCPR are indeed striking, notwithstanding the fact that the concept "community"

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<sup>10</sup> Section 31, 1996 Constitution:

Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community –to enjoy their culture, practice their religion and use their language; and to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.

is used instead of "minority", and "ethnic" is replaced by "cultural" because the ICCPR concepts are too tainted by apartheid ideology and practices to be used in the post-apartheid constitution. Nevertheless, it can be argued that "the most pragmatic way to deal with the difficulties of definition of the term community is to see it as doing more or less the same work as the term it substitutes for Article 27's "minority" (Currie looseleaf, 35.16). Similarly, the term "ethnic" should be viewed as having a meaning more or less concurrent to the concept of "cultural" (Ibid, 35.12).

The provision on the right to education (section 29 of the 1996 Constitution) also proved very contentious because of the issues of language in education and single medium institutions. From a certain point of the negotiations onwards, the National Party insisted on a right to single medium institutions in the public education sector, which they considered a crucial means of maintaining the Afrikaans language. The ANC, however, was not open to any such concessions as it considered a right to such type of educational institutions a return to apartheid practices (Ibid, 35.6-35.7). Eventually, the National Party agreed to a considerably diluted version of its original proposal in the provision on the medium of instruction:

"Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, *the state must consider all reasonable educational alternatives, including single medium institutions*, taking into account:

- (a) equity;
- (b) practicability; and
- (c) the need to redress the results of past racially discriminatory laws and practices"<sup>11</sup> (emphasis added).

The factors which the state is to take into account when implementing the right to receive education in the official language or languages of choice have some if not significant potential for the realisation of single medium Afrikaans institutions. Although the final factor contained in the above provision does not seem to support the concept of single medium Afrikaans institutions as such institutions were mostly advantaged rather than disadvantaged by the past racially discriminatory laws and practices, this might be balanced out in certain circumstances by the "equity" factor, for example in areas where the majority of the people speak Afrikaans.

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<sup>11</sup> Section 29(2) 1996 Constitution.

#### **4. Certification Judgements as related to the 1996 Constitution of the Constitutional Court**

The Constitutional Court had to certify, in accordance with section 71 of the interim Constitution, whether the 1996 Constitution complied with the 34 Constitutional Principles before the latter Constitution could come into effect. In the first Certification Judgement the Court held that:

"the NT [new text, referring to the 1996 Constitution] cannot be certified as it stands because there are several respects in which there has been non-compliance with the Constitutional Principles ... Yet, in general and in respect of the overwhelming majority of its provisions, the CA [Constitutional Assembly] has attained that goal [of measuring up to predetermined requirements]".<sup>12</sup>

Of particular relevance is an analysis of the answers of the Constitutional Court as regards objections raised concerning the language-related clauses enumerated above. An objection was raised that none of the Indian languages spoken in South Africa were given the status of "official language". The Court, however, rejected the argument and emphasised that:

"the object of Constitutional Principle XI is to provide protection for the diversity of languages, not the status of any particular language or languages. The granting of official status to languages is a matter within the sole responsibility of the Constitutional Assembly, and it is the Constitutional Assembly's considered determination in that regard that is reflected in New Text 6(1)".<sup>13</sup>

The Court also remarked that linguistic diversity is recognised and promoted by the other subsections of section 6. For example, the Pan South African Language Board is required "to promote and ensure respect for ... Gujurati, Hindi, ... Tamil, Telegu, Urdu ... and Sanskrit ...",<sup>14</sup> which are the principal Indian languages spoken in South Africa (Currie looseleaf, 37.3).

A further complaint about the language clause is related more specifically to the status of Afrikaans, which was allegedly diluted under the 1996 Constitution due to the dropping of the non-diminishment provision. In view of the fact that no Constitutional Principle prohibited the status of Afrikaans being altered, the Court rejected this complaint and added that:

"in any event, the [New Text] does not reduce the status of Afrikaans relative to the [interim Constitution]: Afrikaans is accorded official language status in terms of [New Text] 6(1). Affording other languages the same status does not diminish that of Afrikaans".<sup>15</sup>

The absence of a non-diminishment provision does imply a reduction of the constitutional rights of that language since 1910. This is not, however, unreason-

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<sup>12</sup> First Certification Judgement of the National Constitution, § 31.

<sup>13</sup> Ibid, § 211.

<sup>14</sup> Ibid, § 210.

<sup>15</sup> First Certification Judgement of the National Constitution, § 212.

able or unjust. Of related concern was the provision obligating national and provincial governments to use at least two official languages as languages of government which, despite its underlying intention, does not guarantee that this will include Afrikaans (Currie looseleaf, 37.7).

The two objections leveled against section 29 New Text, targeted the fact that the right to education in the language of choice was reduced under the 1996 Constitution. In response, the Court emphasised that its task is not to compare the new text with the interim Constitution but with the 34 Constitutional Principles. However, it did point out that the relevant subsection contained in the 1996 Constitution imposes a clear objective duty on the state to implement the right to receive education in the official language or languages of choice in so far as that would be "reasonably practicable", whereas that duty did not exist under the interim Constitution.<sup>16</sup>

Consequently, in respect to language clauses, the 1996 Constitution did not have to be amended so as to comply with all 34 Constitutional Principles. The amended version of the Constitution was eventually certified by the Constitutional Court and came into effect 4 February 1997.

## **5. Implementation of the Relevant Constitutional Provisions**

### *5.1 Section 6 of the 1996 Constitution: Status of Languages spoken in South Africa*

The constitutional framework concerning the accommodation of South Africa's linguistic diversity is rather promising in that it provides a basis for the enhanced empowerment (Sachs 1994, 2) and political participation, as well as equal access to services (Reagan 1995, 320) for the speakers of the 11 official languages. Furthermore, the importance of promoting and ensuring the respect of the other languages spoken in the country is acknowledged (section 6(5)). Simultaneously, the improved constitutional recognition of several of the indigenous languages contributes to the achievement of the principle of substantive equality, which is so vital and central for the new South Africa.

Although the Constitution recognises 11 official languages, the actual content of the official language policy is only determined by specific regulation of language use in interactions between the state and the subjects (Currie looseleaf, 37.3-37.4). The Constitution does include a subsection on language use for "purposes of government" (subsection 3) which indicates the factors that should be taken into account when devising such policy at national, provincial and local level. "Purposes of government" include the determination of languages of record, journals, proceedings in Parliament, bills, laws, (Du Plessis 1998, 276-284) notices of general public importance. At the national and provincial level, at least two

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<sup>16</sup> First Certification Judgement of the National Constitution, § 81.

official languages must be employed for the purposes of government, which could be viewed as an indication of the perceived need to counter the move towards English-only practices. Further, there are also certain considerations such as "usage, practicability, expense, regional circumstances and the balance of the needs and preferences of the population".

Currie writes that the usage factor "would clearly justify the use by a provincial government of only the principle languages of a region for purposes of legislation and administration. It would also justify the national government formulating a policy of using only the principal languages of a region for the purposes of administrative services in that region" (Currie looseleaf, 37.11). These considerations can be related to the use of the "sliding-scale" approach and imply a recognition of the practical constraints in a multi-lingual country it "will all too often be practically and financially impossible to provide every type of government service in each of the official languages everywhere" (Ibid, 37.13). The sliding scale approach would imply that the higher the degree of concentration of speakers of a language in a particular area and the more important a government service for the population, the more pronounced the state/provincial obligation to provide services in that language would be. An analogous approach would be valid for the municipal level, although the only factors explicitly mentioned as relevant for the determination of the policy for language use for purposes of government at that level are "usage and preferences of their residents" (Ibid, 37.12). It should also be noted that municipalities are allowed to use only one official language for purposes of government.

The Pan South African Language Board undeniably provides a degree of institutional support for the language policy as outlined in the Constitution. The Board's functions can be described as advising government, making proposals on language policy and investigating complaints concerning language rights. The overall goal of the Board should be the promotion of multi-lingualism. However, due to a lack of governmental and departmental support, the Language Board has not been in a position to contribute a great deal to the achievement of a multi-lingual policy in post-apartheid South Africa. The Language Board's activities and difficulties suggest that the practice regarding language issues in South Africa is rather disappointing. This is exacerbated by the shift towards English *lingua franca* in the public domain.

The actual practice regarding language use for purposes of government and other related public functions falls well short of the promising constitutional principles contained in the 1996 Constitution. African languages are virtually never employed in public administration. Further, hardly anything has been done so far to raise the status and use of the indigenous official languages.<sup>17</sup> African languages are

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<sup>17</sup> There are certain initiatives at some universities, but this occurs at the instigation of the universities themselves without any guidance from government. Some work is being done to establish dictionaries in the nine indigenous official languages by the Language Directorate of the Department of Arts, Culture, Science and Technology, but this work is developing very slowly.

occasionally used for Acts of Parliament and in provincial and local administration and they are used in a certain amount of public broadcasting, but English is clearly dominant and omnipresent.

There is, consequently, a rather uniform complaint about the dominant status of English as *lingua franca* and the concomitant negation of meaningful multi-lingualism which the Constitution demands. Although certain public institutions and national departments are trying to develop language policies which contribute to the right of identity of the various linguistic groups in South Africa while taking practical constraints and considerations of nation-building into account, overall there seems to be a *de facto* denial of several constitutional principles concerning the status of languages and multi-lingualism.

The Language Directorate at the Department of Arts, Culture, Science and Technology reacts with mixed feelings to the distinctive language policy proposals made by the government departments and parliament. In general, the lack of inter-governmental co-operation is felt to be problematic and the perceived sub-text of stamping out Afrikaans is also regarded as a negative aspect.

The Language Plan for South Africa, developed by the Language Directorate, is envisaged as becoming a very important tool for the effectiveness of multi-lingualism in South Africa and has, as its central principles, language equity and widespread language facilitation services. The latter would contribute to equal access to all spheres of South African society for all South Africans, particularly to the civil service. The Plan is balanced in that it takes the practical and other resource constraints sufficiently into account by advocating functional multi-lingualism, which would entail a functional differentiation of the official languages.

The Plan is currently going through the final phases before its ultimate approval by the minister and the subsequent passage through the legislative process to transform it into an Act.<sup>18</sup> Extensive discussions have taken place concerning the draft language policy and plan between the Cabinet Committee for the Social Sector and the National Treasury. Currently, a system is being devised to deal with the financial implications of the so-called "rotation principle" for the official languages, while the language units in national departments and provinces are being identified through a survey. Thus, real, concrete rules and standards are still in the process of being determined. Considerations of proportionality or the "sliding scale" approach are included in the discussions and will undoubtedly leave their mark on the standards eventually adopted.

Overall, the development of an appropriate language policy will consist of a balancing process which attempts to strike an appropriate balance between the

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Further, the Language Plan for South Africa with more concrete principles pertaining to language use in the public sphere is still not finalised.

<sup>18</sup> It should be emphasised however, that by end of August 2001 the plan was still not finalised, let alone concomitant legislation developed.

accommodation of linguistic diversity on the one hand and concerns of national unity and limited resources on the other.

## 5.2 Language in Education: Section 29(2) of the 1996 Constitution

A particularly sensitive issue with regards the right to education is the policy concerning language of instruction, as exemplified by the constitutional negotiations on the relevant subsection. The relevant constitutional sections are not only the non-discrimination clause (section 9(3) and (4)), which prohibits direct or indirect discrimination on the basis of language, but also that part of the section on the right to education which states that:

"everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable" (section 29, 2, first sentence of the 1996 Constitution).

Meanwhile, the national ministry of education has proclaimed *Norms and Standards regarding Language Policy published in terms of Section 6(1) of the South African Schools Act, 1996*.<sup>19</sup> The basic principles of this document should be set against the background of the *Language in Education Policy* produced by the same department, which underscored the importance of multi-lingualism and additive bi-lingualism in education and imposes an obligation on the schools to promote multi-lingualism.<sup>20</sup> These national Norms and Standards can be considered a genuine attempt to realise as much as possible the individual student's choice concerning the medium of his or her instruction, while taking resource and other practical constraints duly into account.<sup>21</sup> The Norms and Standards make explicit what is meant by "where reasonably practicable"<sup>22</sup> and, overall, take into account such things as local conditions, the need to co-ordinate the policy choices at regional level, and the need for a minimum number of students asking and/or willing to follow education in that language.<sup>23</sup>

Although this policy seems rather progressive, the principles can, nevertheless, be criticised regarding some of its components. There is no attention at all given to

<sup>19</sup> Government Gazette, 4 August 1997.

<sup>20</sup> Language in Education Policy in terms of section 3(4) (m) of the National Education Policy Act, 1996, Government Gazette, 4 August 1997, §§ 4.1.5., 4.1.6. and 5.3.1.

<sup>21</sup> Ibid, inter alia § 5.4.4. "The provincial department must explore ways and means of sharing scarce human resources. It must also explore ways and means of providing alternative maintenance programmes in schools or school districts which cannot be provided with or offer additional languages of teaching in the home languages of learners."

<sup>22</sup> Norms and Standards, § 5.4.3: "It is reasonably practicable to provide education in a particular language of learning and teaching if at least 40 on Grade 1 to 6 or 35 in Grades 7 to 12 learners in a particular grade request it in a particular school."

<sup>23</sup> Norms and Standards, § 5.3.2: "Where there are less than 40 requests in Grades 1 to 6, or less than 35 requests in Grades 7 to 12 for instruction in a language in a given grade not already offered by a school in a particular school district, the head of the provincial department of education will determine how the needs of those learners will be met, taking into account ... 5.3.2.2. the need to achieve equity; 5.3.2.3. the need to redress the results of past racially discriminatory laws and practices; 5.3.2.4. practicability ...".

non-official languages, such as the Indian languages, despite their significant presence in Kwazulu-Natal. Further, the numerical criteria<sup>24</sup> are so elevated that they *de facto* exclude the possibility of instruction in one of the smaller official languages, such as Venda or Ndebele. Finally, little attention is paid to the way in which African languages should be promoted and developed, as is demanded by section 6(2) of the 1996 Constitution.

It should also be noted that "choice" is often socially and politically constrained. A choice for English as medium of instruction is greatly influenced by the legacy of apartheid's indoctrination about the lack of value of indigenous languages and the perception of the absolute power of English. Language awareness campaigns organised by the National Department of Education and of Arts and Culture are specifically aimed at countering these internalised negative perceptions about the African languages and their value in future life (Desei 1998, 5). Indeed, the pervasive influence of apartheid policies cannot be underestimated. Although the African communities do wish to hold on to their languages, they have the impression that they can only "make it" in their careers if they have been taught in English, even though such impression are incorrect. Consequently, these campaigns are not devised so as to create a desire in the African communities to hold on to their own, separate identity, as one of the prerequisites for a group to qualify as a minority, but to make the Africans aware of the value of mother tongue education for future success.

Overall, South Africa has adopted a rather inventive, although imperfect policy regarding language in education. This policy is still relatively new and will need to be further developed and adapted in the coming years for its potential benefits to be realised.

### 5.3 *Minority Rights Sensu Stricto and Language*

As discussed above, section 31 of the 1996 Constitution of South Africa is very similar in its formulation and intent to Article 27 of the ICCPR, and can thus be identified as a minority rights provision *sensu stricto*. In view of apartheid's abuse of the minority rights discourse, it is certainly remarkable to have such a constitutional provision relatively soon after the official abolition of apartheid. There are, however, differences in formulation evident in the text of the Constitution, which can be explained by sensitivities due to apartheid's legacy in this regard. However, due to the strong similarities between section 31 of the Constitution and Article 27 of the ICCPR, it can nevertheless be argued that one can rely on the General Comment pertaining to Article 27 ICCPR, and perhaps also on the UN 1992 Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities, as interpretative guidelines to establish a more precise content of section 31.<sup>25</sup>

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<sup>24</sup> See Note 22 *supra*.

<sup>25</sup> See also section 39(1)(b) of the 1996 Constitution.

In this respect, it should be noted that the UN Declaration contains in Article 1 a confirmation that states have certain positive obligations as regards their minorities, even though these do not seem that extensive when compared with more detailed provisions contained in the same Declaration. Furthermore, the Human Rights Committee in its General Comment on Article 27 ICCPR also seems to require not only positive measures of protection,<sup>26</sup> but also positive measures in certain circumstances in order to protect the identity of a minority and "the rights of its members to enjoy and develop their culture and language and to practise their religion in community with the other members of their group".<sup>27</sup> The following argument can thus be made in favour of positive state obligations in certain circumstances regarding the "communities" of section 31 of the 1996 Constitution:

"The s 31 right requires for its exercise the existence of an identifiable community practising a particular culture or religion or speaking a particular language. Therefore, if as a result of state action or inaction that community loses its identity, if its absorbed without trace into the majority population, the individual right of participation in a cultural or *linguistic* community will be harmed. Section 31 therefore certainly requires non-interference with a community's initiatives to develop and preserve its culture. In addition, it is likely that it requires positive measures by the state in support of vulnerable or disadvantaged cultural, religious and *linguistic* communities that do not have the resources for such initiatives" (Currie looseleaf, 35.18) (emphasis added).

Only further implementation of this constitutional section will reveal to what extent this position is effectively followed in South Africa. By the beginning of 2001, however, implementing legislation does not appear to be on the cards at all and, presumably will not be for the near future. The slow and painstaking development of legislation concerning the section 185 Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities attests to the significant amount of time which may be required before such legislation is framed.

Whereas the formulation of section 185 seems to imply a stronger recognition of the group dimension of these "communities" or minorities, in that it refers to rights of these communities as such and not to rights of the members of these communities, the draft bill on section 185 currently before the national Parliament does not bear this out. The bill remains quite vague and does not give many further indications about the kind of protection (linguistic) minorities can expect in South Africa. It certainly does not indicate the kind of specific rights that flow from section 31 of the Constitution.

Article 4 enumerates the primary objectives of the Commission, including the promotion of respect for the rights of communities and of tolerance and national unity. Part 5 of the bill on the functions and powers of the Commission does not express a strong commitment to minority protection as it mentions monitoring,

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<sup>26</sup> General Comment, § 6.1.

<sup>27</sup> Ibid, § 6.2.

investigating, researching, educating, lobbying, advising and reporting on any issues concerning minorities, without imposing any obligation on government to take these activities into account. Further, although the Commission is empowered to deal with complaints by linguistic minorities, there is no further clarification as to what this can entail. Consequently, the Commission does not seem to have any enforcement powers. Importantly, the Commission must co-operate with other constitutional institutions and organs of state where the functions of the Commission overlap with those of such other constitutional institutions or organs of state.<sup>28</sup> Regarding linguistic minorities, both the Pan South African Language Board and the South African Human Rights Commission are institutions with which the Commission would have to co-operate.

It will be very interesting to examine how this Commission will function once established and in what way it will contribute to the protection of linguistic minorities in South Africa.

## **6. International Framework regarding Language Rights for Minorities**

The existing international framework regarding language rights for members of minorities is not extensively developed and is relatively weak. Article 27 ICCPR, the most basic provision in international law regarding minority rights, is not particularly helpful in that it merely states that persons belonging to linguistic minorities shall not be denied the right to use their own language. Nor is the General Comment of the Human Rights Committee regarding Article 27 ICCPR very informative on the more precise content of Article 27 rights for members of linguistic minorities. Paragraph 5.3 of this General Comment merely establishes that the right of linguistic minorities to use their own language is valid both in private and in public and should be distinguished from other language rights of the ICCPR. This requirement of distinction does not clarify the content of Article 27 itself.

The UN Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities is inspired by the provisions of Article 27 ICCPR (preamble, paragraph 4) and arguably further illuminates the meaning of Article 27, while also containing provisions which go further than Article 27 (Schulte-Tenckhoff and Ansbach 1995, 66).

Whereas Article 2(1) of the Declaration merely reformulates Article 27, Article 1(1) explicitly recognises the right to linguistic identity of minorities, which is merely implicit in Article 27 ICCPR (De Varennes 1996, 149; Thornberry 1991, 141). Furthermore, Article 4 contains two paragraphs with language-related provisions, namely paragraph 2 and 3. Paragraph 2 stipulates that states shall take measures to create favourable conditions to enable persons belonging to minorities to develop their language. Although *prima facie* promising, this provision is so vague and

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<sup>28</sup> Section 22(2) of the draft bill.

open-ended that it does not impose much of a real obligation on states. Paragraph 3 contains even more loopholes as it reads: "states *should* take *appropriate measures* so that, *wherever possible*, persons belonging to minorities have *adequate opportunities* to learn their mother tongue *or* to have instruction in their mother tongue" (emphasis added).

Although the Declaration thus contains standards that are further elaborated than those contained in Article 27 of the ICCPR, they remain quite vague (Eide 1996, 7). Furthermore, they are formulated in such a cautious way that states can easily argue that they comply (Benoît-Rohmer 1996, 23). The use of formulations such as "wherever possible", "adequate opportunities" and the use of the verb "should" rather than "shall" to reflect states' obligations inevitably concede a wide margin of discretion to states (Karagiannis 1994, 218). Similar arguments can be made in relation to other relevant international and European instruments.

The UNESCO Convention on the Elimination of Discrimination in Education indicates in Article 2(b) that the establishment or maintenance of separate educational systems or institutions for linguistic reasons would not amount to prohibited discrimination. This merely implies that states can allow separate educational institutions in certain circumstances but does not oblige them to do so.

In Article 5(1)(c)<sup>29</sup> however, the contracting states do agree to allow members of national minorities to establish and maintain, in certain circumstances and under certain conditions, their own educational institutions in which lessons can be taught in the minority language. However, the overall effect of numerous restrictions is to heavily restrict the recognition of the right as, in practice, "they enable each state to frustrate the operation of the clauses referred to by, for example, invoking discretionary considerations of national educational policy or the need to avoid compromising sovereignty" (Capotorti 1976, 8-9).

At the European level, reference should be made to the 1995 Framework Convention for the Protection of National Minorities and the 1992 European Charter for Regional or Minority Languages. The most striking feature of the Framework Convention is that, although it is the first international treaty with a general protection regime for minorities, (Benoît-Rohmer 1998, 145) it concedes a very wide measure of discretion to the contracting states as it consists of vague programmatic provisions and includes numerous escape clauses (Klebes 1995, 93-

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<sup>29</sup> Article 5(1)(c) UNESCO Convention on the Elimination of Discrimination in Education:

The State Parties to this Convention agree that : ...

It is essential to recognise the right of members of national minorities to carry on their own educational activities, including the maintenance of schools and, depending on the educational policy of each State, the use or the teaching of their own language, provided however: that this right is not exercised in a manner which prevents the members of these minorities from understanding the culture and language of the community as a whole and from participating in its activities, or which prejudices national sovereignty; that the standard of education is not lower than the general standard laid down or approved by the competent authorities; and that attendance at such schools is optional.

94). Regarding language rights Articles 10 and 14 are of special importance. Article 10<sup>30</sup> guarantees the right to use the minority language. However, its second paragraph, concerning the right to use this language in communication with the public authorities, is very strongly qualified (Klebes 1995, 95). Not only is the right contingent on a high geographic concentration of members of the linguistic minority but it is also weakened by discretionary phrases such as "where such a request responds to a real need" and "as far as possible". Consequently, the actual implications of this provision are not as far reaching as they may seem *prima facie*.

Article 14<sup>31</sup> regarding the right to learn the minority language and to be taught or receive instruction in a minority language is equally cautiously formulated. Moreover, the states do not appear to have an obligation to take positive measures regarding the right to learn the minority language. The right to instruction in a minority language in particular is very tentatively phrased. Indeed, states are not obliged but merely encouraged to provide this service (Fenet 1995, 180), since they can also opt to endeavour to ensure that members of national minorities have adequate opportunities to receive education of their minority language. Together with the requirement of territorial concentration, article 14, § 2 also contains vague conditions such as "as far as possible" and "within the framework of their education system", which seem to be easily open to abuse by states. This is particularly so given the weak, purely political enforcement procedure of the Framework Convention. Once again, no clear solid standards seem to emerge.

The European Charter for Regional or Minority Languages is remarkable in that it does not grant any rights to speakers of certain (minority) languages or to certain linguistic groups but is instead focused on the languages themselves. It undoubtedly provides protection in an indirect way for linguistic minorities and their speakers (Schumann 1994, 93).

A second important feature of the Charter is the fact that, certain general principles in Article 7 aside, the contracting states can under certain minimum conditions choose their obligations à la carte (De Varennes 1997, 156). Each state can even determine for itself to what languages, spoken in its territory, the Charter will apply, thus significantly extending state discretion (Benoît-Rohmer 1998, 146).

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<sup>30</sup> Article 10, § 2 Framework Convention: In areas inhabited by persons belonging to national minorities traditionally or in substantial numbers, if those persons so request and where such a request corresponds to a real need, the Parties shall endeavour to ensure, as far as possible, the conditions which would make it possible to use the minority language in relations between those persons and the administrative authorities.

<sup>31</sup> Article 14 Framework Convention: § 1. The Parties undertake to recognise that every person belonging to a national minority has the right to learn his or her minority language. § 2. In areas inhabited by persons belonging to national minorities traditionally or in substantial numbers, if there is a sufficient demand, the Parties shall endeavour to ensure, as far as possible, and within the framework of their education systems, that persons belonging to those minorities have adequate opportunities for being taught the minority language or for receiving instruction in the minority language.

The states ratifying the Charter commit themselves to a greater or lesser extent<sup>32</sup> to protect and promote the use of regional or minority languages in the domain of education (Article 8), judicial authorities (Article 9), administrative authorities and public services (Article 10), access to the media (Article 11), as well as the domain of cultural, economic and social activities (Articles 12 and 13).

The actual contribution of the Charter to minority protection is of course modulated and balanced in view of its high flexibility as regards the content of state obligations (Blair 1994, 59-60).

The Explanatory Report on the Charter reveals, however, that the states may not choose arbitrarily between the options contained in the Charter but should do so "according to the situation of each language". Arguably this reflects a sliding-scale approach in that it would imply that "the larger the number of speakers of a language, and the more homogeneous the regional population, the "stronger" the option which should be adopted" (Ibid, 59-60). This approach seems particularly meaningful for a multilingual country like South Africa and its influence can indeed be identified in some of the South African policy documents regarding language use, such as the Norms and Standards governing Language Policy in Education.

## **7. Evaluation of the South African Norms and their Application in light of this Framework**

As the preceding analysis of the South African situation has revealed, it seems that in theory, at the level of policy decision-making, South Africa operates within the international (and European) minority standards. However, in view of the weak nature of these obligations and the numerous loopholes in the current standards that leaves the states a great deal of discretion, this is not a difficult task. The sliding-scale approach, as is visible in the European Language Charter, seems particularly meaningful and appropriate for a multi-lingual country such as South Africa.

However, in terms of actual practice, the picture in South Africa is considerably less positive. Several policy documents are in the process of being developed and finalised in order to counter the shift towards English *lingua franca* in the public domain and to improve to some extent the status of the indigenous (official) languages. Only time will tell whether this counter-tactic will be effective and whether multi-lingualism in South Africa will be able to one day truly flourish.

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<sup>32</sup> The articles of the European Charter for Regional or Minority Languages are too extensive to quote here.

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# OSCE Developments and Linguistic Minorities

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&

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*The following is intended to provide an overview of the work carried out by the institutions of the Organisation for Security and Cooperation in Europe (OSCE) with regard to the protection of the linguistic rights of persons belonging to national minorities and to indicate significant developments in this regard. By way of introduction, the issue of language is placed within the conceptual framework of the OSCE as an organisation which is concerned primarily with peace and security and against the back-drop of recent political developments within the OSCE area, in terms of post-Soviet State-building, the resurgence of nationalism and threats to peace and security in the OSCE region. Some trends in States' practice in this regard, along with some developments on the part of the OSCE aimed at assisting States in developing good practice regarding the linguistic rights of their minorities, are outlined. Thereafter follows a more detailed analysis of the work of the OSCE institutions in addressing specific language-related issues that have commonly arisen in the course of these institutions' involvements in various States. It is hoped that this account of the relevant work carried out by the OSCE institutions will provide an insight into the way in which the OSCE acts to give meaning and effect to agreed standards aimed at protecting and promoting the linguistic rights of persons belonging to national minorities.*

## **1. Language in the OSCE Framework**

As a security organisation the OSCE derives its interest in language issues from a conflict prevention perspective. The protection of the rights of persons belonging to national minorities, including their linguistic rights, constitutes a key element within the framework of the OSCE's overall approach of "comprehensive security" (which recognises the interdependence of issues of military and political security,

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<sup>1</sup> The views expressed in this article are those of the authors alone, and do not necessarily reflect the views of either the High Commissioner or the OSCE.

economic and environmental well-being, and respect for human rights) and "cooperative security" which is grounded in the commitment of all States to cooperate within a framework of open, democratic societies with free market economies, based on the rule of law and respect for human rights. It is important to note from the outset that all OSCE participating States have voluntarily accepted by consensus and in the spirit of cooperative security that human rights are a legitimate concern to all participating States and that they do not belong exclusively to the internal affairs of the State concerned.<sup>2</sup> Furthermore, all OSCE States have bound themselves to respect not only express OSCE commitments, but all relevant international law irrespective of its source. The existence and functioning of the OSCE institutions is the product of consensus decision-making - neither standards nor institutions are imposed. The work of the OSCE institutions, which often reaches significantly into the specific regulatory and practical affairs of participating States, therefore proceeds from assumptions of common interests and cooperation.

### 1.1 *The OSCE and Conflict Prevention*

The linguistic rights of persons belonging to national minorities have emerged as among the most common sources of dispute in many OSCE States. As the principal OSCE institution mandated in July 1992 specifically to prevent conflicts in situations involving minority issues, the High Commissioner on National Minorities (HCNM) has been engaged, in cooperation with other OSCE institutions, in a number of situations that have threatened to destabilise certain regions of Central and Eastern Europe and the former Soviet Union. While the roots of disputes and the particular historic circumstances may differ, the status of the mother tongue and the regulation of the use of language are particularly contentious elements that tend to polarise parties like no other.

So why are issues surrounding language so charged? Part of the answer lies in the symbolic function of language and its centrality to notions of identity, both as a source of individual self-identification and as a crucial element in the collective cultural identity of many communities (especially in Europe).<sup>3</sup> Of course "identities" are complex and changeable, with different elements becoming more important depending on the contexts and the nature of interactions encountered therein. In a depoliticised context, "national" identity in the sense of ethnic (or even purported "racial") characteristics may take a backseat.<sup>4</sup> This element comes to the fore when the sense of identity — whether individually or collectively — feels threatened in some way. Any threat (real or perceived) to the use of language, such

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<sup>2</sup> See the 1991 Document of the Moscow Meeting of the Conference on the Human Dimension of the (then) CSCE in: Bloed 1993, 606.

<sup>3</sup> In the European Union alone an estimated 40-50,000,000 EU citizens speak a language other than the main official language of the State of which they are citizens; see O Riagain, 2001, 33.

<sup>4</sup> For a presentation of research conducted into the self-articulation of identity in the South African context which found individuals defining themselves in terms of personality traits, institutional, familial/social and regional identities over and above "race", see Carrim 2000.

as inadequate opportunities to learn or use one's own language in public or in private, is interpreted as tantamount to a threat to the very identity of those involved, thus provoking understandably strong and defensive reactions. This entanglement of issues of language with such a sensitive phenomenon as identity provides fertile ground for conflicts.

Further to its implications for identity, language also functions as a tool of social organisation. Choices made by States in the use of language — especially in the public sphere of governance — have a bearing on access to important public goods, and constitute either a means to or obstacle in the way of social integration (Packer 2001, 258). Problems arise when persons or groups feel that they are being excluded from certain processes or opportunities in the public sphere — including access to an equitable share of the State's resources — derived from their lack of knowledge of the State language(s). Disputes may arise over access to, *inter alia*, public services and facilities, employment or economic opportunities, and prestigious positions within the State. Fundamentally in some States, language is also a key factor affecting access to citizenship (in particular through language requirements in the naturalisation process) which in itself is key to full participation and integration within the State.

The role of the OSCE as a security organisation, and specifically of the HCNM as an instrument of conflict prevention, is not to address questions of identity *per se*. Indeed, it is the experience of the HCNM that although questions of identity often help to explain the context of a dispute they seldom, in themselves, represent the root of the problem. A minority/majority may be concerned about the protection of identity, but usually in relation to a particular issue or set of issues. The HCNM, therefore, seeks to direct disputing parties towards the solution of concrete issues and away from the rather nebulous and volatile concept of identity. By focusing on specific substantive questions — on policy, legislation and governmental practice — parties are able to frame their concerns in a subject-oriented rather than national(ist)-oriented way (*see* Kemp 2001, 119).

## 1.2 Integrating Diversity

It is the task of the democratic State to provide the framework within which each individual can be free to maintain and develop his or her identity pursuant to a "social contract" which both legitimizes and sustains the State in that same task for the benefit of others. In doing so the State has a responsibility to ensure an even-handed (as opposed to a completely neutral "hands-off") approach in responding to competing claims — including matters of culture and identity — with the aim of ensuring equal respect for all (*see* Carens 2000, 12). While no liberal democratic regime can ever be culturally neutral — since every State has to make choices regarding, for example, the language(s) to use for government, the courts and in public education — cultural particularism should be kept strictly to a minimum (*see* Carens 2000, 11).

The creation of new States (or the restoration of their sovereignty) in post Cold War Europe, including post-Soviet State formation, has been accompanied in many areas by national and ethnic revivals. Thus, the OSCE has had to pay particular attention to problems of diversity, especially linguistic diversity. The objective promoted by the OSCE is one of "integrating diversity", that is the simultaneous maintenance of different identities and the promotion of social integration. This implies a pluralist, multicultural model of societal organisation based on the principle of non-discrimination (as opposed to an assimilationist or exclusivist approach). A common fear is that support for integration, as opposed to assimilation, within the State will in fact lead to its disintegration. The OSCE approach informs that the reverse is true. Specifically, the HCNM's experience is that: "A minority that has the opportunity to fully develop its identity is more likely to remain loyal to the State than a minority who is denied its identity." (Van der Stoel 2000, 209)

Within the framework of integrating diversity, as informed by international standards, the State is entitled and indeed obliged to seek integration in accordance with the principles of equality and non-discrimination.<sup>5</sup> This is a matter of balancing general and particular interests and wills. Distinctions and preferences must constitute a *proportionate balance* between the different interests in accordance with respect for the dignity of the individual and the protection of their rights — most relevantly the rights to freedom of expression and association. As de Varennes observes, in order to determine whether such preferences (in this case, linguistic ones) are discriminatory, various factors must be taken into account, including a State's demographic, historical and cultural circumstances: what is reasonable in the context of one State may be completely unadaptable in another (De Varennes 1993, 8).

Furthermore, States have an obligation (in accordance with paragraph 33 of the Copenhagen Document<sup>6</sup>) to encourage conditions for the promotion of identity that goes beyond mere protection and requires special or "positive" measures to ensure equal enjoyment and development of the rights of minorities in fact as well as under law. Crucial in this regard are the language and educational policies of the

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<sup>5</sup> See Eide 1999, 322. The principle of non-discrimination is enshrined in, inter alia, the following standards: The 1948 Universal Declaration of Human Rights (UDHR), Article 2; the 1966 International Covenant on Civil and Political Rights (ICCPR), Articles 2(1) and 26 which provides a wider guarantee — not only in respect to those rights set out in the instrument itself as in the European Convention; the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Article 14 (along with Protocol 12 additional to the ECHR); the Council of Europe Framework Convention for the Protection of National Minorities (Framework Convention), Article 4(1); the Document of the Copenhagen Meeting of the Conference of the CSCE (Copenhagen Document), Articles 31 and 32; the 1992 United Nations General Assembly Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (UN Minorities' Declaration), Articles 3(1) and 4(1). In addition, dedicated anti-discrimination instruments are important, such as the 1965 International Convention on the Elimination of All Forms of Racial Discrimination.

<sup>6</sup> For the full text of the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, adopted on 29 June 1990, see Bloed 1993, 439-465.

State concerned (*see* Eide 1999, 322). Persons who have the official language of the State as their mother tongue (usually the numerical majority) are automatically advantaged over those who speak a minority language. The privilege of the State language must therefore be balanced by adequate compensatory measures aiding persons belonging to linguistic minorities. At the same time, the international instruments for the protection of minorities provide that the exercise of positive rights shall neither impinge on the rights of others,<sup>7</sup> nor shall they in any way compromise the territorial integrity of the State.<sup>8</sup>

Accordingly, in practice, in OSCE States (Estonia, Georgia, Latvia, the former Yugoslav Republic of Macedonia, Moldova, Slovakia and Ukraine among others) where language regulation has been a source of tension, the HCNM stresses that, while he remains aware of and sensitive to the historical experiences of past repression, there is a need to balance efforts to preserve and promote the language of the majority with measures to ensure the maintenance and development of the languages of persons belonging to minorities. At the same time, the HCNM reminds minorities that as members of the larger society of the State, they also have interests and even certain obligations to learn and use the language(s) of the State.

While learning the State language promotes intra-State cohesion it also benefits linguistic minorities in terms of their integration into society and their access to public goods. This has been so particularly in cases where knowledge of the State language is required in order to facilitate access to citizenship (for example, as is the case in the Baltic States). In many newly-independent States of the former Soviet Union, where a substantial part of the population may not speak the designated State language to any degree of proficiency, there is a need for adequate educational opportunities for persons belonging to minorities to improve command of the State language(s). In response to such needs the OSCE HCNM and Missions have consistently encouraged the development of training programmes (for example, the State Language Training Programme in Latvia and similar programmes in Moldova and the FYROM) aimed at enabling persons who according to the law must use the State language, or who would wish to do so for their own benefit.

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<sup>7</sup> *See* Dunbar 2001, 118. *See*, for example, Article 8(1) of the United Nations General Assembly Declaration on the Rights of Persons Belonging to National Minorities, and Article 20 of the Framework Convention for the Protection of National Minorities.

<sup>8</sup> As paragraph 37 of the Copenhagen Document makes clear: "None of these commitments [i.e. specified minority rights] may be interpreted as implying any right to engage in any activity or perform any action in contravention of the purposes and principles of the Charter of the United Nations, other obligations of international law or the provisions of the [Helsinki] Final Act, including the principle of territorial integrity of States."

### 1.3 *Some remarks regarding States' Practice*

Practice amongst OSCE participating States varies considerably in terms of the Constitutional and legal recognition and protection of minority languages.<sup>9</sup> Within the OSCE area, a number of newly-independent States have elevated selected language(s) to enjoy official status over others — in some cases directly inverting the hierarchy imposed under the previous regime, and thereby signaling the dominance of those for whom the official language is the mother tongue. In the Baltic States and elsewhere, the objective of the titular communities or so-called "State-forming nations" has been to enact the real and symbolic restoration of the language(s) spoken by the majority to primacy as the sole official languages of the State in a process of "cultural recovery".

While some States make no provision for languages other than the dominant State language, other States do make provision for minority languages to a greater or lesser degree in their Constitutions. For example, the Georgian Constitution provides for the additional official use of Abkhazian in the Abkhaz region. Similarly, Tajikistan has enshrined minority language rights for Tajik, Russian and Uzbek speakers in its Constitution. Other Constitutions (for example, those of Uzbekistan and Ukraine) embody a wider, more liberal approach to language issues whereby the State guarantees to respect, protect and create the conditions for the free development of all minority languages.<sup>10</sup>

*De jure* protection does not, however, guarantee equality in practice and OSCE documents expressly include the need for *effective* implementation of OSCE commitments. The 1999 Istanbul Summit Declaration, for instance, emphasises the requirement that laws and policies regarding the linguistic rights of persons belonging to national minorities at all levels conform to applicable international standards.<sup>11</sup> Even where constitutional protection exists, failure to enact and implement language legislation can create uncertainty on the part of linguistic minorities as to the content and extent of the rights granted to them, leading to anxiety and creating tensions.

Failure to adopt regulations for the swift implementation of existing laws can have a similar effect. In 1996, for example, the HCNM recommended that the implementation of the Romanian Law on Education be expedited in order to

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<sup>9</sup> For a survey and analysis of OSCE States practices regarding the linguistic rights of minorities, see the HCNM's March 1999 *Report on the Linguistic Rights of Persons Belonging to National Minorities in the OSCE Area* (hereafter "Linguistics Report").

<sup>10</sup> The Uzbek Constitution (in Article 4) prescribes that Uzbek is the State language, but at the same time obliges the State to "ensure a respectful attitude toward the languages, customs and traditions of all nationalities and ethnic groups living on its territory, and create the conditions necessary for their development". Similarly, Ukraine's Constitution (in accordance with a recommendation of the HCNM) guarantees the free development, use and protection of Russian and other languages of national minorities in Ukraine, as well as guaranteeing the right of citizens to receive instruction in the native tongue or to study the native language in State and communal educational establishments and through national cultural societies.

<sup>11</sup> The 1999 Istanbul Summit Declaration at para. 30.

address the uncertainty and fears of the Hungarian minority.<sup>12</sup> Similarly, on the adoption of the State Language Law in Slovakia, the HCNM encouraged the rapid adoption of a law on minority languages as a counter-balance in order to avoid a legal vacuum on issues such as the use of minority languages in official communications.<sup>13</sup> In addition, the need for promoting more *understanding* of relevant legislation regarding minority rights has also been an issue, in Kazakhstan for example (*see* Kemp 2001, 275). This last element is crucial insofar as there frequently exists a considerable gap between widely held "folk" beliefs about the rules of language, which can contribute to distrust and resentment between linguistic groups, and the reality in law (*see* Kontra 1999, 89-93).

Even where good laws exist at a national level, reluctance or inability to implement them at local public administration level can generate problems. In the former Yugoslav Republic of Macedonia (fYROM), for example, there was a dispute at the Pedagogical Faculty of the principal university in Skopje in 1998 as the Dean refused to implement a special law ensuring instruction in the Albanian language with a view to meeting the practical need to train a sufficient number of Albanian-language instructors to fill posts in Albanian-language schools throughout the country (*see* Packer 2001, 268).

#### 1.4 *The Oslo and Hague Recommendations*

It was in order generally to assist policy- and law-makers in developing and implementing good policies and laws in the areas of minority education and language rights that the HCNM facilitated the elaboration of two sets of general recommendations by a group of independent internationally-recognised experts for use in all OSCE participating States and beyond. Where, in the High Commissioner's experience, the international standards for protection of minorities lack clarity in some areas in terms of their content which leaves them open to interpretation and possible inconsistencies on application, the aim of *The Oslo Recommendations Regarding the Linguistic Rights of National Minorities* (1998)<sup>14</sup> and *The Hague Recommendations Regarding the Education Rights of National Minorities* (1996)<sup>15</sup> is to provide States with some guidance in finding appropriate accommodations for their minorities in the spheres of education and language that fully respect the letter and spirit of the internationally agreed standards. As such,

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<sup>12</sup> *See* OSCE HCNM letter to H.E. Mr. Teodor Melescanu, Minister for Foreign Affairs of Romania, 26 February 1996, OSCE doc. REF.HC/6/96.

<sup>13</sup> Although when a Law on the Use of Minority Languages was adopted in 1999, the HCNM expressed his regret that his proposal to clarify the legal relationship between the two laws was not included. *See* OSCE HCNM letter to H.E. Mr. Janos Martonyi, Minister for Foreign Affairs of Hungary, 11 August 1999.

<sup>14</sup> The Oslo Recommendations are reproduced, together with some scholarly analysis of the related subject matter, in a special issue of the *International Journal on Minority and Group Rights*, Vol. 6, No. 3, 1999.

<sup>15</sup> The Hague Recommendations are reproduced, together with some scholarly analysis of the related subject matter, in a special issue of the *International Journal on Minority and Group Rights*, Vol. 4, No. 2, 1996/97.

the Recommendations represent an expert interpretation of binding, legal obligations and political commitments. Aimed at use in all OSCE participating States and beyond, they provide a clear framework within which States can develop law and policy tailored to their own specific cultural and linguistic context. Fully endorsed by the HCNM and available in several languages, they have been circulated widely, have been the subject of seminars organised by the HCNM, have been discussed in the Permanent Council and at the 1999 OSCE Summit meeting in Istanbul, and have generally become a reference, at least among OSCE participating States (*see* Packer 2001, 262).

### 1.5 *Survey of State Practice*

In 1996, the HCNM also initiated a survey of OSCE participating States' practice concerning the linguistic rights of persons belonging to national minorities within their jurisdictions. Information was sought on four fundamental aspects of linguistic rights: the official status of languages; communication with administrative and judicial authorities; language in educational curricula; and access to public media in a minority language. The resulting comparative study, the *Report on the Linguistic Rights of Persons Belonging to National Minorities in the OSCE Area* issued in March 1999, provides an analytical summary of States' replies (mainly received in the course of 1997 and 1998 thus reflecting laws and practices in force at that time) grouped not only according to the questions asked but from the perspective of relevant international standards.<sup>16</sup> In doing so, the HCNM sought not only to document the range and variety of common States' practice, but also to indicate those options which met or surpassed minimum international standards — thereby indicating "best" practices upon which States could draw in developing or reforming their own regimes for the protection of the linguistic rights of minorities.

## **2. The role of the OSCE Institutions in addressing specific language-related issues**

This section highlights some recurring issues related to language arising in the OSCE context, providing the reader with a survey of the practical application of OSCE values through the work of the OSCE institutions in addressing specific language-related issues. It does not seek to provide a comprehensive survey of every issue that has arisen in the OSCE States in which the HCNM, Missions and other OSCE institutions are involved, but rather to provide an insight into the interventions of OSCE institutions in practice.

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<sup>16</sup> The full texts of the replies form an Annex to the HCNM's report which is available from the Office of the HCNM in The Hague.

## 2.1 The OSCE Institutions<sup>17</sup>

As the main OSCE institution mandated specifically to prevent conflict arising out of disputes between majority/minority groups, the HCNM has raised minority language issues as outlined below in many aspects of his work. He has done so through quiet diplomacy with the States concerned and has elaborated specific recommendations, communicated through formal exchanges of letters with governments, aimed at helping States to adopt policy and law in line with international standards. To this end, they usually refer to specific policies, laws and administrative practices and tend to be precise and detailed in substantive terms. The OSCE and other international standards to which the States have voluntarily subscribed serve as the principal framework of analysis and provide the basis for these recommendations.<sup>18</sup> These exchanges, although neither specifically foreseen by the mandate nor initially expected to become public, now form a mainstay of the HCNM's engagement with States. The written recommendations reflect the overall problem-solving, solution-oriented approach of the HCNM, which seeks politically viable solutions based on detailed (often legal) analysis within the framework of OSCE values and international standards. The HCNM has also raised minority language issues in very many other aspects of his work including through direct personal contacts with various interlocutors, at seminars and round-tables conducted behind closed doors, through confidential exchanges of correspondence which may include specific recommendations, as well as in his periodic reports to the Chairperson-in-Office and the Permanent Council of the OSCE, in exchanges with inter-governmental organisations and in consultations with independent experts (*see* Packer 2001, 258).

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<sup>17</sup> It is not intended, here, to provide a description or analysis of the mentioned OSCE institutions, their particular mandates or motivations and rationale for addressing the specific matters. Basic information on the OSCE, its institutions, their mandates and work is available from, e.g., the following: the Internet via the OSCE's web-site at [www.osce.org](http://www.osce.org); the OSCE Handbook and other relevant documentation (e.g. Fact Sheets, monthly Newsletter, etc.) published by the OSCE available from the OSCE's Documentation Section located at Rytirska 31, CZ-110 00 Prague, Czech Republic, e-mail: [quest@osceprag.cz](mailto:quest@osceprag.cz); and the OSCE Yearbooks prepared by the Institute for Peace Research and Security Policy at the University of Hamburg and published by Nomos Verlagsgesellschaft in Baden-Baden, Germany. In addition, useful compilations of documentation and analyses may be found, e.g., in the following: Bloed 1993; Bloed 1997; Rotfeld 1996; Gheballi 1996; Bothe, Ronzitti, Rosas 1997 and Cohen 1999.

<sup>18</sup> It is to be noted that, beginning with Principle X of the *Helsinki Final Act* signed on 1 August 1975 by the Heads of State or Government of the then 35 participating States, all OSCE participating States have committed themselves to "fulfill in good faith their obligations under international law, both those obligations arising from the generally recognized principles and rules of international law and those obligations arising from treaties or other agreements, in conformity with international law, to which they are parties". It is also to be noted that a wide variety of relevant obligations arise from the fact that all OSCE participating States are members of the United Nations (with the exception of the Swiss Confederation which is, in any case, a party to numerous treaties elaborated within the UN context), 43 OSCE States are members of the Council of Europe, 16 OSCE States are members of the Central European Initiative, 15 OSCE States are members of the European Union, 12 OSCE States are members of the Commonwealth of Independent States, and 11 OSCE States are members of the Council of Baltic Sea States – all of which (not to mention sub-sub-regional organizations and arrangements or bilateral treaties) bind OSCE participating States to a fundamentally consistent body of essentially repeated obligations.

In most situations where he is involved the HCNM's office maintains regular contacts with OSCE Missions and other field operations. While the OSCE Missions predominantly carry out their functions according to their own specific mandates which include minority languages to varying degrees,<sup>19</sup> they also provide valuable support to the HCNM, particularly in following up on his recommendations by means of monitoring, maintaining direct contacts, contributing analyses and performing tasks (*see* Packer 2001, 263). The work of both the Office for Democratic Institutions and Human Rights (ODIHR) and the Representative on the Freedom of the Media also have a bearing on minority language issues to some degree (as described below).

## 2.2 *The Public/Private Divide*

Issues arise in relation to both the "public" and "private" spheres and particularly at their point of intersection, raising difficult questions of the balance between legitimate public interests and the protection of human rights (*see* Packer 1999, 312). Activities in the private sphere may be subject to regulation by the State in the interests of protecting *inter alia* national security, public order, public health or morals, or the rights and reputations of others. The State could, for example require the use of an official language *along side* the minority language in the activities of private groups or organisations in the keeping of financial record and other official documentation. Any restrictions by the State made purportedly in the public interest must be proportional to the aim sought. Unwarranted interference (specifically the imposition of language preferences) by the State in the private sphere is often a major source of dispute between governments and linguistic minorities. Attempts to do so may fall foul of a number of well-established rights in international law, including the right to family and private life, freedom of expression and non-discrimination, as well as the norms of international labour law.

In the public sphere, issues arise in situations where persons belonging to national minorities seek the use of their own language in a wide range of activities involving State authorities, including the provision of public services. While there is a public interest in ensuring coherent and effective administration, it should be noted that multi-lingualism in public affairs is both possible and common practice in many States and in certain fields allowing minorities to use their mother tongue is a matter of ensuring access to justice (for example, in communication with the judiciary).

Whereas a State can adopt any official language(s) it chooses, there are situations where it would be unreasonable and therefore discriminatory *not* to allow the use of other languages in the provision of public services or in the sphere of public administration *in addition* to the State language. This applies typically (though not exclusively) under certain conditions, that is in areas where minorities are

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<sup>19</sup> For a description and analysis of the concept and mandates of OSCE Missions, including accounts of the work of selected ones, *see* Rosas 1997, 167-190.

"traditionally" present or are concentrated in "substantial numbers" and where there is a "sufficient demand".<sup>20</sup> In some cases such a provision is also a matter of public interest. With regard to health services, for example, consultation provided in a language that the individual understands ensures good diagnosis and appropriate treatment — which may have wider, public health implications.

In practice, difficulties have arisen in terms of defining what proportion of the population constitutes "significant numbers". In Slovakia, for example, the threshold percentage of persons belonging to a national minority needed in order for a community to provide minority language services (10% or 20%) was a bone of contention between ethnic Slovak and Hungarian parties in the governing coalition of 1998 (*see* Kemp 2001, 125). Although percentage minimums appear necessary, it is most important that decisions are reasonable, that the specific situation of minorities is taken into consideration and creative solutions sought (*see* Sieminski 1999, 353).

### 2.3 Resources

The fact that State obligation is linked to these specific territorial and other criteria reflects the concerns of States about potentially open-ended spending commitments and potential shortages of minority language speakers to provide such services if the obligation to do so were absolute.<sup>21</sup> Given the political sensitivities of "fragile majorities" combined with competing demands on limited resources, particularly in transitional economies, the majority is often reluctant to see resources expended on the promotion of the cultural and linguistic rights of persons belonging to minorities. Inequality in the distribution of State resources thus becomes a major point of dispute — particularly in the realms of culture and education. Access to cultural subsidies for the Hungarian minority under the Mečiar Government in Slovakia, for example, constituted a source of tension. The OSCE approach, informed as it is by the principle of non-discrimination, advises that while resources will always be limited, it is important to ensure that those which are available be used in an equitable fashion and to maximum effect — that is, to the benefit of the largest number of persons and groups. In particular, cost-effectiveness and transparency are key in ensuring acceptance among majority

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<sup>20</sup> For applicable standards regarding the rights of persons belonging to national minorities to use their own language in dealing with public authorities, in the public display of local names, and to receive instruction in that language, *see*: the Framework Convention, Articles 10(2), 11(3) and 14(2); and The European Charter for Regional or Minority Languages (European Language Charter), Articles 8, 9 and 10. Paragraph 34 of the Copenhagen Document while not making explicit reference to geographic concentration, tradition or numbers, stipulates that States should "endeavour [...] wherever possible" to ensure that persons belonging to national minorities enjoy adequate opportunities to use their mother tongue before the public authorities and to be taught in this language.

<sup>21</sup> *See* Dunbar 2001, 112. Although, as Dunbar notes, while some argue that the more territorially concentrated and more assertive the minority, the greater their entitlement to positive measures should be, one could equally argue that the relative weakness and marginalisation of a minority group would justify more, not less extensive measures of support.

opinion for minority language policies.<sup>22</sup> It is worth noting, in addition, that relatively simple and inexpensive ways can often be found to facilitate minority language use in, for example, communication with the State.

Even where the political will exists, sometimes States simply cannot afford to implement desirable policies aimed at accommodating minority demands. In Georgia, for example, serious economic constraints on the authorities have made it difficult to overcome the lack of educational materials for minority language schools across the country (*see* Packer 2001, 267). In specific cases the OSCE Missions and the HCNM have both intervened to facilitate funding for various desirable policy-making endeavours. In Kyrgyzstan, for example, new textbooks for Uzbeki schools were provided with the assistance of the Foundation on Inter-Ethnic Relations.<sup>23</sup>

#### 2.4 Public Administrative Authorities

The extent and conditions under which State authorities may have an obligation to allow the use of non-official minority languages in addition to the State language(s) in contacts with official authorities in the conduct of governance (for example, in organs of local self-administration) has been the source of controversy in many OSCE participating States. This right is particularly significant for persons belonging to linguistic minorities since it both ensures that they are able to understand the policies that affect them, and that they may express their own views and become actively involved in civil life.<sup>24</sup> In Bosnia and Herzegovina, for example, use of language in official communications, including documentation and official settings (such as meetings), has been a constant source of disputes (*see* Packer 2001, 264).

All OSCE States are committed to "endeavour to ensure that persons belonging to national minorities [...] have adequate opportunities [...] wherever possible and necessary for its [the mother tongue] use before public authorities."<sup>25</sup> According to both the Copenhagen Document and the Framework Convention,<sup>26</sup> where national minorities need to communicate with governmental institutions, typically though not exclusively in areas where they live traditionally or in substantial numbers, the government should make every effort to make this possible. At the same time, both instruments recognise that financial and other constraints may come into play.<sup>27</sup>

<sup>22</sup> European Centre for Minority Issues 2000, The Flensburg Recommendations on the Implementation of Policy Measures for Regional or Minority Languages, at para. 9.

<sup>23</sup> A non-governmental organisation established on the HCNM's initiative when he began his mandate in 1993, but legally and financially independent, in order to fund initiatives and projects to enhance the effectiveness of the HCNM. The Foundation was dissolved in 2000 and its assets and activities were incorporated into the Office of the HCNM.

<sup>24</sup> The Linguistics Report, *supra*, n. 9, at p. 12.

<sup>25</sup> The Copenhagen Document, para. 34.

<sup>26</sup> The Framework Convention, Article 10(2).

<sup>27</sup> The Linguistics Report, *supra*, n. 9, at p. 13.

The issue of the use of minority languages in official communications with governmental officials and bodies has arisen frequently in OSCE States. Some, like Tajikistan, have taken the step of guaranteeing in their Constitutions minority language rights, including access to administrative services and courts in areas where minority language groups live in substantial numbers (*see* Packer 2001, 269). By contrast, in Slovakia the use of minority languages in official communications was a major source of dispute between the ethnic Hungarian minority and the Mečiar Governments in the Slovak Republic between 1993 and 1998. During this period the HCNM consistently argued for the restoration of the rights of minorities to use their languages in official communications and, specifically, against proposals by the Government to oblige a translation in the State (that is, Slovak) language to be included in every such communication (which, the HCNM argued, would rob the right of its meaning).<sup>28</sup> Subsequent to the change in Government in 1998, the issue was resolved the following year with provision now made for minorities to use their language in communications with public administrative organs and in organs of local self-administration in those municipalities where they constitute at least 20% of the population.<sup>29</sup> In Romania in this regard, a significant development was the passage in January 2001 of a law on public administration that allows for the official use of minority languages in communities where the speakers make up at least 20% of the population. Some States, such as Croatia, guarantee the official use of minority languages and script together with the State language where persons belonging to minorities constitute more than 50% of the population in a municipality.<sup>30</sup> The obvious limitation of the aforementioned provisions lies in the fact that minority protection is not usually extended in official relations beyond the municipal framework, which means to the exclusion of minorities that are not territorially concentrated.

With regard to communication with judicial authorities, as a matter of due process the State is obliged to provide interpretation for those who do not understand the language of the Court in criminal proceedings.<sup>31</sup> The protection afforded, however, requires the use of the individual's own language only if he/she understands no other; it does not permit a member of a minority to choose the language to be used (*see* Dunbar 2001, 105). With respect to the use of the mother tongue in non-criminal court proceedings, the OSCE has not reached consensus on standards to

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<sup>28</sup> OSCE HCNM letter to the Minister for Foreign Affairs of the Slovak Republic, H.E. Mr. Juraj Schenk, 24 August 1995, OSCE doc. REF.HC/9/95.

<sup>29</sup> Having consistently urged Slovakia over the years to clarify the specific rights of persons belonging to national minorities to use their languages in accordance with the Slovak Constitution and international standards, the HCNM welcomed the introduction of a Law on the Use of Minority Languages which was finally adopted in July 1999. *See* OSCE HCNM Press Release of 19 July 1999, "High Commissioner Welcomes Restoration of Use of Minority Languages in Official Communications in Slovakia".

<sup>30</sup> *See* the 1991 Constitutional Law on Human Rights and Freedoms and the Rights of National and Ethnic Communities and Minorities in the Republic of Croatia, as cited in Packer 2001, 265.

<sup>31</sup> ECHR, Articles 5(2) and 6(3); ICCPR, Article 14(3); and the Framework Convention, Article 10(3).

this effect, although other international standards do allow for a "sliding scale" approach dependent upon the particular circumstances.<sup>32</sup>

### 2.5 *Public Office and the Electoral Process*

Political representation through access to positions of public office and to the electoral process are key in ensuring the effective participation of minority language-speakers in public life. In a number of OSCE States language issues have arisen both in terms of the linguistic proficiency of candidates for public office, and of the proceedings of the electoral process. The work of the ODIHR on elections and democratisation is especially relevant in this regard.

In relation to OSCE election-related commitments, as reflected principally in the 1990 Copenhagen Document,<sup>33</sup> there is no specific mention of language requirements, although issues arise in relation to the principle of non-discrimination, the freedom of expression and voter understanding of election processes and political platforms (*see* Packer 2001, 272).

In view of the importance of democratic processes open to all citizens, effectively disenfranchising or excluding individuals from standing for office because they do not speak the official language would most likely constitute an unreasonable, and therefore discriminatory, restriction (*see* De Varennes 2001, 27); in fact, Article 25 of the ICCPR stipulates a much more precise and rigorous standard insofar as "no distinction" is to be made with regard to the right to stand for elected office.<sup>34</sup> The rationale underlying this standard is not only to protect the individual's right to seek to be elected, but also the more fundamental interest to ensure the freedom of the electorate to choose their representatives and, thereby, that the will of the people shall be the basis of the authority of government in the State.<sup>35</sup>

The concern about elections foreseen by the United Nations in 1966 in adopting the precise text of Article 25 as part of the ICCPR appears today remarkably astute. In practice, States do act to prevent individuals not proficient in the official language(s) from standing for election to official posts. For example, in early 1999

<sup>32</sup> The European Language Charter in Article 9, for example, allows for an increase in the use of minority languages in criminal, civil and administrative tribunal proceedings where "the number of residents [...] justifies the measures". The same approach is embodied in Recommendations 18 and 19 of the Oslo Recommendations.

<sup>33</sup> Regarding elections, *see* Chapter I of the Copenhagen Document (more especially paras. 5.1, 5.2 and 7 with all its sub-paragraphs).

<sup>34</sup> *See* the views of the UN Human Rights Committee adopted on 25 July 2001 in the case of *Ignatane v. Latvia* (Communication No. 884/1999).

<sup>35</sup> As de Varennes observes: "The relatively simple truth is that if someone not proficient in the official or dominant language is elected, it is either because that person represents many people who are in the same situation or, in any event, because the electorate indicated that with their votes their confidence in his or her ability to represent their interests in the legislature. If anything, such election is evidence of the social reality in that constituency. It should only be set aside for the most clear and pressing reasons which would (and should) in all likelihood be extremely rare, if at all possible." (De Varennes 2001, 317).

the presidential election in Kazakhstan drew criticism from the ODIHR insofar as candidate registration required the passing of a Kazakh language test that was considered to be arbitrary and gave rise to public mistrust of the process.<sup>36</sup> Likewise, language proficiency requirements for presidential candidates of the Kyrgyz Republic, including the establishment of a special Language Commission for purposes of testing candidates, effectively resulting in elimination of representatives of certain political groups; this also drew criticism from ODIHR. In Estonia amendments in 1998 to the Laws on Parliamentary Elections, Local Elections, and the State Language, which tightened the linguistic requirement to stand for elected office to the Riigikogu (Parliament) or local government council, led both ODIHR and the HCNM to express concerns about the effective restrictions on the right of citizens to seek office, in contravention of both Estonia's international obligations and her Constitution.<sup>37</sup> In 2001, Estonia acted to abolish these requirements, satisfied with the stipulation of the Estonian language as the sole language of the Parliament.<sup>38</sup> Unfortunately, similarly legislated requirements remain in place in Latvia notwithstanding repeated appeals from the international community to abolish them.<sup>39</sup>

As regards the election process generally, the ODIHR Election Observation Handbook states that "in multilingual societies, observers should note whether the election administration has made any effort to facilitate voting of those citizens who may not speak the language of the majority."<sup>40</sup> Recently developed *Guidelines to Assist National Minority Participation in the Electoral Process* clearly state that the use of any language should not be prescribed or proscribed in the electoral process; they recommend the monitoring and assessment of language requirements concerning: design, print and dissemination of ballots; voter education/information campaigns (including access to the media in a minority language); political party registration and promotion materials; and State language laws affecting voter/candidate registration.<sup>41</sup> In 1999, for example, the ODIHR Election

<sup>36</sup> See Report of the ODIHR Election Assessment Mission, 5 February 1999.

<sup>37</sup> See OSCE HCNM letter of 19 December 1998 addressed to H.E. Lennart Meri, President of Estonia, calling upon the President not to promulgate the adopted Laws; the letter is reproduced in Rob Zaagman, *Conflict Prevention in the Baltic States: The OSCE High Commissioner on National Minorities in Estonia, Latvia and Lithuania*, ECMI Monograph #1, April 1999, at Annex 4. Notwithstanding this appeal, the Laws were promulgated and subsequently criticized by ODIHR when observing the next elections.

<sup>38</sup> See the Statement by the OSCE HCNM of 22 November 2001 welcoming the Estonian Parliament's abolition of the linguistic requirements to stand for elected office; OSCE doc. HCNM.GAL/6/01.

<sup>39</sup> With regard to Latvia, the HCNM first raised this matter in writing in a letter dated 13 April 2001 addressed to H.E. Indulis Berzins, Minister for Foreign Affairs of Latvia. In December 2001, the President of Latvia made a strong recommendation to the Latvian Parliament to remove the restrictions. In recent weeks, leading Statesmen (including US Secretary of State Colin Powell, US President George W. Bush and NATO Secretary General Lord Robertson) have called upon Latvia to remove the restrictions.

<sup>40</sup> See The ODIHR Election Observation Handbook, Fourth Edition, April 1999.

<sup>41</sup> See "Guidelines to Assist National Minority Participation in the Electoral Process", ODIHR, Warsaw, March 2001, particularly Addendum III on Integrating Minority Issues into ODIHR Election Observation. The Guidelines, elaborated jointly by experts under the auspices of ODIHR,

Observation Mission in Estonia noted that the Estonian regulations on language use interfered with the ability of some candidates to communicate with parts of the electorate by limiting the language on campaign posters and related materials only to the State language.<sup>42</sup> Regarding voter registration, the OSCE Mission in Kosovo reports that the majority of Kosovo Turks did not participate in the process for the October 2000 municipal elections because the Turkish language was not used in the registration process.<sup>43</sup> It is envisaged that provisions to accommodate the need for the use of the Turkish language will facilitate participation of this community in forthcoming Kosovo-wide elections in 2001.<sup>44</sup>

Language-related problems have also arisen with respect to political associations and parties which, while generally deemed to operate in the private sphere (and not therefore subject to language restrictions), are subject to regulation where they interact in the public sphere, for example in the broadcasting of political messages on public media or in the registration process. In 1998 in FYROM, for example, an ethnic Albanian political party was refused registration by a court of registration partly on the grounds that its seal was bilingual — which was said to be unconstitutional since the State language is Macedonian written in Cyrillic Script — causing significant political controversy (*see* Packer 2001, 268).

## 2.6 *Employment in the public and private spheres*

With regard to non-elected public positions, the High Commissioner and other relevant OSCE bodies have urged a balanced ethnic composition of personnel in various branches of the public service such as governmental departments, the military and police in various States where such an imbalance has caused tension<sup>45</sup>

Issues of State language proficiency have also arisen with regard to certain jobs in both public and private sectors. In Latvia in 1998, the HCNM was instrumental in persuading the Latvian President to reconsider an amendment to the labour code which would have empowered the State Language Inspectorate to require employers to terminate contracts of those employees who did not meet language requirements stipulated under Latvian law. In 2000, this time in connection with implementation of the State Language Law, the HCNM expressed concern over the penalisation of employers who would engage persons who should have State language proficiency, but do not have proof of this proficiency from the State

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HCNM and the International Institute for Democracy and Electoral Assistance (IDEA), expand upon Recommendations 7-10 of the "Lund Recommendations on the Effective Participation of National Minorities in Public Life" which were elaborated in September 1999 by independent experts upon request of the HCNM; for the full text of the Lund Recommendations, *see Helsinki Monitor*, Vol. 11(2000), No. 4, pp. 45-61.

<sup>42</sup> *See* Report of the ODIHR Election Observation Mission, 7 March 1999.

<sup>43</sup> Restricted report on file with the authors.

<sup>44</sup> OSCE Mission in Kosovo Proposal for an operation plan for Voter Services (Registration) and a Kosovo-wide Election in 2001, restricted OSCE Doc. SEC.GAL/61/01, 3 May 2001.

<sup>45</sup> *See*, for example, the HCNM's Statement on Inter-Ethnic Issues in FYROM, 9 November 1998; [http://www.osce.org/press\\_rel/1998/11/828-hcnm.html](http://www.osce.org/press_rel/1998/11/828-hcnm.html).

Language Centre (as opposed to other sources of proof).<sup>46</sup> In Estonia, the HCNM expressed concern regarding a Governmental decree implementing the Estonian Language Law with regard to employment in the private sector, where he felt regulations were overly intrusive. Implementation decrees pertaining to the language requirements for employment in the public and private spheres (as stipulated in the Law on Language) continued for a long time to be the subject of informal discussion between Estonian authorities and experts from the High Commissioner's office. When regulating in this area, the HCNM has stressed to States like Latvia, which adopted such an implementing decree in August 2000, that State language-proficiency requirements must be directly and convincingly connected with specific legitimate public interests.<sup>47</sup> Lists of professions requiring a high level of proficiency in the State language should therefore be kept to a minimum so as to avoid discrimination.<sup>48</sup>

## 2.7 Citizenship

The HCNM has also encountered language issues in relation to stipulations made by Citizenship Laws and naturalisation procedures. Most notably, the HCNM's engagement in the Baltic States has focused on the persistent problem of the large number of Stateless persons in these countries, constituting an unparalleled per cent of the total population.<sup>49</sup>

Specifically, in Latvia, the HCNM in cooperation with the OSCE Mission has sought to stimulate the slow naturalisation process by overcoming obstacles of language testing and procedural requirements (such as the so-called window system which restricted applicants according to date of birth) and also, through a greater pace of naturalisations, to promote social integration (*see* Packer 2001, 260). In order to promote public awareness regarding naturalisation procedures and so encourage applications, the HCNM requested FIER (the Foundation on Interethnic Relations) to prepare a pamphlet in both the Estonian and Russian languages (since non-Latvian-speakers – mainly Russian-speakers – comprise the overwhelming majority of the Stateless population). The Mission, for its part, has monitored the work of the Naturalisation Board and sought simplification and other improvements in the language tests for naturalisation. In particular, the Mission monitored and encouraged the work of the National Programme for Latvian-Language Training, including efforts to find funding for this crucial programme. Most recently, prior to its closing at the end of 2001, the OSCE Mission encouraged and secured foreign funding for free language training for 2000 persons through the Latvian Naturalisation Board in order to prepare these persons

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<sup>46</sup> OSCE HCNM letter to H.E. Ms. Ingrida Labucka, Minister of Justice of Latvia, 29 November 2000.

<sup>47</sup> OSCE HCNM letter to H.E. Ms. Ingrida Labucka, Minister of Justice of Latvia, 4 August 2000.

<sup>48</sup> OSCE HCNM Statement regarding the adoption of regulations implementing the Latvian State Language Law, 31 August 2000.

<sup>49</sup> In Estonia, Stateless persons constitute about one-seventh of the total population, while in Latvia they constitute about one-quarter of the total population.

to pass the language test forming part of the naturalisation process; it is remarkable that demand out-stripped the available places by a ratio of 10 to 1.

Similarly, in Estonia the HCNM's central recommendations have focused on the need to set reasonable linguistic standards and develop a pro-active public information campaign (in the language of the target group) aimed at clarifying requirements, in particular to dispel fears about their level of difficulty. He has also encouraged the Government to address concerns regarding, amongst others: opportunities to retake the language test; measures to reduce the risk of different interpretations and practices by the officials concerned; and the rate of examination fees.<sup>50</sup> The HCNM's recommendations have always been specific and reasoned, for example stressing the importance of an effective system of language instruction with qualified instructors, modern teaching materials and methods and expanded use of the mass media.<sup>51</sup>

## 2.8 *The Economic/Commercial sphere*

Freedom of expression extends to the right of persons belonging to minorities (as to all other persons) to use their own language in private activities, including in the private display of signs, posters etcetera, of a commercial nature.<sup>52</sup> This does not, however, exclude the possibility for the State to require some use of an official language in private commercial enterprises where a legitimate public interest may be invoked — such as the furtherance of workplace health and safety or consumer protection or in dealings with the public authorities in accounting, taxation or other processes.<sup>53</sup> However, such a requirement may only ever stipulate the additional use of an official language: it may never expressly or in effect prohibit the use of (an)other language(s). Thus requirements must be both pursuant to a legitimate public interest and be proportionate to the specific aim sought such that, for example, a requirement would be in violation of international standards should it require *all* employees (without distinction, or without specific justification) of a private enterprise to speak an official language (*see* De Varennes 2001, 16).

The extent of permissible State interference in the private sphere raises practical, administrative and other issues relating to economic efficacy. The State should take into account the practical effects of their requirements in order to ensure that they

<sup>50</sup> CSCE Communication No. 124, Prague, 23 April 1993.

<sup>51</sup> "Recommendations of 9 March 1994 on the question of the implementation of the Estonian Law on Aliens", CSCE Communication No. 20, Prague, 14 June 1994 (includes response from the Minister of Foreign Affairs).

<sup>52</sup> The UN Human Rights Committee in *Ballantyne, Davidson and McIntyre v. Canada* (Communication Nos. 359/1989 and 385/1989, 31 March 1993) clearly stated its view that the freedom of expression applies to any commercial activity and signs, rejecting the argument that commercial expression is somehow less worthy of protection under Article 19 of the ICCPR; for more on this point, *see* De Varennes 1994, 177.

<sup>53</sup> Consistent with international standards, the Oslo Recommendations, in para. 12 of the Explanatory Note, makes reference to a number of areas where a private enterprise could be required to accommodate the official language(s) of the State.

do not make unrealistic and discriminatory demands on owners of private businesses. In 1997, for example, the HCNM criticised a Latvian draft law which stipulated the use of the State language within all enterprises (companies), including meetings of directors and staff.<sup>54</sup> Similarly, in July 1999 the OSCE Mission in Moldova informed the HCNM of proposed amendments to the Moldovan Law on Commercial Advertising effectively prohibiting advertising in the Russian-language (or any other language than the State language). When the Government moved in the autumn of 1999 to adopt the amendments, the HCNM wrote to the Foreign Minister recommending withdrawal of the proposed amendment on the argument that it contradicted the freedom of expression.<sup>55</sup> While the Foreign Minister did not share the HCNM's assessment -- arguing the need to take account of the country's "specific situation, also characteristic for other states from former soviet space" -- the exchange initiated an on-going dialogue with the Government about the regulation of language in general in Moldova.<sup>56</sup>

## 2.9 Provision of public services

The extent to which the State is required to accommodate the desire of persons belonging to national minorities to use their own language in the public sphere has arisen frequently vis-à-vis the provision of key services in the fields of health, social services and education. The use of the minority mother tongue is particularly important in the areas of health and social services where individuals must be able to express themselves clearly and fully. This right might extend in certain situations (at least in regions and localities where minorities are present in significant numbers and where they have expressed a desire for it) beyond the right to address and receive a reply from the authorities in the minority language, to include the right to receive services in that language (*see* Packer & Guillaume 1999, 345). Of course, the provision of services in a national minority language may have substantial resource implications. However, as persons belonging to minorities often point out, as taxpayers their needs should be taken into account according to the principles of equality and non-discrimination. Indeed, from the perspective of need, it may well be that special measures are required exactly for smaller groups who otherwise would be disadvantaged and normally would not comprise a sufficient economic base to generate their own financially justified "demand". In fact, economic and financial considerations are arguably over-stated in these cases; careful recruitment policies (for example, engaging bilingual staff) in the relevant services can often respond satisfactorily to particular needs.

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<sup>54</sup> See OSCE HCNM letter to H.E. Guntis Ulmanis, President of Latvia, 10 November 1997.

<sup>55</sup> See OSCE HCNM letter to H.E. Mr. Nicolae Tabacuru, Foreign Minister of the Republic of Moldova, 2 November 1999  
<http://www.osce.org/hcnm/documents/recommendations/moldova/1999/2-10-1999.html>.

<sup>56</sup> For the response of the Foreign Minister, see his letter of 31 March 2000;  
<http://www.osce.org/hcnm/documents/recommendations/moldova/2000/31-3-2000.html>.

### 2.10 Education

Perhaps nowhere has the question of the State funding of services provoked more debate than in the sphere of education. Education and the extent to which an education system allows the use and development of minority languages is crucial for minorities, both in its implications for cultural continuity and for access to employment and other opportunities within the State. The UN Committee on the Rights of the Child has clearly indicated that education should aim to promote respect for each child's own cultural identity, language and values, along with the national values of the country in which the child is living; this requires a balanced approach, reconciling a wide range of values, crossing religious, ethnic and cultural boundaries.<sup>57</sup> In addition, the promotion of understanding, tolerance and friendship as a component of education is important insofar as children may play a unique role in bridging differences that have historically separated groups from one another in their wider social environment.

Issues arise in both public and private spheres as regards the teaching *of* and teaching *through* the medium of the minority language at all levels (pre-school, primary, secondary, vocational, and tertiary) as well as the content of the curriculum, the training of teachers, the monitoring of performance, and the recognition and provision of qualifications in the minority language. In particular, the question of State obligations regarding the funding of private educational institutions set up by minorities in an effort to meet their own linguistic and educational needs has been a source of contention in many States.

The principle that minorities should, where possible, be provided with adequate opportunities for instruction of or in their mother tongue (without prejudice to the learning of the official language or the teaching in this language) is established in OSCE and other international standards.<sup>58</sup> To this end, they are entitled to set up and to manage their own private educational and training establishments.<sup>59</sup> States are often resistant to the creation of such "parallel" institutions and argue that, where they do exist, they should be privately funded. While there is no formal obligation on States to provide funding to private minority language educational establishments, paragraph 32.2 of the Copenhagen Document stipulates that such institutions have the right to "seek voluntary financial and other contributions as

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<sup>57</sup> Committee on the Rights of the Child, General Comment No. 1 (17 April 2001) on Article 29(1): The Aims of Education, UN Doc. CRC/GC/2001/1.

<sup>58</sup> The Copenhagen Document, para. 34 provides that:

"The participating States will endeavor to ensure that persons belonging to national minorities notwithstanding the need to learn the official language or languages of the State concerned, have adequate opportunities for instruction in their mother tongue, as well as, wherever possible and necessary, for its use before public authorities, in conformity with applicable national legislation."

The Framework Convention contains a similar provision in Article 14 applicable under certain circumstances, i.e. in areas inhabited by persons belonging to national minorities traditionally or in substantial numbers, if there is sufficient demand.

<sup>59</sup> The Copenhagen Document, para. 32.2; the Framework Convention, Article 13.

well as public assistance ...".<sup>60</sup> In situations where the State already provides assistance to private schools, then minority educational facilities would be entitled to similar support in accordance with the principle of non-discrimination (*see* De Varennes 2001, 28).

Nowhere is the argument more heated over the funding of minority language education than at tertiary level. The situation in the fYROM shows how this issue can stir nationalist feelings. Here, the question of official State recognition and funding of the "underground" Albanian language University in Tetevo (created without prior consultation with, or the consent of, the State authorities) has constituted one of the key demands of the minority Albanian-speaking population and is inextricably linked to the very process of State-building in the former Yugoslav Republic.<sup>61</sup> Indeed, while certainly not the only issue of concern, the Albanian community has mobilised around the question of a minority university to the extent that it has strained majority-minority relations to breaking point. At various points since the HCNM's involvement in 1993, the issue has threatened to erupt into violence. In his efforts to promote dialogue and accord between the parties, the HCNM has consistently urged the Government to accommodate the legitimate Albanian aspirations for improved access to higher education in the mother tongue, while appealing to the Albanian community to pursue their aims through available legal channels. Specifically, he was instrumental in brokering the compromise that led to adoption of the Law on Higher Education on 25 July 2000 which allows for higher education in minority languages, thus making it possible to establish a new private higher educational institution, the South Eastern Europe University (SEE University) located at Tetevo, which offers a curriculum in the Albanian language with courses also in the Macedonian, English and other European languages. Under the HCNM's guidance a business plan was developed and an International Foundation established to plan and oversee the project, funding for which has been secured from several OSCE States, the EU and the Soros Foundation.<sup>62</sup>

In addressing demands for separate State funded minority-language institutions in fYROM and elsewhere the HCNM has encouraged parties to explore different options available for promoting minority language education, including the possibility of enhancing existing institutions to accommodate the linguistic needs of minority groups. Such an approach avoids the potential risk of creating separate institutions leading not to integration but to linguistic "ghettoisation". In Romania, for example, while the Hungarian minority was calling for reestablishment of the Hungarian University of Cluj, the HCNM urged parties to consider options other than the restoration of an exclusively Hungarian institution. Options proposed by

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<sup>60</sup> The parallel provision of the Framework Convention, Article 13(2), makes it clear that this right does not imply any financial obligation on the State.

<sup>61</sup> In this context it should be noted that problems of inter-ethnic character in fYROM are grounded to a large extent in the assertions of Albanians that they are not a national minority, but one of the founding "peoples" of the State. *See* Siemienski 2001, 188.

<sup>62</sup> For more on the SEE University, *see* [www.see-university.com](http://www.see-university.com).

various parties included: establishing a university with Hungarian and German lines of study, establishing separate Hungarian faculties within the existing Babes-Bolyai University (BBU) in Cluj-Napoca, or developing the concept of multiculturalism at BBU by adapting its curriculum and introducing a more appropriate ethnic mix of staff. The latter option was eventually facilitated by the adoption of a new Law on Education in 1999 — which also allowed the possibility of the development of a private Hungarian University. Similarly, in FYROM, the HCNM looked into the possibility of providing Albanian language courses at existing Pedagogical Faculties in Skopje and Bitola (*see* Kemp 2001, 187). Significantly, one of the preconditions of the current agreement on the SEE University requires a close and institutionalised cooperation with the "Saint Cyril and Methodius" University in Skopje. The HCNM has also been instrumental in encouraging access for Albanian-speaking students to Macedonian-speaking higher education through the setting up of a "Transition Year Programme" providing Albanian-speaking students with specialised training in the State language.<sup>63</sup>

Questions of State intervention and funding in education also raise issues of design and control. While the State has a right and responsibility to ensure that all educational institutions are established and maintained in accordance with the law, and may impose certain requirements (such as the learning of the official language(s) up to a certain level),<sup>64</sup> the HCNM has cautioned against the imposition of "unduly burdensome legal and administrative requirements regulating the establishment and management of educational institutions, whether private or public".<sup>65</sup>

Whether incorporating linguistic diversity into existing institutions or setting up new educational establishments, assuring minorities a degree of control over the design and implementation of decisions that directly affect them is key. In Romania, for example, particular emphasis has been placed on the need for changing decision-making structures at the BBU in order adequately to safeguard the interests of the Hungarian-speaking minority.<sup>66</sup>

Linguists recognise that along with other design and implementation issues, the content of curricula can have a profound effect on the levels of success in protecting the rights of linguistic minorities (*see* Dunbar 2001, 111). Where

<sup>63</sup> OSCE HCNM Statement on Inter-ethnic Issues in FYROM, 9 November 1998; [http://www.osce.org/press\\_rel/1998/11/828-hcnm.html](http://www.osce.org/press_rel/1998/11/828-hcnm.html).

<sup>64</sup> *See*: 1960 UNESCO Convention against Discrimination in Education, Article 2; 1966 International Covenant on Economic, Social and Cultural Rights, Article 13 (3); the Framework Convention, Article 14 (3); the Copenhagen Document, para. 34; and the European Language Charter, Article 8(1).

<sup>65</sup> "The Linguistic and Education Rights of National Minorities and their application in Moldova", Keynote speech by Max van der Stoep, Chisinau, 18 May 2000. The HCNM was referring to the teaching of Moldovan in the east of the country (also known as Transdnistria) which has a large Russian-speaking population; for the full text of his speech, see under <http://www.osce.org/hcnm/documents/speeches/2000/index.php3>.

<sup>66</sup> *See*, e.g., OSCE HCNM letter to H.E. Mr. Andrei Marga, Romanian Minister of Education and Rector of the Babes-Bolyai University, 30 March 2000.

possible, the HCNM has encouraged the development of alternative textbooks, particularly in subjects relating to language, history and culture, to develop the curriculum. ODIHR activities and projects have also touched upon language issues in this regard, with the sponsoring, publication and distribution of the first Roma-Macedonian dictionary which has been instrumental in fostering integration while contributing to the preservation of Roma identity. Such steps facilitate parental choice as foreseen in Article 5 *juxta* Articles 28 and 29 of the Convention on the Rights of the Child, Article 13 of the International Covenant on Educational, Social and Cultural Rights, and recommendation 7 of The Hague Recommendations regarding the Education Rights of National Minorities.

At the primary and secondary levels, linguistic minorities frequently raise concerns regarding the quality of minority language education and the need for more teachers, specifically the lack of State-funded facilities to train teachers who could offer instruction in minority languages. Accordingly, the HCNM has encouraged and supported teacher-training projects and programmes in a number of places, including Latvia and Moldova. In a similar vein, the HCNM has encouraged and supported the improvement of teaching of the majority language (usually the official or State language) in minority-language schools since quality language instruction as a second language is critical for the future social, economic and political mobility of the individual children and also for the future social stability of the country as a whole.

The HCNM has also assisted States in addressing logistical problems of, e.g., physical accessibility related to the provision of minority language education. In Ukraine, where the Crimean Tatar minority are geographically dispersed and children have experienced problems getting to or integrating into mainstream schools, the HCNM has encouraged the development of "home schools" whereby individuals are provided with support to enlarge their homes to accommodate classes and local teachers are contracted to provide instruction in the Tatar, Ukrainian and Russian languages (*see* Kemp 2001, 227 ). In another case, the HCNM has supported the Spillover Mission in the FYROM which has facilitated communication between donors and communities seeking funds to improve the infrastructure of their schools which is doubly strained in those schools with parallel (Albanian and Macedonian) teaching shifts.

### 2.12 *The Media*

The interventions of the OSCE Representative on Freedom of the Media, Mr. Freimut Duve, in various OSCE States since he took up office in 1998 have focused mainly on the independence of the media and constraints on journalistic freedom.<sup>67</sup> Freedom to use (minority) languages in the media is also an issue in many OSCE States, which so far has been addressed primarily by the HCNM.

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<sup>67</sup> The activities and interests of the Representative on Freedom of the Media are reported publicly on an annual basis in: *Freedom and Responsibility, Yearbook 1998/1999, 1999/2000, and 2000/2001* available through the OSCE secretariat in Vienna or the OSCE Documentation Section in Prague.

Following the OSCE's Supplementary Human Dimension Meeting on Freedom of Expression held in Vienna in March 2001, the HCNM and the Representative on Freedom of the Media are cooperating in studying issues in this field.<sup>68</sup>

There is no doubt that the freedom of expression guarantees not only the right to impart and receive information, but the right to do so in the chosen medium, including language and form.<sup>69</sup> As far as private operations are concerned, it is difficult to imagine a convincing basis which could interfere (in particular by prohibiting) with the language of the media as the vehicle of communication; there would seem to be no legitimate public interest that would justify either restricting or requiring a choice of language in this way.<sup>70</sup> However, legitimate public interests may justify restrictions on the *content* of communications.<sup>71</sup> It is also to be acknowledged that the State may regulate with regard to licensing and registration where a legitimate public interest may be invoked, in the use of radio bands for example (indeed, regulation is essentially required in this field). Furthermore, the State may act in these fields on the basis of a public interest to promote various activities or to provide various services, including government owned/run broadcasting.<sup>72</sup> In Moldova, Ukraine and elsewhere, the HCNM, while acknowledging the legitimacy of promoting the State language (through the dedication of resources, etcetera), has stressed that this should not be achieved through the proscription of alternative (private) broadcasting.<sup>73</sup>

Both the OSCE Representative on the Freedom of the Media and the HCNM have addressed the issue of the freedom of the use of (minority) languages in the predominant media, both broadcast and print, in Moldova, following the adoption of legislation prescribing a substantial amount of programming in the State language even in *privately* owned and operated media. In 2000, restrictive measures in the Moldovan Law on Audio-Visual Broadcasting were introduced stipulating that at least 65% of all broadcasts even on private stations had to be in the State language, leading to the suspension of the licenses of a number of private

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<sup>68</sup> See: Supplementary Human Dimension Meeting on Freedom of Expression: New and Existing Challenges, Final Report, 29 March 2001, OSCE Doc. PC.DEL/204/01/Corr.1; and The Representative on Freedom of the Media, Mr. Freimut Duve, Report to the Permanent Council, 5 April 2001, OSCE Doc. FOM/GAL/9/01. For supporting statements, see: US Mission to OSCE Statement on Freedom of Expression delivered to the Permanent Council, 5 April 2001, OSCE Doc. PC.DEL/243/01; and EU Statement in Response to Mr. Duve, the OSCE Representative on Freedom of the Media, Permanent Council No.331, 5 April 2001, OSCE Doc. PC.DEL/228/01.

<sup>69</sup> For a comprehensive discussion of the interrelationship between language and the freedom of expression, see De Varennes 1994, 163-186.

<sup>70</sup> On this question, see Packer 1996, 501-522, arguing that there is essentially no basis for a derogation from certain minority rights (including, by extension, language as a vehicle of communication, as distinguished from its content, under either Article 19 of the ICCPR or Article 10 of the ECHR).

<sup>71</sup> Oslo Recommendations, para. 12 Explanatory Note.

<sup>72</sup> See OSCE HCNM letter to H.E. Mr. Nicolae Tabacuru, Foreign Minister of the Republic of Moldova, 22 September 2000.

<sup>73</sup> See, e.g., OSCE HCNM letter to Mr. Taniuk Les Stepanovych, Chairman of the Ukrainian Parliamentary Committee on Culture, 28 May 2001.

radio stations. The HCNM requested that the Moldovan Parliament amend the relevant article of the law to bring it into line with international standards (specifically, freedom of expression); amendments were subsequently made, but still failed to comply with the standards.<sup>74</sup>

Neither freedom of expression in general nor more specific provisions of minority-related instruments<sup>75</sup> impose an obligation on States to provide resources for minority media — private or public. The principle of non-discrimination, however, implies that an *equitable* share of State resources should go to support such activity.<sup>76</sup> Furthermore, with regard to the provision of minority language programming in the public media, international standards imply that where there are a substantial number of persons belonging to a (linguistic) minority they should be given access to a share of broadcast time in their own language on publicly-funded media commensurate with their numerical size and concentration.<sup>77</sup> In practice, the HCNM has encountered a number of situations whereby States' legislation regulating in the field of media failed to make express provision for minority-language programming (for example, the subsequently amended 1999 Croatian Telecommunications Law). On occasion, the HCNM has raised these issues: that of adequate airtime for public radio and television in the Slovak language in the Republic of Hungary, for example.<sup>78</sup>

### 3. Conclusion

In various fields and to varying degrees, all States regulate regarding the use of language and, indeed, in Europe there is a long history of providing opportunities for the use of the mother tongue in various aspects of public life. Since States can never be completely neutral in this regard, the aim of good governance is to find a suitable balance between competing interests and desires. There are many ways to accommodate the use of various languages within the same State, even in public administration. While solutions need to be found that are suited to the specifics of each situation, guidelines on how States may achieve this can be found in OSCE commitments and other international standards (as further supplemented by the

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<sup>74</sup> See OSCE HCNM letter to H.E. Mr. Nicolae Tabacuru, Foreign Minister of the Republic of Moldova, 22 September 2000.

<sup>75</sup> I.e., the Framework Convention (Article 9) and the European Language Charter (Article 11(2)).

<sup>76</sup> See Oslo Recommendations 7 and 9.

<sup>77</sup> See Article 9(1) of the Framework Convention and Oslo Recommendation 9.

<sup>78</sup> See OSCE HCNM letter to the Minister for Foreign Affairs of the Republic of Hungary, H.E. Mr. László Kovács, 26 February 1997, OSCE Doc. REF.HC/5/97.

Oslo Recommendations and the OSCE HCNM's 1999 Report on the Linguistic Rights of Persons Belonging to National Minorities in the OSCE Area). Careful practical implementation of these standards will lead to good laws at every level of governance.

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# Language Policies in Present-Day Central Asia<sup>1</sup>

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*Current language policies in Central Asian states developed in parallel with the disintegration of the Soviet Union and were left in the hands of persons trained in Soviet-style state bureaucracy. In 1989–1990, language laws were passed in the five republics of Kazakhstan, Kirghizstan, Uzbekistan, Tajikstan and Turkmenistan laying down the rights and obligations in the use of languages. Ensuing language reform has been devoted to corpus issues - first and foremost the question of a change-over to Latin script, but also lexical revision. Even though the implementation of Central Asian language laws is slow and hesitating, the intensified preoccupation with linguistic matters in the newly-independent states of the region has made people more conscious of their own linguistic destiny and language identities. This concern among language users will add further dynamism to linguistic issues and influence both official language reform and developments for which there are not yet any definite plans.*

Within a period lasting less than a year, between July 1989 and May 1990, and as part of a political development that culminated in the final disintegration of the Soviet Union, the five Central Asian languages Tajik (Iranic), Kazakh, Kirghiz, Uzbek and Turkmen (Turkic) were proclaimed the official languages and ultimately the state languages of their respective eponymous republics and would-be sovereign states (Carlson 1994). These languages were already defined and, to varying degrees, developed as standardised, sovietised, languages.<sup>2</sup>

The proclamation as official languages was no surprise to anyone and was instead part of a general trend among the Soviet republics. Similar developments could be identified occurring in other parts of the union. Furthermore, it was a generally held belief or expectation that the conferring of official status to such languages

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<sup>1</sup> This article originates from a speech delivered on 27 June 1998 at the International Conference of Asian Scholars in Leiden, to which the author was invited in her capacity as Turkologist and Head of the Stockholm Forum for Central Asian Studies (FoCAS).

<sup>2</sup> See, for example Lewis 1972 as well as articles in Kirkwood 1985 and Kreindler 1985; for Uzbek, see especially Fierman 1991.

was but a natural course of events and the fruit of the endeavours of groups of people, possibly the majority of people, in the republics in order to gain autonomy or even independence. This expectation was reinforced – not least among linguists in the West – by the final collapse of Soviet socialism and the disintegration of the Soviet Union. The symbolic impact of language is also generally recognised; it easily becomes a feature of identity or an index of cultural belonging of some sort or other. In Western thinking, the symbolism of language has acquired a significant political dimension as a result of the inclusion of language in definitions of ethnicity and nation.

In 1991, as the Soviet Union was split up and new states involuntarily came into existence, the idea of nation-state grew strong and nation-building became an important political goal with language as one of its focal points. The Central Asians were already familiar with this mainly Western idea of nation-building; as members of the Soviet state they had, after all, experienced its impact for the past seventy years. However, they had never before experienced it as a sovereign people, left as they were with the responsibility of determining the features of nationhood for themselves.

### 1. Language policy

Another conceptual problem that the Central Asians are facing is that of language policy. Their legacy here is, quite naturally, Soviet language policy which during the Soviet era became highly centralised, being as it was designed and controlled by the central authorities in Moscow and first and foremost characterised by the dominance and influence of the Russian language. The men and women in charge of current language laws and their implementation were brought up with this kind of language policy. Consequently, present-day Central Asian language policies are centralised rather than decentralised, though this time at the local level instead of at a broad all-union level. Further, the languages to which the present-day language policies in the former Soviet Union are applied are former standardised Soviet languages and, as such, are more or less russified languages.

Definitions of language policy vary in the linguistic literature; from narrow definitions confined to state or authority intervention affecting language (cf. e.g. Coulmas 1985), to broad definitions which include not only decisions and actions but also public and official attitudes to language (cf. e.g. Schiffman 1996). For my own research on the language situation in Uzbekistan, I have chosen to adopt a rather narrow definition of this notion. In a report from this project, *Language Policy in Independent Uzbekistan*,<sup>3</sup> language policy is explained to be that which an authority, for example, the government of a country, both allows and stipulates as far as language practice is concerned. Language reform – a related notion – is

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<sup>3</sup> Schlyter 1997. An abridged and slightly altered version of the same article was published as Schlyter 1998.

promoted, on the one hand, by language policy and, on the other, by language planning and its implementation (cf. Appel & Muysken 1987).

The notions of language policy and language reform are often treated as if they are, first and foremost, concerned with language or languages. In fact, they are not. Rather, they are concerned with language practice, or more precisely, with the language users. In the figure below, language community and language reform are shown as two separate but interrelated entities. The language community is represented by the whole square and the language reform process by the spiral. These two entities, language community and language reform, are interrelated by the features of the former, that is, by the language community and most prominently the members of this community. Features to be included are socio-demographic structure, language habits, changes in language habits, language attitudes and a phenomenon called language reform awareness. In my framework of linguistic research the notion of language reform awareness refers to the fact that people must be informed and kept aware of the language reform process and must somehow be convinced of its righteousness in order for the language reform to be realised and take effect.

The aforementioned features characterising the members of a language community not only constitute the prerequisites for and the promotive force behind the processes of language reform, but they are themselves also affected and possibly altered by these processes:



At present, Uzbekistan is the only Central Asian state to have a language policy in the sense of a strategy for fundamental change of language practice in the country. For other states and nations it would perhaps be more appropriate to speak of tendencies or inclinations in linguistic matters, rather than fully-fledged language policies.

The degree of the public's language reform awareness and engagement in the process is dependent on the general sociopolitical importance of linguistic matters. In Uzbekistan today, for example, the language issue is not as politically hot as it was just a few years ago. Uzbek has been established as the state language and is safe in this respect. At the same time there is some fatigue caused by practical intricacies and the slowness of language reform, particularly among politicians who are constantly faced with more urgent problems in other areas of society (cf. Fierman 1995). It ought to be mentioned, however, that an impressive amount of language reform work has been undertaken already in Uzbekistan. The Uzbeks are admittedly embracing a fairly broad-scale language policy which includes both alphabet and vocabulary. This is, however, no indication that the Uzbeks always know what they are doing or what they want to do.<sup>4</sup>

## **2. Alphabet reform in Uzbekistan**

One intricate circumstance in the case of Uzbek language policy is the presence of the Autonomous Republic of Karakalpakistan within the state borders of Uzbekistan. Karakalpakistan is, to a certain degree, allowed its own autonomous language policy, as is stated more or less emphatically in the Uzbek state language laws. However, thus far, there have been hardly any discernible signs of any independent Karakalpak language policy. Instead, the decision makers in the Karakalpak capital Nukus seem to closely follow the decisions already taken by the central government in Tashkent. The modified Karakalpak Latin alphabet introduced in 1995, for example, showed the same changes as the revised Uzbek Latin alphabet which had been presented a few months earlier, and the same deadline of September 2005 was set down for the change-over to the new Karakalpak alphabet.

The two alphabets that have been so far proposed for Uzbek in 1993 and 1995 respectively, have been heavily criticized even by the Uzbeks themselves, including Uzbek linguists. From a linguistic point of view, the alphabets proposed can hardly be regarded as improvements on the current Cyrillic alphabet; they are more or less just schemes for Cyrillic-Latin transliteration. The preparations for the change to Latin script continue at a rather slow pace. Nevertheless, a detailed plan has been conceived for the implementation of the Latin alphabet for Uzbek, at least in Uzbek schools and higher institutes (cf. Schlyter 1997: 35f.).

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<sup>4</sup> Cf. the concluding comments in Schlyter 1997/1998.

### 3. Language reform in other Central Asian republics

In Kazakhstan in particular, but also in Kirghizistan, the proportions of Russian speakers in the overall population have been much higher than in the other three states in the former Soviet Central Asia. This situation has had an impact on language attitudes and the manner in which language issues are handled, not least the Russian language issue. In the latest version of the Kazakh constitution from 1995, Russian was elevated from its status as the language of interethnic communication to the status of official language, while Kazakh simultaneously remained the sole state language.

The requirements on proficiency in the state language were reduced considerably as a result of a new language law in July 1997 which was written in Russian, as is still the rule with Parliament laws in Kazakhstan (cf. Dave 1996a, b and Eschment 1998). In Kirghizistan, Russian was given the status of official language in certain regions of the country through a presidential decree in 1994, and in 1996, through an amendment to the constitution (Pannier 1996), Russian was *de facto* made into the second official language of the republic. This was in direct contrast to statements in the Kirghiz 1989 state language law, which stated that Russian should be phased out as a language of official government work by 1999.

To date, no recent Parliament law concerning the alphabets of the respective state languages exists in either of the two republics, even though the change-over to Latin script is subject to commissioned discussions and work.

The first Central Asian republic to make its national language the state language of the republic was Tajikistan. Tajikistan has a large Uzbek population, and concessions were made in the Tajik language law of 1989 for the practice and teaching of Uzbek, in the same manner as concessions were made for the usage of the international Russian language and Russian-Tajik bilingualism in the republic. Provision was also to be made for the preservation and use of minority languages in Gorno Badakhshan. With little or no further alteration, the entire Tajik language law came into effect on 1 January 1990 and was met with demands for a gradual implementation of the law.

Subsequent language laws in the other Central Asian republics were provided with timetables giving different deadlines for different articles or sets of articles. Generally speaking, transition periods of around 10 years duration for the complete implementation of all articles of the language laws were envisaged. However, long before the 10 year period had come to an end, it became obvious to those in charge that this was an unrealistic deadline. In Uzbekistan, the transition period has been prolonged through statements in new revised language laws.

As for Tajik alphabet revisions, there have appeared no official decisions or concrete proposals so far. On the other hand, the Arabic script has made its way back more strongly in this republic than in the others. However, the Latin script has its proponents even among the Tajiks. As regards Tajik in Uzbekistan, this is a

sensitive question and one which should be politely avoided, at least during interviews at the Ministry of Education in Tashkent. During the author's visits in Samarkand and Bukhara in May 1996, some of her interlocuters at the universities there were of the opinion that there should be cooperation and coordination between Uzbekistan and Tajikistan on the alphabet issue, since the Uzbek and Tajik languages and literature are so closely intertwined and ought, therefore, to employ the same type of script. This would not, however, be an easy task.

The last republic to proclaim its state language was Turkmenistan. A Turkmen Latin alphabet was adopted in 1993 which included some inconvenient special letters not found in any other Turkic Latin alphabet (Simsir 1995; Schlyter 2001). According to Charles F. Carlson (1994), Turkmenistan was the only Central Asian republic to put its national language on a par with Russian as an international language. Less reliable sources suggest that an attempt was made in 1993 to put English ahead of Russian as the second official language of the Turkmen state. Similar rumours have circulated concerning English in Kirghizstan. Such measures, whether true or not, would be of no great significance for a rather long time to come, since, after all, language practice presupposes language knowledge.

#### **4. A Turkic Common Alphabet**

With these developments of new Central Asian Turkic alphabets, the attempts at creating a basic, or general, Turkic Latin alphabet seem to have been seriously hampered. At the beginning of the 1990s, Turkey was active on this issue. The first in a series of alphabet conferences in Turkey was held in November 1991 at the Marmara University in Istanbul (Devlet 1992). The basic Turkic alphabet adopted there has appeared from time to time in publications where it is presented as the valid new Turkic Latin alphabet. However, as things now stand, not only Uzbekistan, Karakalpakistan included, but also Turkmenistan and possibly also Kazakstan have introduced alternative alphabets that are not just modifications of the basic Turkic alphabet but alphabets which differ on certain fundamental points from the Turkic one.

Turkey seems to have become quite disenchanted by the recent development, but this country maintains its interest in its Central Asian brethren and is now approaching them in other ways: for example, through small business and not least education where not only a Turkic-Turkish alphabet but the Turkish language itself is being launched.

#### **5. Language and identity**

With new socio-political contexts emerging in present-day Central Asia, most identities in this region are in a sensitive state of readjustment and redefinition, be they ethnic, cultural, national or any combination of these. The new conditions may

have effects on every single individual, no matter if he identifies himself in the first place with a majority group or a minority group.

The designations of titular populations, such as Uzbeks and Kazakhs, are slowly and to varying degrees changing from ethnic terms to names of citizenship with particular implications as regards at least statehood but most probably also nationhood. The proclamation and promotion of state languages is a measure to the same effect. What impact this order might have on other ethnicities in the respective republics seems to have been a much eschewed issue so far, which could be interpreted as either avoidance of a very intricate problem or deliberate quiescence of a uniformation policy that could stir up people's feelings to dangerous confrontations. In my own research on current language policy in Uzbekistan I have been met with confusion combined with some irritation when asking responsible officials about the effects of new state language laws on minority languages in the country:

Surprisingly little attention has so far been paid to the fact that the adoption of Uzbek as a state language is a measure of national re-identification that affects non-Uzbek nationals as much as, and in one important sense, even more than it does ethnic Uzbeks. These other nationals, who are now expected to become Uzbeks both where state loyalty and national (= "nation-state") identity are concerned, may have found Russian a more neutral interethnic and official language, insofar as this language was equally foreign to all indigenous groups, ethnic Uzbeks included, and did not interfere with group identities at a lower level. ... .. The uncertainty among officials as to the fate of Tadjik script in Uzbekistan in the event of a change of Uzbek alphabets and possibly a simultaneous change of Tadjik alphabets in Tadjikistan indicates that not all aspects of the effects of the Uzbek language reform on the statuses and corpora of minority languages in the country have been fully considered. [Schlyter 1997, pp. 40f.]<sup>5</sup>

## **6. Concluding Remarks**

The five state language laws passed by the Central Asian Supreme Soviets in 1989 and 1990 were first and foremost language status laws which laid down the rights and obligations in the use of languages and the choice of language in specific public settings and official functions. To a much lesser extent, and merely in the form of general comments or recommendations, the laws referred to language corpus issues such as alphabet, vocabulary and grammar. These matters were to be later regulated by additional laws and proposals within the few years following the first round of enactments of state language laws and while they were simultaneously the focus of attention in public debates incited by the work performed on establishing state languages.

Much of the follow-up work of language law implementation in Central Asia at the present moment is concerned with not the status but the state of languages. In this

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<sup>5</sup> For comments on other minorities, such as Qaraqalpaqs, Koreans and Arabs, see Schlyter 2001 and Schlyter, in print.

regard, arguments are often put forward concerning the necessity to improve not only people's proficiency in the state language of their republic, but also the very corpus of this language. In the lexical field, responsible linguists call for moderation and caution against the threat of anarchy through the allowance of too much spontaneity. At the same time there is greater eagerness among language users in general to resuscitate older vocabulary or to create words from indigenous language material in order to counterbalance the Russian influence on Central Asian lexical stock. Evidence of this is, for example, the use in Kazakstan of *egemendik* (Turkic) instead of *suverenitet* (Russian) meaning 'sovereignty', in Turkmenistan, the use of *otly* (Turkic) instead of *poezd* (Russian) meaning train, and in Uzbekistan, the use of *tajjoragoh* (Arabic and Persian) instead of the Russian *aeroport* for 'airport'. In the fields of new technology and new socio-political and economic paradigms, the principle of internationalism seems to be favoured and there is no bias against Western terminology, including Russian: for example, in Uzbekistan Russian *komp'juter* is used together with *biznes*, *menezher* (English).

When a nation becomes a state, bureaucracy generally makes its entrance into the organisation of that state. The Central Asian language policies, or attempts at language policies, are good examples of this. They are bureaucratic state language policies. With the inclusion of bureaucracy, dynamism and flexibility are easily lost. On the other hand, the republics being considered in this article belong to a still larger Central Asia which is today, in most of its composite parts, in a process of cultural metamorphosis or transformation. In the vicinity of these republics there are language movements which are not necessarily supported by any state bureaucracy and which may, therefore, have stronger features of spontaneity. Mongolian attempts at reintroducing the Uighur-Mongolian script might be an example of something in between state policy and non-official trends (Campi 1991).

The fate of Central Asian minority languages, which are now under the regiment of new official language policies and linked to quite different conditions than they were just a decade ago, offers another challenging field for future linguistic research (Schlyter 2001). In a recently established research project, "Modernity in the Eastern Islamic World" at the Stockholm Forum for Central Asian Studies, the effects of present-day state language policies in Central Asia on language minorities in this region will be one of the topics to be studied.<sup>6</sup>

This paper has focused on official language policies or strategies in the newly-independent Central Asian states. As is the case for any political activity, there is also a non-official aspect. Language debate and enforced changes of linguistic behaviour, of which one impact is the abovementioned 'language reform awareness', may also cause reactions and linguistic changes that are in opposition to the

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<sup>6</sup> For further information about this project, see the Stockholm Forum for Central Asian Studies website at <http://www.orient.su.se/focas.html>.

official language reform work or some development for which there is not yet any definite plan.

The current linguistic awareness and cultural transformation in large parts of the Central Asian region will be of immediate interest to researchers. Furthermore, this transformation might well add dynamism to linguistic issues and have influence on attitudes towards language and culture even in state bureaucracies.

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# Development of the Language Legislation in the Baltic States

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*MINELRES (Minority Electronic Resources), Latvia*

*The paper examines development of the language legislation in three Baltic states - Estonia, Latvia and Lithuania - after the restoration of their independence. The author describes the regulations determining the status of the state language and the languages of national minorities, as well as governing the use of languages in elected bodies, before public authorities, in media, in education, and in employment. Possible inconsistencies with the provisions of the international instruments on minority rights are identified. The author analyses the main features of the language policies in the Baltic states, and proposes his own theory concerning the main factors affecting the formation of these policies.*

All three Baltic states regained their independence after the collapse of the USSR in 1991 what put an end to a half-century long Soviet annexation. For Estonia and Latvia, the period of pre-war independence was rather short, and the processes of state- and nation-building had been far from completed. After the Second World War, Estonia and Latvia experienced large-scale immigration of a predominantly Slavic population: in the late 1980s, the proportion of ethnic Estonians in the total population of Estonia dropped to 62 per cent, and of ethnic Latvians in Latvia to 52 per cent. In Lithuania, the proportion of ethnic Lithuanians remained at approximately 80 per cent.

These demographic changes brought about a substantial alteration of the linguistic situation. Although the use of the Baltic languages was formally permitted in different areas, as is evident in the parallel system of public education in Russian and in the Baltic languages from kindergarten to university level, and the relatively generous financing for the publication of Baltic literature and the development of arts, the overall sphere in which they functioned was severely curtailed. In the areas of state government, transport, industry, military, public safety and security only the "imperial" language, Russian, was allowed for official use. This situation could be described as "diglossia", or asymmetrical bilingualism with clear domination of one language, and gradual suppression of another.

This asymmetry was also manifested in the language proficiency of the Baltic residents in the Soviet period. In 1989, only 22.3 per cent of ethnic Russians in Latvia had proficiency in the Latvian language (Kamenska 1995). In Estonia and Lithuania, the corresponding figures were 13.7 per cent and 33.5 per cent.<sup>1</sup> By the 1990s, this situation had changed considerably: in 1995, already 55.8 per cent of ethnic Russians claimed fluency in the Latvian language (Druviete. 1998).

However, as the years passed, the progress in this field slowed substantially: for the population census conducted in Latvia in 2000, 58.5 per cent of ethnic Russians said they were proficient in Latvian.<sup>2</sup> Overall, the proportion of people in Latvia able to speak Latvian (81.7 per cent) was less than those able to speak Russian (84.4 per cent).<sup>3</sup>

After the restoration of independence, development of the new linguistic legislation became one of the major challenges for the restored states. It is important to note that the states themselves were not acting alone in this field. Although Russian-speaking minorities, poorly mobilised and largely disenfranchised due to restrictive citizenship legislation (the so-called "legal continuity" concept)<sup>4</sup> could hardly have a serious impact on shaping of the new language legislation, external actors were much more actively involved. International organisations, the OSCE, the Council of Europe, and later the European Union played an important role in the shaping of the new language legislation. Russia also played a role in the development of such legislation.

This paper will briefly describe the main features of the linguistic legislation developed in the Baltic states since late 1980s, and will analyse the main factors, trends and controversies in this field.

## **1. Development of linguistic legislation after the restoration of independence**

The language issue was a central factor behind the mass mobilisation for the drive for independence of the Baltic states in late 1980s. Domination by the Russian language gave rise to widespread concerns about the "imminent extinction" of

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<sup>1</sup> Jamestown Foundation, [http://www.amber.ucsf.edu/homes/ross/public\\_html/russia\\_/ruslang.txt](http://www.amber.ucsf.edu/homes/ross/public_html/russia_/ruslang.txt).

<sup>2</sup> RFE/RL Newslines, 10 April 2001.

<sup>3</sup> RFE/RL, *ibid*.

<sup>4</sup> Latvia and Estonia were the only two post-Soviet states who rejected the so called "zero option" of citizenship. Not all persons who lawfully resided within their territories at the moment of the restoration of independence were recognized as citizens. Only those who had possessed the citizenship of pre-war Latvia and Estonia before annexation, and their direct descendants were recognised as such. Those who entered after the Second World War were defined as foreigners who had to apply for residence permits (in Estonia), or as "non-citizens", an entirely new legal status introduced by a special law (in Latvia). This "restorationist" concept resulted in factual deprivation of the political rights of approximately one-third of the population of Latvia, and secured the political domination by the ethnic Latvians: their share in the citizenry appeared to be approximately 80% although they only comprised a little over 50% of the total population).

Latvian, and slogans aimed at the protection of language were actively supported by a great majority of ethnic Latvians.

Even before the very idea of independence appeared explicitly on the public agenda, the Supreme Soviets (Soviet-time parliaments) of three Baltic states had adopted special declarations assigning Estonian, Lithuanian and Latvian languages the status of "state language" for the corresponding republics. Furthermore, special language laws were adopted in all three Baltic countries in 1989: the Language Law of the Estonian SSR adopted 18 January 1989, the Decree on the Lithuania SSR Official Language Usage adopted 25 January 1989 and the Republic of Latvia Language Law adopted 5 May 1989. These laws essentially had a dual nature: while the aim of asserting the position of the newly re-established state languages was more than apparent, the role of Russian, the official language of the then superior state structure, had to be secured in order to avoid an overly hostile reaction from the Moscow authorities, who still maintained at that moment control over the situation in the Baltics.

However, soon after the restoration of independence, the language legislation in all three Baltic states underwent substantial changes resulting in the adoption of completely new language laws: the Estonian Language Act of 21 February 1995, the Lithuanian Law on the State Language of 31 January 1995, and the Latvian State Language Law of 21 December 1999.

In the case of Latvia, substantial amendments to the 1989 Language law which tightened its regulations considerably had already been adopted by 1992, two months before its scheduled entry into force. Many provisions of the law were made more restrictive than its former incarnation and increasingly excluded the use of other languages in public administration and, in many cases, even in the private domains as was the case for public information of a private nature.

In Latvia, the new State Language draft law also appeared in 1995, but its adoption had to be delayed considerably because of harsh criticism directed at it by the OSCE High Commissioner on National Minorities and other international organisations. As a result of protracted debate, conducted both in public and behind-the-scenes, some provisions of the new State Language Law appeared to be even more liberal than those in force before its adoption. In particular, the new law allowed, under certain conditions, the use of other languages in public information of a private nature and at public gatherings. Simultaneously, however, the possibility to submit individual applications or complaints to state or municipal institutions in English, German and Russian envisaged by the Law of 1992, had been eliminated.

Meanwhile, numerous other acts adopted since 1990 incorporated several essential provisions relevant to language use. In the next chapters, the principal rules for the use of languages in different areas in the Baltic countries will be outlined.

## 2. Status of languages and recognition of minority languages

The status of the state languages has been enshrined in the Constitutions<sup>5</sup> of all three Baltic states: in Article 14 of the Constitution of the Republic of Lithuania, Article 6 of the Constitution of Estonia and Article 4 of the *Satversme* - Constitution of Latvia.

The Constitutions of all three Baltic states refer to the minority language in the following, very general way:

"Persons belonging to ethnic minorities have the right to preserve and develop their language and their ethnic and cultural identity".  
(Article 114 of the Latvian Constitution)

"Citizens who belong to ethnic communities shall have the right to foster their language, culture, and customs". (Article 37 of the Lithuanian Constitution).

The Constitutions do not spell out any specific rights beyond the broad statements cited above. There are, however, a few exceptions: the Estonian Constitution, for example, guarantees the right to use minority languages in education (Article 37 paragraph 4) and before public authorities in localities where at least half of the permanent residents belong to an ethnic minority (Article 51 paragraph 2).

The Language Act of Estonia explicitly mentions the notion of minority language in the following terms:

"§ 2. Foreign language.

For the purposes of this Act, any language other than Estonian is a foreign language.

A language of a national minority is a foreign language which Estonian citizens who belong to a national minority have historically used as their mother tongue in Estonia".

In contrast, the State Language Law of Latvia does not mention minority languages, except for the "Liv" language,<sup>6</sup> which is not, however, defined as a minority language:

"Article 5. For the purpose of this Law, any other language used in the Republic of Latvia, except the Liv language, shall be regarded as a foreign language."

In other pieces of Latvian legislation, minority languages are explicitly referred to. The Law on the State Language of Lithuania does not mention minority languages

<sup>5</sup> All legal texts are quoted after the collection of minority related national legislation at the MINELRES web site: <http://www.riga.lv/minelres/NationalLegislation/Estonia/estonia.htm>, <http://www.riga.lv/minelres/NationalLegislation/Latvia/latvia.htm>, <http://www.riga.lv/minelres/NationalLegislation/Lithuania/lithuania.htm>.

<sup>6</sup> The Livs are small indigenous Finno-Ugric group numbering approximately 200 members in 2000.

at all. Thus, one can say that minority languages are generally not recognised in the legislation governing the Baltic States.

Some clauses relevant to the use of minority languages have been incorporated into special laws regarding national minorities. For example, Article 1 of the Law on Ethnic Minorities of Lithuania adopted 23 November 1989, stipulates:

"The Lithuanian SSR... shall guarantee to all ethnic minorities residing in Lithuania the right to freely develop, and shall respect every ethnic minority and language".

The Estonian Law on Cultural Autonomy, adopted 26 October 1993, provides:

"Members of a national minority have the right: ... to use their mother tongue in dealings within the limits established by the Language Law" (Article 4).

The Law about the Unrestricted Development and Right to Cultural Autonomy of Latvia's Nationalities and Ethnic Groups (adopted 19 March 1991) envisages that:

"The Republic of Latvia government institutions should promote the creation of material conditions for the development of the education, language and culture of the nationalities and ethnic groups residing within Latvia's territory" (Article 10).

Thus, at the level of declarations, the presence of minority languages is recognised and some formal safeguards enshrined in the national legislation. However, more detailed regulations and concrete mechanisms for the implementation of these declared rights are either ineffective or non-existent. Thus, the declarative constitutional provisions are not legally enforceable. However, the amendments to the Latvian Law on the Constitutional Court which took effect on 1 July 2001 permit an individual to bring a case before the Constitutional Court, and several actions questioning the compatibility of some legal provisions with those contained in the Constitution have been initiated in July and August 2001. These actions concern, for example, the rules pertaining to the spelling of people's names and the "language quotas" on private radio and TV stations. As of September 2001, the courts are yet to consider such actions on their merits.

### **3. Use of languages in legislatures and elected municipal bodies**

Legislatures in all three Baltic states must perform their functions using only the state language. As for municipal bodies, Article 52(2) of the Estonian Constitution permits the use of the language of the majority of the permanent residents:

"in localities where the language of the majority of the population is other than Estonian... for internal communication to the extent and in accordance with procedures determined by law".

Article 11 of the 1995 Language Act stipulates:

"in local governments where the majority of permanent residents are non-Estonian speakers, the language of the national minority constituting the majority of the permanent residents of the local government may be used alongside Estonian as the internal working language of the local government on the proposal of the corresponding local government council and by a decision of the Government of the Republic".

However, in practice, this provision has never been implemented, as the national Government has rejected all proposals of the kind received thus far (Jarve 2000).

The Lithuanian Law on Ethnic Minorities of 1989 stipulates in Article 4:

"In offices and organisations located in areas serving substantial numbers of a minority with a different language, the language spoken by that minority shall be used in addition to the Lithuanian language".

In Latvia, all municipalities must work in the state language only, regardless of how many persons belonging to minorities reside in a given locality.

Although no language requirements exist in Lithuania for candidates running in parliamentary and municipal elections, in Estonia and Latvia these requirements are established by law. In Estonia, the regulations determine language requirements for all candidates elected to the national or local legislature. However, the regulations are silent with regard to procedures designed to ensure such requirements.

In contrast, corresponding laws in Latvia stipulate exigent requirements which candidates must meet: persons who cannot demonstrate the highest level of proficiency in the state language cannot stand for elections.

Of more substance, the amendments to the *Riigikogu* (Estonian Parliament) Election Act adopted in December 1998 explicitly required that all elected members of Parliament are proficient in the Estonian language.<sup>7</sup>

Identical amendments were simultaneously made to the Local Government Council Election Act. As mentioned above, the legislation does not include a framework of formal procedures by which the language requirements can be implemented. Nevertheless, in at least two cases, governmental bodies responsible for the implementation of the language legislation have initiated court proceedings aimed at preventing the individuals elected at the municipal level from sitting due to an alleged failure to comply with the language requirements. The court proceedings,

<sup>7</sup> "2-1.Language requirements.

The oral and written knowledge of Estonian of a member of the Riigikogu shall enable him or her to participate in the work of the Riigikogu, which means:  
to understand the content of legislation and other texts;  
to present reports on agenda items and express his or her opinion in the form of a speech and a comment;  
to make inquiries, pose questions and make proposals;  
to communicate with electors, respond to appeals and petitions, and answer inquiries".

however, were not completed before the following elections or, consequently, the expiration of the mandates of the individuals involved.

In Latvia, the language requirements for the candidates running for office in both Parliament and municipal councils are more detailed. Persons are not eligible to run in elections and should not be included in the list of candidates if they "have not mastered the national language to the highest (third) level of competence" (Article 5 paragraph 7 of the *Saeima* (Latvian Parliament) Election Law of 25 May 1995; Article 9 paragraph 7 of the Election Law on City and Town Councils, District Councils and Pagasts Councils of 13 January 1994).

When registering as candidates, persons who have graduated from a school that provides instruction in a language other than Latvian must attach to the list of candidates a copy of the certificate of the highest (third) knowledge level of the State language (Article 11 paragraph 5 and Article 17 paragraph 4, respectively). Moreover, even where a person possesses the required certificate, the State Language Inspectorate can assess the person, and if the language inspector concludes that the candidate's language proficiency does not correspond to the highest knowledge level, the candidate will be removed from the list of candidates.

This occurred during the municipal elections held in 1997 and 2001, and during the parliamentary elections held in 1998. In some cases, the removal of the candidate from the list resulted in the lodgement of individual complaints to the UN Human Rights Committee and the European Court of Human Rights. The plaintiffs claimed that the universal right to be elected, which cannot be restricted on the basis of language, had been violated. For one of the complaints lodged, the UN Human Rights Committee found that Articles 2 and 25 of the International Covenant on Civil and Political Rights<sup>8</sup> had been contravened. Another case based on similar facts has been declared admissible by the European Court of Human Rights in late 2000 but has not yet been considered on its merits.

#### **4. The right to use minority language(s) before public authorities**

The Language Act of Estonia stipulates:

"In oral communication with public servants and employees of state agencies and local governments, persons who are not proficient in Estonian may, by agreement of the parties, use a foreign language which the public servants and employees understand. If no agreement is reached, communication shall take place through an interpreter and the costs shall be borne by the person who is not proficient in Estonian" (Article 8).

Further, under certain circumstances, the limited right to use a minority language before public authorities is guaranteed by law:

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<sup>8</sup> Views of the Human Rights Committee under article 5, paragraph 4 of the Optional Protocol to the ICCPR, Seventy-second session, 25 July 2001, Communication No.884/1999, Ignatane v Latvia.

"In local governments where at least half of the permanent residents belong to a national minority, everyone has the right to receive answers from state agencies operating in the territory of the corresponding local government and from the corresponding local government and officials thereof in the language of the national minority as well as in Estonian" (Article 10 paragraph 1 of the same law)."

However, in practice, implementation and invocation of this provision are not common.

According to Article 9 of the Lithuanian Law on the State Language:

"All the transactions of legal and natural persons of the Republic of Lithuania shall be conducted in the state language. Translations into one or more languages may be attached to them".

Only foreign individuals and organisations are permitted to transact in other languages. However, this provision exists alongside Article 4 of the 1989 Law on Ethnic Minorities mentioned above. Thus, a discretionary margin for interpretation is left open to officials.

In Latvia, in addition to Latvian, the Language Law of 1989/1992 allowed applications to public officials to be made in English, German, and Russian. Civil servants were given the choice of answering in either Latvian or the language used in the application. However, the 1999 State Language Law abandoned such a liberal approach. According to Article 10 of this law:

"State and municipal institutions, courts and agencies belonging to the judicial system, as well as state and municipal enterprises (or companies) shall accept and examine documents from persons only in the state language".

Documents in other languages should be accepted only "if they are accompanied by a translation verified according to the procedure prescribed by the Cabinet of Ministers or by a notarised translation". However, several instances of exception to this rule arise: documents issued in the territory of Latvia before the date on which this law comes into force, as well as documents received from abroad, need no translation; nor do statements submitted to the police, medical institutions, or rescue services or the like in emergency situations.

Thus, the right to use minority language when dealing with public authorities is severely restricted, particularly in Latvia. After the new State Language Law took effect on 1 September 2000, several cases were reported where individuals had made complaints regarding the effective denial of the basic rights guaranteed by Latvian law as a result of the provisions of Article 10.<sup>9</sup> The individuals involved were not sufficiently fluent in Latvian to prepare a complaint concerning abuse by the police or local authorities, to complete applications to social security office, or to make submissions of similar importance. Nor did they have adequate funds to

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<sup>9</sup> See, for example, Annual Report of the National Human Rights Office. 2000. Riga, 2001.

pay for the required translation and/or certification which meant that their applications were not accepted by public institutions. It should be mentioned that the Latvian Constitution stipulates that:

"Everyone has the right to address submissions to State or local government institutions and to receive a materially responsive reply." (Article 104).

One has good reasons to question the compatibility of this provision with Article 10 of the State Language Law referred to above.

## **5. Professional and occupational language requirements**

The language laws of all three Baltic states prescribe obligatory proficiency in the state language for employees in certain fields. Provisions enshrined in the earlier versions of Latvian and Estonian language laws caused protracted controversy in that the new laws extended the application of the language requirements to include employees working in the private sector. Only after the OSCE High Commissioner on National Minorities and the European Commission became actively involved, was a compromise achieved.

Thus, Latvian State Language law requires that all employees of state and municipal institutions, courts and judicial agencies, state and municipal enterprises and companies in which the state or a municipality holds the largest share of the capital have knowledge of the state language. Employees of private institutions, organisations and enterprises, as well as people who are self-employed, must use the state language if their activities relate to legitimate public interests such as public safety, health, morals, health care, protection of consumer rights and labour rights, workplace safety and public administrative supervision or if they "perform certain public functions" envisaged by law or other normative acts (Article 6).

The Estonian Language Act contains very similar provisions (Article 5). However, the Lithuanian Law on the State Language mentions private institutions only implicitly in the following terms:

"Heads, employees and officers of state and local government institutions, offices, services, as well as heads, employees and officers of the police, law-enforcement services, institutions of communications, transportation, health and social security and other institutions providing services to the population..." (Article 6).

Legislators in all Baltic states, influenced by the international organisations, also incorporated the principle of proportionality into clauses contained in their respective laws. That is, the language restrictions established by law had to be supported by a legitimate public interest and had to be proportionate to the stated objectives. The Latvian State Language Law, for example, contains the following clause:

"[government employees] must know and use the state language to the extent necessary for the performance of their professional and employment duties".

In practice, attempts to reconcile the principle of proportionality with the push to broaden as much as possible the scope of professions subject to language requirements has resulted in the adoption of detailed governmental regulations. These regulations stipulate the degree of proficiency in the state language required, testing procedures and the lists of the professions and occupations in which the specified level of language proficiency is required. Concerns have been expressed regarding the risk that the principle of proportionality has been interpreted too broadly and has resulted in the imposition of excessive language requirements, particularly in the private sphere.

Initially, three levels of language proficiency were introduced in Latvia – basic, intermediate and advanced. However, regulations adopted in August 2000 by the government of Latvia replaced this system with 6 levels.

The complex and voluminous content of these regulations and the adoption of numerous amendments and interpretative documents make a more comprehensive analysis of the regulations in this paper impossible. However, a brief analysis reveals that almost all medium-ranking and high-ranking officials and state servants are required to have the highest level of language proficiency. That is, a successful career in any area of public service or state sector or in the legal professions presupposes perfect knowledge of the state language. It should be noted that, in addition to these regulations, other pieces of legislation also include language requirements for particular professions. For example, the Latvian Law on Education stipulates that all teachers employed in state or municipal educational institutions must have the highest level of command of the Latvian language (Article 50 of the Education Law of 1998).

As a consequence of the introduction of these language requirements many hundreds of thousands of people have had to take exams to prove their command of the state languages. Moreover, these requirements have impacted heavily on reshaping the representation of native speakers of titular languages and Russian-speakers in the state and municipal sector: today Russian-speakers are vastly under-represented in the state sector and are employed mostly in the private sphere.

## **6. Languages in media**

No language restrictions exist in any of the Baltic states in the field of printed media. However, the situation regarding the electronic media in Estonia and Latvia is markedly different.

Article 25 of the Estonian Language Act requires that, during broadcasts, "foreign language text shall be accompanied by an adequate translation into Estonian".

However, radio broadcasts "which are aimed at a foreign language audience" are explicitly exempted from this requirement (paragraph 3). Moreover, paragraph 2 of Article 35 of the 1994 Broadcasting Act requires that at least one of the two Eesti Raadio (public radio) channels air "in a foreign language". This clause used to be interpreted as implying broadcasts in the language of the largest Russian minority. However, paragraph 4 Article 25 of the Estonian Language Act, introduced as an amendment in 1997, limits the volume of foreign language news programmes and live foreign language programmes on both public and private television which can be broadcast without translation into Estonian under paragraph 2, to no more than 10 per cent "of the volume of weekly original production".

In Latvia, the share of broadcasts on private radio and television channels in languages other than Latvian must not exceed 25 per cent of the total amount of daily broadcasting (Article 19 of the Radio and Television Law of 1995). As for public television and radio, the first channel must broadcast exclusively in the state language, whereas the same law allows for up to 20 per cent of broadcasting in minority languages on the second channel (Article 62 of the same law). However, these language limitations are not extended to cable and satellite TV.

In practice, these legal constraints, which are dubious to say the least in the limits that they place on freedom of expression, effectively prevent minorities from establishing their own electronic media. The restrictions placed on radio broadcasting are particularly detrimental as, in contrast to television broadcasting where a compromised solution can be achieved through dubbing or subtitling (although this obviously places broadcasters under additional financial burden), no technical means of translation are available for radio broadcasts.

Although there were no administrative proceedings reported in Estonia in respect to the above-outlined limitations, in Latvia several cases are known where private broadcasters were punished through fines or temporary suspension of their broadcasting licences for violation of the language quotas. Moreover, in at least one case where a violation was established, the corresponding supervisory body, National Radio and TV Council, demanded the outright cancellation of the broadcasting licence. A final decision in this case is still pending as at May 2001. In August 2001, the president of the media holding "Business & Baltija" brought a case before the Latvian Constitutional Court which questioned the language restrictions placed on private audiovisual media.<sup>10</sup> The Constitutional Court's judgement in this case is certain to create an important precedent and will, to a considerable extent, shape the future of minority media in Latvia and Estonia.

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<sup>10</sup> See *Minority issues in Latvia*, No. 34, August 12, 2001, <http://raccoon.riga.lv/minelres/archive//08132001-10:18:44-14805.html>.

## **7. Use of languages in education**

Access to education in minority languages remains the most controversial language issue in the Baltic states. The Lithuanian legislation is the most liberal in this regard. Article 10 of the Law on Education of 1991 declares that:

"The language of instruction at Lithuanian schools of the Republic of Lithuania shall be Lithuanian".

However, it continues:

"Populous and compact communities of ethnic minorities in the Republic of Lithuania shall be provided facilities for having public or maintained pre-school institutions, schools of general education and lessons in the mother tongue".

Classes, optional courses and Sunday schools are envisaged by law for small and non-compact minorities. In Estonia, the use of languages in general schools is determined in the main by Article 9 of the Basic Schools and Upper Secondary Schools Act of 1993. In basic schools, that is grades 1 to 9, "any language may be the language of instruction", such language of instruction ultimately determined by the corresponding municipality. However, in the upper secondary schools, grades 10-12, the legislation stipulates that the language of instruction be Estonian. The transition to secondary education in which instruction is to be provided exclusively in Estonian was initially scheduled for introduction in the year 2003, but was later postponed until 2007. An important amendment to this law was adopted in 2000 in that a clause was introduced defining the notion of "language of instruction" as follows:

"The language of instruction is the language in which at least 60 per cent of the teaching on the curriculum is given".

Thus, even in secondary schools, up to 40 per cent of all curricula can be taught, in principle, in a minority language. However, it is still unclear how this approach will be implemented in practice.

In vocational schools in Estonia, the language of instruction is Estonian. However, the Minister of Education can decide on the use of other languages as languages of instruction under Article 18 of the Vocational Educational Institutions Act of 1998.

In Latvia, the provisions for acquiring education in minority languages are the most stringent. Article 9 of the Law on Education of 1998 permits education in languages other than Latvian only in the following cases:

- (1) at private education institutions;
- (2) at state or municipal education institutions which implement education programs of national minorities. The Ministry of Education and Science

shall determine the subjects of these programs which have to be taught in the state language;

(3) at education institutions prescribed by special laws.

Thus, the law establishes mandatory bilingual education in primary schools (grades 1-9), and the share of curricula offered in the minority language may vary significantly, depending on the decisions of the Ministry of Education.

Transitional provisions of this law stipulate that, beginning in the year 2004, secondary schools as well as all vocational schools must change to teaching exclusively in Latvian. In other words, the complete elimination of state and municipally financed minority language secondary education is scheduled for 2004. This provision has attracted considerable protest from a number of minority NGO and minority-based political parties, and can be expected to create significant tensions in the future if the authorities refuse to re-consider this provision before the proposed deadline.

Paragraph 2 of Article 59 of the Latvian Law on Education has also been controversial. This provision envisages possible subsidies from the state budget for private schools, however only those private educational institutions which "implement state accredited education programs in the state language" are eligible for these subsidies. Thus, minority private schools cannot claim subsidies unless they change to providing instruction in the Latvian language.

According to Article 56, a child-orphan and a child left without parental care shall receive education in the state language, regardless of whether they had already begun their education in a minority language, or the level of schooling that they had achieved when they lost their parents.

Finally, mention should be made of a number of specific aspects concerning the viability of minority schools. First, the training of teachers requires comment. All state-funded university education, according to the law, must be conducted in the state language. In addition, the law requires that all teachers in the state and municipal educational institutions have perfect proficiency in the state language. These regulations effectively prevent many potential teachers from being employed in municipal schools, and create an artificial shortage of the staff. Second, regarding the availability of training materials, the Ministry of Education does not allow use of many textbooks published outside of Latvia, while the scope of textbooks and manuals published within Latvia in minority language is limited, and they are not always of comparable quality.

## **8. Conclusions: main features of the language policies in the Baltic states**

The historical and political upheavals of the last century – the loss and restoration of independence, considerable changes to the demographic situation, the emergence of widespread asymmetrical bilingualism as mentioned above – predetermined stringent language policies in the Baltic states. Even a brief and incomplete overview of the language legislation clearly reveals that the higher the proportion of speakers of Russian in a given population, the more rigorous the linguistic containment policy: the language legislation is visibly more liberal in Lithuania, a country with a strong ethnic Lithuanian majority of more than 80%, more severe in Estonia, and the most restrictive in Latvia, the most ethnically diverse Baltic state.

The citizenship policies in Estonia and Latvia have contributed a great deal to the development of the language legislation. Both states adopted the so called "legal continuity" approach, where only those residents who had possessed Estonian/Latvian citizenship before the annexation of 1940 and their direct descendants were "automatically" recognised as citizens after the restoration of independence. Thus, a considerable majority of the Russian-speakers – all those who arrived in Estonia or Latvia after the Second World War - did not receive citizenship and were supposed to acquire it through a process of naturalisation with rather demanding conditions, a process which has so far brought modest results. Therefore, without voting rights, the majority of the Russian-speakers in both Latvia and Estonia had little opportunity to have any input into the formulation of the linguistic legislation drafted in the 1990s.

In summary, several major trends in the language politics in the Baltic states can be identified:

- (1) *Protection of the state languages.* A common challenge faced by the languages spoken by relatively small number of people has, in the case of Estonia and Latvia, been aggravated by the undermining during the Soviet period of the positions held by the titular languages through diglossia and the exclusion of these languages from some important areas, for example military affairs, industry and transport. The restoration of independence brought about a massive "invasion" of English and other foreign languages. Harsh language legislation is seen as a tool for preserving the titular languages and ensuring their competitiveness, or as combating "linguistic Darwinism", as one leading linguistic expert in Latvia described.
- (2) *Strengthening statehood.* In the Baltic states, languages also perform very important symbolic functions. The undisputed domination by the titular languages is perceived as one of the main attributes of sovereignty, and, conversely, statehood is seen largely as a tool to protect the language. Under these circumstances, promotion of minority languages may be seen

as a manifestation of disloyalty. Hence, legislators are usually reluctant to resort to this kind of action.

- (3) *Emphasising new geo-political orientation.* Promotion of the titular languages is linked with an ulterior purpose: the eradication of Russian as a symbol of the eradication of Russia's domination. Efforts to join the European Union and NATO might seem to be undermined symbolically if Russian – "the language of oppressors" – is practised too widely. While some language purists are now hostile towards the more dangerous "invader", American English, most Balts are inclined to tolerate the vast presence of Western languages (although knowledge of them is not yet common), and are much less tolerant towards Russian.
- (4) *Ensuring political domination.* During the dismantling of the Soviet government system and the formation of new state bureaucracies, severe and allegedly excessive language requirements ensured pivotal advantages for native-speakers of the titular languages (largely ethnic Balts), and excluded the absolute majority of Slavs.<sup>11</sup> Nationalistically-minded political groups did not conceal their more ambitious goal: that of promoting the emigration of Slavs, termed "voluntary repatriation". Liberalisation of the linguistic legislation might increase competitiveness of minorities. In the eyes of many of those who belong to the Baltic political élites, this might jeopardise the role of their states as the guarantors of the survival and domination of the titular nations within their "historical territories".

In addition to these "internal" factors, external influences have also played an essential role in shaping language policies in the Baltic states. Nation and state building, interrupted by the forced incorporation into the Soviet Union in 1940, resumed in 1990 under completely different conditions: a framework of international organisations actively monitored the human rights situation in the restored independent Baltic countries. Although this monitoring was not always consistent and free from purely political considerations, inter-governmental organisations became important actors in the creation of language policies. Lithuania, Latvia, and Estonia were eager to achieve full recognition and accession to international organisations. Hence, they were compelled to consider foreign advice, even in cases where such recommendations clearly ran contrary to the preferences of their own political élites.

All of these often competing factors determined the main trends of the linguistic policies and the development of the language legislation which can be briefly and somewhat superficially summarised as follows:

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<sup>11</sup> For further details concerning the ethnic aspect of the formation of the new elites in the Baltic states, see: Steen 1994.

- the state languages are mostly promoted through legislative restrictions, such as language requirements for employment and the prescription of mandatory use of the state languages in various areas, and through punitive measures such as the establishment of governmental bodies responsible for monitoring the implementation of the language legislation and punishing those who breach it;
- while minority languages are explicitly or implicitly recognised, their practice tends to be legislatively limited to certain "designated areas": activities of special "ethnic cultural societies", religious practices, and inter-personal or family relations;
- there have been extremely emotional and politicised, even irrational, reactions to the language issues which is due to their perception as issues of crucial importance for the development of the re-established statehood.

The array of the linguistic legislation which has emerged as a result of these trends, is usually evaluated as being "essentially in conformity" with the international obligations of the Baltic states.<sup>12</sup> However, serious criticism has also been directed at several provisions. Indeed, compatibility of some regulations with the norms of the basic human rights instruments is more than doubtful, particularly in respect to language proficiency requirements for the candidates to national parliaments and local municipalities, the prohibition of establishing private electronic media in minority languages, or the discrimination against accredited private minority schools in terms of their access to state subsidies. Judgements anticipated from the European Court of Human Rights on such issues might be the only effective tool for eradicating provisions of this kind.

Other provisions appear to be incompatible with the Framework Convention for the Protection of National Minorities and may give rise to serious allegations of discriminatory treatment of persons belonging to linguistic minorities. Prohibition of the use of minority languages before public authorities, which may, in some cases, lead to effective denial of constitutionally guaranteed rights, is perhaps the most obvious example; take for example prison inmates who do not have sufficient command in the state language and who, for obvious reasons, have no access to professional translation and notaries' services.<sup>13</sup> Another example is the curtailment of state funding for minority language schools, which is potentially the most explosive issue in the field of the language politics.

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<sup>12</sup> See, for example, OSCE High Commissioner on National Minorities' "Statement regarding the adoption of regulations implementing the Latvian State Language Law", 31 August 2000, [http://www.osce.org/news/generate.php3?news\\_id=985](http://www.osce.org/news/generate.php3?news_id=985) ; and "Statement regarding the adoption of amendments to the Law on Language by the Estonian Parliament", 15 June 2000, [http://www.osce.org/news/generate.php3?news\\_id=546](http://www.osce.org/news/generate.php3?news_id=546).

<sup>13</sup> See Human Rights in Latvia in 2000, Latvian Centre for Human Rights and Ethnic Studies, <http://www.riga.lv/minelres/count/latvia/hrlatvia2000final.htm>.

Strategies aimed at the integration of the societies<sup>14</sup> have been recently declared to be official state policies in Estonia and Latvia. This declaration clearly marks a substantial shift in the attitude of these states concerning their minorities to more liberal and balanced approach. Meanwhile, it remains to be seen how these declarations will be implemented in reality, for example, how the idea of the "integration on the basis of the state language" will be interpreted. So far several minority organisations have criticised the preliminary documents on integration for not taking into consideration important proposals put forward by minorities, for insufficiently accounting for minority rights standards,<sup>15</sup> and have concluded that the integration concept is actually aimed at the forced assimilation of minorities.

Despite growing bilingualism and efforts aimed at the integration of their respective societies, Estonia, Latvia, and, to a much lesser extent, Lithuania, remain deeply divided along linguistic lines. To cope effectively with this problem and to ensure the peaceful and democratic development of the Baltic states, the efforts aimed at protection and promotion of the state languages must be reconciled with the legitimate concerns and interests of their sizeable Russian-speaking minorities – a task that Estonia and Latvia have so far failed to fully resolve.

Constructive dialogue within the states is a necessary prerequisite for this kind of compromise. Thus far, internal dialogue has often been replaced with dialogue with, on the one hand, the OSCE, the Council of Europe and the European Union, and with the Russian Federation on the other. Significant cooperative efforts are required from both the titular political élites and the minority leaders. In addition, a consistent approach and permanent involvement is required from international organisations if this goal is to be achieved. Finally, further development of a free market economy, and restraint of unnecessary intervention on behalf of the state, in particular, into the use of languages in the private sphere, will undoubtedly facilitate the achievement of reasonable and compromised solutions.

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14 See <http://www.np.gov.lv/en/fjas/integracija.htm>; <http://www.undp.ee/integrat/eng/integrat.html>; <http://www.meis.ee/eng/index.html>.

15 See, for example, <http://racocon.riga.lv/minelres/archive//02172000-19:46:56-14688.html>.

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