

Does the Draft EU Constitution Contain a Language Policy?

Dr. Niamh Nic Shuibhne

School of Law, University of Edinburgh, Scotland

I. Introduction

The title of this paper poses a very simple question; and it is one which could perhaps be answered with equal simplicity – ‘no’. Leaving things there, however, would belie both the complexities of the issues involved and, more significantly, the real and deepening problems associated with the *absence* of a European Union (EU) language policy. Moreover, this continuing policy gap seems all the more perplexing against the backdrop of EU enlargement (of an unprecedented scale) and the seismic constitutional mandate bestowed on the Convention on the Future of Europe.¹ How is it possible, then, that language policy was so much *off* these critical EU agendas?

More fully to explore these questions, some brief comments on the EU and the constitutional process will first be made (section II); whether the EU can be said already to have a language policy will then be considered (section III). In section IV, some of the problems and complexities alluded to above will be discussed more fully. Finally, the extent to which language questions actually featured in the Convention process will be set out (section V) before the question posed by the title of the paper will again be directly addressed (section VI).

II. The EU and the Constitutional Process

The EU is already a ‘constitutional’ entity through an indirect process which can be traced to the jurisprudence of the Court of Justice; the extent of its constitutional character – or more precisely, the constitutional character of its treaties – is, however, a matter of persisting debate. Compared to other international organisations, the EU is premised on complex principles of somewhat autonomous constitutional quality, especially the primacy of Community law over conflicting national law, the direct application of some Community law measures without any intervening Member State action, and the potential direct effect of Community law in the courts of the Member States.² If the EU can be described as some sort of constitutional entity, then its constituent Treaties could be considered, collectively, as its ‘constitution’ – and within the various disciplines of EU studies, whether and/or the extent to which this holds true (and, indeed, whether it should ever have happened at all) have long been a matter of vibrant debate.

Over the past five decades, the European Economic Community has evolved into a European Community and European Union; a series of amending Treaties has filled gaps in the original Treaty of Rome, as well as introduced new competences, capturing new legal and political ideas and creating new legal and political mechanisms, institutions and structures. Thus, we see an evolving EU legal and constitutional order, generated by an active and dynamic process of integration. The Convention on the Future of Europe was charged, via the Laeken Declaration, with distilling all of these developments into one definitive constitutional document – a mission completed on publication of the ‘Draft Treaty establishing a Constitution for Europe’ (here, Draft Constitutional Treaty, or DCT), currently being contemplated by the Member States.³

¹ The European Council’s Laeken Declaration – which inaugurated the Convention, and thus the Draft Constitution, process – can be viewed at <http://european-convention.eu.int/pdf/LKNEN.pdf>.

² The ‘classic’ decisions here are Case 26/62 *van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1 and Case 6/64 *Costa v ENEL* [1964] ECR 585; see also Case 294/83 *Parti Ecologiste ‘Les Verts’ v European Parliament* [1986] ECR 1339 and Opinion 1/91 [1991] ECR 6079.

³ OJ 2003 C169/1; at the time of writing, the Irish Presidency of the European Union has launched a renewed drive to secure agreement on the Draft by the end of its term (June 2004).

The determination of the language rules to which a governing entity is committed – and, even more practically, in accordance with and through which it can function – is typically an integral aspect of a constitutional document; or, at least, we can find there the principle(s) which must guide language policy determination and development. This paper assesses the strength or otherwise of the DCT in this regard. Initially, however, it is necessary to step back from the Draft and the Convention process, and to think first about what we already have – in other words, to ask whether the EU already *has* a language policy.

III. Does the EU Already Have a Language Policy?

Again, in short, no.⁴

The exceptional character of the EU as a governing entity has already been suggested; it is also, of course, exceptional in terms of language. At the time of writing, we have a Union of fifteen Member States; we have eleven ‘official’ EU languages,⁵ one ‘Treaty language’ (Irish),⁶ and a multitude of non-official languages – all with varying status in the Member States themselves. Soon, we will have a Union of twenty-five Member States, adding nine new languages to the official EU language list⁷ and increasing considerably too, of course, the number of EU languages in a more general sense.

The EU also has a considerable number of language functions, language arrangements and language rules, collectively comprising the elements which would expect to find manifestation in or as an EU language policy. We can pool these different elements together and attempt thereby to discern the range of EU language involvement. In the appendix to this paper, several of these ‘components’ of EU language policy are gathered together. It is not the intention here to go into detail vis-à-vis these components;⁸ but it can clearly be seen that language cuts across the range of EU activity – from institutional administration, to the free movement of goods and persons, from language learning to the development of cultural policy and the specific promotion of regional and minority languages.⁹

⁴ On this theme, see especially B. de Witte, “Language Law of the European Union: Protecting or Eroding Linguistic Diversity?”, in R. Craufurd Smith (ed.), *Culture and European Union Law*, (forthcoming, Oxford: OUP, 2004), chapter 7, who concludes that: “[t]here is EU language law, undoubtedly, but one may doubt whether there is a genuine EU language policy. There are elements of a constitutional framework for such a policy in the EC Treaty, in Council Regulation 1/58, in the Charter of Rights and in unwritten general principles of Community law. However, these various elements have not grown into a coherent whole. There is no comprehensive reflection on the language question in the European institutions, nor has the Commission ever drafted a White or Green Paper setting out its overall views on the matter.”

⁵ Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish and Swedish; this language list includes at least one of the official languages of all of the EU Member States. For details on language use for official purposes, see Regulation 1/58, OJ 1952-1958 Eng. Sp. Ed. 59; see also, N. Nic Shuibhne, *EC Law and Minority Language Policy: Culture, Citizenship and Fundamental Rights*, (The Hague: Kluwer, 2002; Leiden: Martinus Nijhoff, 2003), pp. 4-21.

⁶ Irish is the national and first official language of Ireland but it is a *de facto* minority language; the Irish Government did not seek ‘full’ official status for Irish on accession to the (then) EEC but its inclusion in Article 314 EC – rendering it a ‘Treaty language’ – has since had additional consequences: it is one of the languages in which EU citizens may contact the EU institutions, for example, the latter then being compelled also to reply in Irish in that instance. Irish may also be used in proceedings before the European Court of Justice (ECJ) and Court of First Instance (CFI), although it never has been to date. Finally, it should also be noted that, at the time of writing, a campaign in Ireland to have Irish ‘upgraded’ to an official EU language is underway; developments in this vein can be tracked at <http://www.eurolang.net/>.

⁷ Czech, Estonian, Hungarian, Latvian, Lithuanian, Maltese, Polish, Slovak and Slovenian.

⁸ See instead, for example, N. Nic Shuibhne, “The European Union and Minority Language Rights”, (2002) vol. 3:2 *MOST Journal on Multicultural Societies* (<http://www.unesco.org/most/vl3n2shui.htm>), section 1.

⁹ De Witte, *supra* n. 4, distinguishes these indirect elements of EU language action (‘negative language policy’), however, from a more considered ‘positive language policy’.

Critically, however, as discussed further below, there is no Treaty provision which underpins the various facets of EU language involvement. And similarly, there is no overarching language 'policy' which measures EU language involvement against a series of tasks, goals or objectives, which coordinates the interaction of the different elements of language involvement, or which manages their relative priority or weighting in the EU sphere. In a sense, then, many ingredients are present, but there is no recipe, and there is no composite product or result either. The recent Commission initiative on language learning, for example,¹⁰ (itself the subject of a contribution to this collection, and the subject of comment in many of the others) is an EU policy on language learning, certainly, but it is not a holistic EU language policy in itself. Moreover, it will be seen below that the Commission intervened strongly on the side of linguistic *restriction* in the final *Kik* case; and the European Parliament – seen most usually as the champion of linguistic diversity, looking to its important and consistent efforts in this field (as can be traced through its resolutions, listed in the Appendix) – did not, surprisingly, intervene at all.

Why does all of this matter? To demonstrate some answers, the following section attempts thematically to sketch some current EU language policy problems – or, more properly, problems which are either caused or exacerbated by the *absence* of an EU language policy. Whether the Convention process and resulting Draft Constitution have changed that landscape will then be considered.

IV. Some (Absence of) EU Language Policy Problems

A. A Lack of Principle

If we could presume the existence of some sort of EU language policy, then both its content and execution would surely need to be underpinned and shaped by some guiding policy principles. What basic tenets would the institutions need to bear in mind when either working within or further developing EU language rules and language actions? What would constitute 'acceptable' EU language action, and what would not? A crucial gap in respect of EU language involvement relates to the absence of these very principles, parameters or premises. Inasmuch as we can even talk about an EU language 'policy', even less certainty attaches to its fundamental aims, goals or objectives. We know that the Union (or more properly its institutions) pledge constantly to the ambition of unity in diversity. But as a driving principle for the setting of policy, this is simply not enough; it lacks the necessary substance and degree of prescription.

In fact, far less than a principle, what we did have has since been shown to be more of a presumption – a presumption at once exceptionally strong yet strongly exclusionary and, perhaps, ultimately empty. Drawing from Article 314 EC (text in the Appendix, below), the legal equality of the Treaty texts established there was infused into the EC language scheme more generally. This can be seen especially where institutional practices with external language implications were concerned. Regulation 1/58 sets down a fairly simple framework in respect of communications between the Community institutions and the Member States, and (natural or legal) persons subject to their jurisdiction, incorporating all of the official EU languages and, in effect, granting choice of language to the Member States (and natural or legal persons) rather than to the institutions. This contrasts with the possibilities for language restriction in Article 6 of the Regulation, which provides that '[t]he institutions of the Community may stipulate in their rules of procedure which of the languages are to be used in specific cases.' Thus, we see a pragmatic balance, one which attempts to ensure internal administrative efficiency but which generates considerable breadth of language inclusion, then, for external communicative purposes. The latter concern is reflected also in Articles 4-5 of the Regulation, in respect of both the drafting of legislation of general application and publication of the *Official Journal of the European Union*, all of this again premised on a notion of equality of the official languages.

¹⁰ *Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions – Promoting Language Learning and Linguistic Diversity: An Action Plan 2004-2006*, COM (2003) 449 final.

If the equality of EU languages was intended as a premise or principle underpinning EU language policy, however, there are two critical problems. First, a decided emphasis on the official EU languages only ignores, obviously, those languages *without* official status in the EU. And, second, an initially pragmatic – and essentially, institutionally internal – hierarchy in respect of even the official languages is emerging also in the field of external communications, thus the suggestion above that the yardstick of equality is more a presumption than a principle. The position of non-official languages will be returned to more fully below; for now, the challenge to official language equality will first be explored.

What can be referred to collectively as the *Kik* case law covers a series of four actions on, essentially, the same issue.¹¹ Briefly, the litigation centred on a challenge to the linguistic regime adopted – by Council Regulation – for the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), an EC agency as opposed to a ‘full’ EC institution. OHIM recognises English, French, German, Italian and Spanish only as its working languages.¹² An application for a Community trade mark may be filed in any of the eleven official EC languages, but applicants must specify a second language – and this must be an OHIM working language – in which the Office may send written communications. Critically, the applicant is deemed to accept this second language as the language to be used in opposition, revocation or invalidity proceedings in certain circumstances.¹³ In *Kik*, the applicant (a Dutch patent agent) submitted *inter alia* that OHIM’s language rules constituted discrimination on grounds of nationality and contravened the equality of the official languages of the EU. The first two cases were dismissed on admissibility grounds relating to the applicant’s standing to pursue judicial review of the Council Regulation;¹⁴ but the substance of her arguments was evaluated in the final two judgments – first by the Court of First Instance¹⁵ and, on appeal, by the Court of Justice.¹⁶

Before the CFI, the applicant argued that “[Regulation 1/58] lays down clearly one of the principles of Community law from which no derogation by subsequent regulation of the Council is permitted.”¹⁷ In more political and constitutional language, the Greek Government submitted, in support of the applicant, that “...the Community legal order does not recognise the superiority of particular official languages in relation to the others and that the EC Treaty as well as Regulation [1/58] lay down the principle of plurilingualism and language neutrality.”¹⁸ It then asserted, from ‘the equivalence of the official languages of the European Communities’ and their recognition as such by the ECJ on many occasions, that the prohibition on nationality discrimination (in Article 12 EC) includes a prohibition on language discrimination.¹⁹ But the Council, as well as pointing out that OHIM is not an institution and is not therefore governed by Regulation 1/58 in any case, argued that the Council was entitled in any event to derogate from that Regulation since it “...contains no fixed principle of Community law.”²⁰ In particular, the Council submitted that “...there is no Community law principle of absolute equality between the official languages. Otherwise, there would be no [Article 290 EC].”²¹ The Council made express reference to ‘budgetary considerations’ and submitted very simply that it had made a choice, one “...based on a balancing of the interests of undertakings on the one hand and the possible drawbacks such as those raised by the applicant on the other.”²²

¹¹ For detailed analysis of the facts and the various judgments, see N. Nic Shuibhne, “It All Falls Down? Case Comment on *Kik v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)*”, forthcoming, (2004) *Common Market Law Review*.

¹² See Regulation 40/94, OJ 1994 L11/1, Article 115.

¹³ *Ibid.*, paras. 4-7.

¹⁴ Case T-107/94 *Kik v Council and Commission* [1995] ECR II-1717 (*Kik I*) and Case C-270/95 P *Kik v Council and Commission* [1996] ECR I-1987 (*Kik II*).

¹⁵ Case T-120/99 *Kik v OHIM* [2001] ECR II-2235 (*Kik III*).

¹⁶ Case C-361/01 P *Kik v OHIM*, judgment of 9 September 2003, not yet reported (*Kik IV*).

¹⁷ *Kik III*, para. 39.

¹⁸ *Ibid.*, para. 42.

¹⁹ *Ibid.*, para. 44.

²⁰ *Ibid.*, para. 51.

²¹ *Ibid.*, para. 52.

²² *Ibid.*, paras. 53-54.

In essence, the CFI agreed with the position put forward by the Council; it confirmed that the Council had made "...an appropriate and proportionate choice, even if the official languages of the Community were treated differently."²³ This reasoning seems to stem from the fact that the OHIM working languages were selected 'from among the most widely known languages in the Community'.²⁴ There is a disappointing lack of more principled discussion in the CFI judgment, however, and it is perhaps not surprising that the applicant chose to proceed with an appeal to the ECJ. Although, in reality, the judgment of the ECJ narrowed the scope for use of the reduced number of working languages by OHIM,²⁵ there is, again, a clear reluctance to engage more fully with the constitutionally oriented arguments submitted by the applicant. Again, while it was acknowledged that languages were being treated differently, the selection of the languages 'which are most widely known in the Community' enabled the regime to meet criteria of appropriateness and proportionality.²⁶ Both the CFI and ECJ judgments are all about this process of justification, but lacking any real acknowledgement of the pre-existing principle(s) being (even justifiably) infringed.

In the aftermath of *Kik*, perhaps just one EC language principle could be considered to be blended with EC constitutionalism *i.e.* for EU citizens, the right contained in Article 21 EC, to write to the EU institutions in any of the languages mentioned in Article 314 EC (thus, 'the eleven' plus Irish) and receive a reply in the same answer. The strength acquired here via constitutionalisation is immediately countered, however, when the limitations are brought into the equation. First, Article 21 EC covers written communications only, and only those initiated by the EU citizen. Second, it refers to institutions only, thus excluding other EC bodies or agencies. Third, only natural persons with the nationality of an EU Member State are covered – leaving outside, then, third country nationals as well as legal persons; this division is very much reflected in *Kik* also, where the fact that a natural person was acting as an economic operator was felt similarly to bring Ms Kik outside the scope of communicating as a 'citizen'.²⁷ But this distinction places an unhelpful and constraining emphasis on the identity of the communicant, rather than on the nature or effects of the communication in question. All of these limitations taken together render the constitutional principle codified in Article 21 EC far narrower than the language scheme set out in Regulation 1/58. And if even the official EU languages cannot claim security from a doctrine of equality, the position of languages left outwith official status in the first place is thus all the more frail. Moreover, what might be called a 'secondary' principle of EU language policy – the notion that language choice rests with Member States and/or individuals, as appropriate, and again emerging from the scheme of Regulation 1/58 – has also been derailed by the judgments in *Kik*.

It should be stressed that even confirmation of a general principle of respect for linguistic equality would not necessarily rule out the result achieved in *Kik*. But even if it was thought appropriate that EC language policy be steeped in a considerable degree of flexibility, flexibility grounded in principled roots would generate far greater legitimacy, and far greater security also; the parameters of EU language action and the EU language policy framework more generally could then be marked down, creating a space within which flexibility could be managed but, equally, the non-discretionary limits outwith which it could not go.

B. Varied Interests (and Interest Groups)

Even if we could identify some principled aims or objectives which should delimit and guide EU language policy, a series of questions would then immediately follow – which languages should be included? Languages with official status in the EU only? Or all of those with official status in the Member States? Or, also including languages without official status in the Member States?

²³ *ibid.*, para. 63.

²⁴ *ibid.*

²⁵ See, in particular, paras. 46-48 of *Kik IV*.

²⁶ *ibid.*, para. 95.

²⁷ *ibid.*, para. 88: "...the Community trade mark was created not for the benefit of all citizens, but of economic operators, and that economic operators are not under any obligation to make use of it."

Even in the most inclusive version, what level of policy priority would be assigned to the different levels of language status? And, quite apart from concerns about legal basis (of which more below), how would the policy objectives be determined? Should the ethos of preservation prevail? Or that of promotion? What would be the extent of EU duties and responsibility? Would the programmatic emphasis be confined to language learning? Or should it be directed also to develop a framework of language rights? Furthermore, the preservation and promotion of linguistic diversity, even if settled as an ambition in itself, would inevitably come into conflict with other aims and objectives that could reasonably be attributed to EU language action: primarily, securing efficient administration in and of the EU institutions, but without disproportionate financial costs.

Different interest groups will necessarily fight for and promote their own specific corner within EU language policy – which is of course to be expected. Some will push for the recognition and promotion of regional or minority languages; others for institutional language practice reform. But as we have seen, there is a damaging absence of any ‘bigger EU language picture’ which would seek to develop EU language policy more holistically, taking all of the different interests and the needs of different interest groups more coherently into account, and recognising their interdependency. Thus, as we will see came to pass throughout the Convention process, since the different interest groups tend to fight for their specific interests to the exclusion of others, any progress achieved is itself necessarily fragmented, lacking any real interplay with the other – equally necessary – facets of EU language policy.

Even looking to the Member States and to the institutions themselves, there are very different views on how EU language policy should develop. On the one hand, we might have assumed a certain level of support for the equality of the official EU languages, thinking of the lengths to which the Member States and the institutions have gone actually to realise and manage an equality of languages over the years, notwithstanding the complexity and expense involved, and all the more so given that the present system will be stretched greatly to include the nine additional ‘enlargement’ languages. But the various interventions submitted in *Kik*, for example, reveal quite a different story. As noted already above, the Council defended the OHIM language scheme very strongly. As the author of the scheme, of course, this is understandable; as an institution composed, in effect, of the fifteen Member States’ interests, perhaps it is less so – at least until the individual positions of the Member States are looked at in more detail below. It was also noted that the Commission supported the position of the Council but not until the final stage, in *Kik IV*; and, perhaps most surprisingly, that the European Parliament did not intervene in the cases at all. But the approach taken by the Courts could have repercussions well beyond OHIM; their failure to consider a constitutional basis for EC language policy leaves even the institutional language practices (outwith Article 21 EC) open to simple legislative amendment. That none of the institutions appears to have thought about this seems unlikely.

Only one of the Member States, Greece, intervened in support of the construction of language equality, somewhat ironically given its own domestic record in respect of linguistic minorities. Just one other Member State – Spain – intervened, from the ‘opposing’ perspective, stressing the fact that the rules allow for ‘a choice between the five most common languages in the Community’.²⁸ But it is doubtful that Spain would have acted similarly if OHIM was instructed to employ the *four* most common languages. Even more difficult to understand, however, is the fact that the vast majority of the Member States did *not* intervene at all: not France, for example, notwithstanding its intense commitment to French language policy domestically; or Ireland, which had rigorously defended its own national language policy in *Groener*.²⁹ Perhaps all the more remarkable still was the silence of other ‘small’ Member States, like Denmark or Portugal, who, we are told, are alarmed at the increasing linguistic dominance of two or three languages at EU level. And surely, above all, we must wonder at the silence of the Netherlands itself. Instead, the views of the Member States, bar one, must be assumed to be collectively represented in *Kik* by the submissions of the Council. As far as this might be considered to

²⁸ *Kik III*, para. 50.

²⁹ Case C-379/87 *Groener v Minister for Education and the Dublin Vocational Education Committee* [1989] ECR 3967.

reflect a key EU 'interest group' – and a group which, effectively, supplies the driving force of EU power – the nonchalant want of linguistic concern would appear quite significantly different from linguistic interest groups striving for recognition within the EU language space more generally.

C. The Discrimination Question

Thinking about language in the context of discrimination is somewhat linked to questions of language policy principles discussed above. But it is also more concretely related to the substantive execution of language policy. The relationship between language rights and discrimination is a strong theme within language rights discourse generally.³⁰ And non-discrimination on grounds of nationality, captured by Article 12 EC, is one of the fundamental principles of EC law more specifically. It is possible to identify an embryonic understanding of language as an element of discrimination on grounds of nationality in case law on the free movement of persons.³¹ In *Mutsch*, for example, the Court classified the right to use a particular language in domestic courts as a social advantage, which must therefore be available to workers from other Member States under the same conditions as for nationals of the host state. The Court attached significance here 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 movement of persons and freedom of establishment, the protection of the linguistic rights and privileges of individuals is of particular importance."³²

In *Groener*, the applicant had challenged a precondition of competence in Irish attached to certain teaching posts in Ireland (and, here, even though English was and was almost certainly to remain the language of instruction). 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, but only under certain conditions: the requirement must be justified by reason of the nature of the post to be filled, be applied in a non-discriminatory manner and be proportionate to the linguistic aim to be achieved.

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 as an aspect of movement and EU citizenship – thus extending the remit of protection significantly beyond that granted to workers in *Mutsch*. And from the perspective of minority language rights, the Court confirmed here what 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). So, it is clear that Member States enjoy discretion in determining 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. Another way of putting this is to stress that responsibility for the substantive implementation of minority language rights is considered still to reside at Member State level; but equally, the ECJ will review national practices in this field where the Community principles of free movement are involved.

³⁰ Cf., for example, the approach in L. Green, "Are language rights fundamental?", (1987) 25 *Osgoode Hall Law Journal*, 639-669 and that in F. de Varennes, *Language, Minorities and Human Rights*, (The Hague: Martinus Nijhoff, 1996), Chapter 4.

³¹ See in particular, Case 137/84 *Ministère Public v Mutsch* [1985] ECR 2681, Case C-379/87 *Groener v Minister for Education and the Dublin Vocational Education Committee* [1989] ECR 3967, Case C-274/96 *Criminal Proceedings against Bickel and Franz* [1998] ECR I-7637 and Case C-281/98 *Angonese v Cassa di Risparmio di Bolzano* [2000] ECR I-4139.

³² *Mutsch*, para. 11.

We have seen, however, that a deeper discussion of language rules, and the possibilities and consequences of discrimination, were raised by the applicant in *Kik* but more or less side-stepped by both the CFI and ECJ. In *Kik IV*, Advocate-General Jacobs dispensed with the cases summarised above on the simple yet literal point that they do not establish 'that all official languages must in all circumstances be treated equally for all purposes'.³³ But this ignores the fundamental ethos of non-(language)-discrimination which emerges from the judgments, or any construction of a principle which is not quite so absolute as that evoked by the Advocate-General but which could instead be, as appropriate, justifiably limited. Thus, we would seem to have the suggestion of language as an element of nationality discrimination in the context of the free movement of persons; but we have no discussion of its development or scope in *Kik* and, at worst, we may even have an implicit rejection of the link.

If that wasn't problematic enough, things become all the more uncertain when looking to any potential *direct* protection against language discrimination in the EC legal order. Article 12 EC is a prohibitive provision, but it relates only to nationality discrimination. Article 13 EC is an enabling provision – not codifying any direct prohibitions, but enabling the legislative institutions to take action to combat discrimination on a number of grounds. This list does not, however, include language. As seen in another contribution to this collection, efforts to add language to the text of Article 13 in its new form (as Article III-8(1) DCT) did not succeed. Another aspect of the DCT process throws up an unusual legal differentiation, however. At present, Article 21 of the Charter of Fundamental Rights of the European Union³⁴ (text in the Appendix) is broader in scope than Article 13 EC in two key ways; first, it is a prohibitive rather than enabling provision and, second, crucially, it *does* include discrimination on grounds of language. At present, the obvious weakness of Article 21 is that the Charter is not, of course, legally binding. But if the DCT is adopted, then the Charter is subsumed into the new Treaty as its Part II – taking on full legal effect.

Thus, there will exist a binding 'prohibition' provision of considerable scope, Article II-21 DCT, diluting the consequences of the exclusion of language from the present 'enabling' provision, Article 13 EC. But it is difficult to see how this situation is compatible with Article 51(2) of the Charter ('This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties'), unless Ms Kik was right – that Article 12 EC and non-discrimination on grounds of nationality must already, then, encompass language discrimination. This in turn renders it arguable that measures requiring more positive action in respect of language are not dependent on Article 13 EC, even now (nationality being also absent from that provision); and in terms of the DCT, this would locate language (implicitly) within Article III-7 ('European laws or framework laws may lay down rules to prohibit discrimination on grounds of nationality...') rather than the 'new' Article 13 EC (Article III-8 DCT). And if holds true, it reveals the dismissal of such claims in *Kik* as all the more problematic.

D. The Concept of Legal Basis

One of the most important principles which guides EU action tends also, unfortunately, to be one of the least acknowledged in language policy discourse: the EU is *not* an autonomous governing entity; it can act only within the scope of the powers conferred on it by the Treaties. So however much a particular language action might be worthy, it can only be undertaken by the EU if the necessary legal basis can be found in a Treaty provision or combination of Treaty provisions, as appropriate. This principle is stated clearly and simply in Article 5 EC: '[t]he Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.'

Just two broad language policy domains could be said to be covered by the Treaty in a *direct* sense (as opposed to *indirect* possibilities, such as language rules as an element of free

³³ *Kik IV*, Opinion of Advocate-General Jacobs, para. 50.

³⁴ OJ 2000 C364/1.

movement of workers) – institutional language rule prescription, and cultural policy. Language rules in the institutions have already been discussed to some extent, and will be returned to again below. Few would disagree that action in the cultural domain should 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 EC competence in cultural policy would seem quite a promising Treaty resource on instinct; but the provision itself (Article 151 EC, text in the Appendix) is, in fact, extremely narrow, thus confining very much the capacity for EC action.

In essence, the EC plays a role largely complimentary to the Member States, where primary responsibility for cultural policy initiatives resides and remains. This can be discerned clearly from the language used throughout the provision (‘... shall contribute ... encouraging cooperation ... supporting and supplementing ... incentive measures ... excluding any harmonisation ...’). Any interest groups lobbying for EU language action should be aware of these limitations. Yes, the EU has *some* competence in the cultural policy field, and it has a responsibility to fulfil the mandate of Article 151 EC; but, in truth, and focusing more directly on language, it does not have very much competence here, beyond the organisation of its own language rules and language practices. Moral and political arguments alone cannot overcome this legal reality. A potentially significant amendment to Article 151 EC might, however, be achieved via the DCT process, and so will be looked at in section V below.

E. Practical Matters

Here, we are raising a problem in something of the opposite realm of concern to those already discussed. This is because the arguments raised in the preceding sections could be loosely classified as loaded in support of diversity but here, looking again at the EU institutions and the languages of their administration, we can see a contrasting tension emerging. Perhaps language policy objectives could be classed – again, loosely – within two broad divisions, thinking of language *promotion* and language *use* as categories or labels. We saw above that the critical problem in respect of language promotion by the EU institutions is a weakness in terms of legal basis. In respect of language use, we have limited but probably sufficient legal basis (thinking especially of Articles 21, 290 and 314 EC). But we have seen also how the exercise of this legal capacity rests on an insecure footing, the potential for Council discretion displayed acutely in the *Kik* litigation.

What should also be remembered, however, is the sheer size and density of institutional language practices – the (soon to be increased) number of language combinations, the demands for translation and interpretation, the costs, the delays, and so on. Practical considerations of this kind should not automatically defeat concerns of a more principled nuance; but equally, even language policy as an expression of fundamental principles must accord due weight to very real practical issues. The debate on EU language action, however, seems plagued by the absence of balance: perspectives can tend instead to seem either too sentimentally principled or too crudely practical. And again, the lack of overall coherence in respect of EU language action – the lack of an EU language policy through or against which different interests could be channelled – simply makes matters worse. It must be accepted that very practical matters *do* have a legitimate place in EU language policy discussion; the challenge, then, is to find the *right* place, the right balance, the right relative weightings and levels of priority. Moreover, as the practical dimension of current language arrangements will become even more prevalent in light of EU enlargement, it seems all the more crucial to get the language principles straight.

V. Language and the Convention Process

It could be expected that this section should be the core of this paper; but there is disappointingly little to say here since, as happened also in respect of the Nice Treaty process, there was simply no real reflection on EU language arrangements during the Convention

process – notwithstanding both the mandate and scale of the constitutional overhaul envisaged, notwithstanding the backdrop of EU enlargement. Both of these features provide a real argument for having had a dedicated Working Group on the language question alone; but a real conversation on EU language policy is something that, ironically, few are willing to have.

Very few submissions to the Convention merit discussion in respect of language. A number of submissions contain minor references to the EU and its official languages.³⁵ But while there are just three examples of more thorough policy reform provided in the Appendix, even here we can see that the agendas were obviously driven by different perspectives and different interests. And so the proposals presented push perhaps too much in respect of one dimension of language policy without really taking any others sufficiently on board. The submission put forward by the European Bureau for Lesser Used Languages (EBLUL), for example (as discussed comprehensively in another contribution to these proceedings) takes no position on language use in the EU institutions; the Freiburg submission, in contrast, considers little else. The submission of *Europa Diversa* does exhibit an awareness, at least, of the different facets of language policy at EU level, but again the tenor of the text leans strongly towards more of a cultural than institutional bias. This more typical interest group approach demonstrates, somewhat worryingly, how a critical watershed like the *Kik* litigation can slip by, then, without the deserved level of interest or critique – notwithstanding that the institutional premise of the resulting jurisprudence is not confined to the institutional dimension of language policy only.

Overall, then, there was a very disappointing absence of the language question from the Convention agenda, an absence compounded by the unique opportunities for discussion of and reflection on the many features of the EU legal order thereby instituted. Is it somehow possible that the Convention's Draft Constitution still managed to identify, even solve, some of the language policy problems set out above?

VI. Does the Draft Constitution Contain a Language Policy?

Yet again, regrettably, we must answer here, 'no'.

The opening articles of the DCT, setting out the Union's values and objectives, are forged in the principles of equality and non-discrimination in a general sense; and Article I-3(3) does commit the Union to respect for its 'cultural and linguistic diversity', but this does not really create any substantive duties or obligations.

The only key change proposed relates to Article 151 EC, where measures could be adopted after qualified majority – as opposed to, at present, unanimous – voting in the Council. Again, this point is discussed more comprehensively in another contribution to these proceedings; and if the change comes to pass, it will undoubtedly facilitate a much smoother flow of proposal and, crucially, adoption in the cultural sphere. Two points should also be borne in mind here, however. First, an identical proposal in the draft Nice Treaty floundered at the Inter-governmental Conference. And, second, while the very obvious stalemate that can occur at the expense of having to find an often elusive political unanimity cannot be underestimated, the requirement of unanimity in Article 151 EC can also be cast in a positive light, since it provides, in effect, a cultural veto for even the smallest of Member States. Thus, shifting to qualified majority is certainly a practical advantage, but it is an advantage gained only by paying a very real price.

³⁵ Some of these papers could be classed as broadly in favour of language reduction, either expressing or implying practical concerns; see, for example, CONV 313/02 (submitted to Working Group X (Freedom, Security and Justice), including a statement from the Director of Europol (pp. 4-5) regretting 'the need for Europol to work in [eleven] languages and the absence of a single working language', in the context of 'too much emphasis on national sovereignty'). Others make more principled, but typically vague, statements on languages and diversity; see, for example, the Report from the Presidency of the Convention to the President of the European Council (18 July 2003, CONV 851/03), which, as one of fifteen points, refers to 'equality of languages' (p. 24), but this is then confined to the function of 'legislating'.

Article III-339 DCT invites, in effect, the adoption of another 'Regulation 1/58' on institutional language rules. In the aftermath of *Kik* – with no guiding principle of language policy governing even the official EU languages (apart from the limited guarantees contained in Article 21 EC), the Council is now free to depart radically from present rules and structures. In many ways, this might be no bad thing. But the Council, bolstered by the support of the Community Courts, seems to be leaning dangerously towards blanket language rules (recalling the 'economic operators' distinction in *Kik*) rather than a more principled and effects-based language rule framework.

Overall, then, perhaps the overwhelming feeling must be that of disappointment. The Convention on the Future of Europe was a unique constitutional experiment – but an utterly missed opportunity from the perspective of EU language policy. The development of EU language rules has been piecemeal and rudderless to date; and nothing in the Draft Constitution makes any serious attempt to remedy this. *Kik* renders the present institutional language scheme almost entirely revocable; the unanimity requirement in Article 151 EC might go, but even then, the constraints of that Treaty provision remain more generally in place, in terms of substantive content. And an already strained language scheme is about to be almost doubled in terms of language volume, with no serious programmatic reform either contemplated or produced by the Convention process.

The EU does not, therefore, have a language policy; and the Draft Constitution does not, regrettably, give it one.

APPENDIX

A. Language and the EC Treaty

Article 5

The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.

Article 12

Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.
The Council ... may adopt rules designed to prohibit such discrimination.

Article 13

1. Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

...

Article 21

...

Every citizen of the Union may write to any of the institutions or bodies referred to in this Article or in Article 7 in one of the languages mentioned in Article 314 and have an answer in the same language.

Article 149

1. The Community shall contribute to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action while fully respecting the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity.

2. Community action shall be aimed at:

- developing the European dimension in education, particularly through the teaching and dissemination of the languages of the Member States ...

Article 151

1. The Community shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore.

2. Action by the Community shall be aimed at encouraging cooperation between Member States and, if necessary, supporting and supplementing their action in the following areas:

- improvement of the knowledge and dissemination of the culture and history of the European peoples;
- conservation and safeguarding of cultural heritage of European significance;
- non-commercial cultural exchanges;
- artistic and literary creation, including in the audiovisual sector.

3. The Community and the Member States shall foster cooperation with third countries and the competent international organisations in the sphere of culture, in particular the Council of Europe.

4. The 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.

5. In order to contribute to the achievement of the objectives referred to in this Article, the Council:

- acting in accordance with the procedure referred to in Article 251 and after consulting the Committee of the Regions, shall adopt incentive measures, excluding any harmonisation of the laws and regulations of the Member States. The Council shall act unanimously throughout the procedure referred to in Article 251;
- acting unanimously on a proposal from the Commission, shall adopt recommendations.

Article 290

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

Article 314

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

Pursuant to the Accession Treaties, the Danish, English, Finnish, Greek, Irish, Portuguese, Spanish and Swedish versions of this Treaty shall also be authentic.

B. Components of an EU Language Policy

EC Secondary Legislation

- ~~///~~ Regulation 1/58, OJ 1952-1958 Eng. Sp. Ed. 59.
- ~~///~~ Regulation 1612/68, OJ 1968 Sp. Ed. L257/2, p. 475 (see Article 3(1) on language competence requirements).
- ~~///~~ Directive 2000/13, OJ 2000 L109/29 (on product labelling).
- ~~///~~ Decision No 508/2000/EC of the European Parliament and Council, establishing the Culture 2000 programme, OJ 2000 L063/1.

European Parliament Resolutions

- ~~///~~ Arfé Resolution (1981) on a Community Charter of Regional Languages and Cultures and on a Charter of Rights of Ethnic Minorities, OJ 1984 C287/106.
- ~~///~~ Arfé Resolution (2) (1983) on Measures in favour of Minority Languages and Cultures, OJ 1983 C68/103.
- ~~///~~ Kuijpers Resolution (1987) on the Languages and Cultures of Regional and Ethnic Minorities in the European Community, Doc. A 2-150/87.
- ~~///~~ Killilea Resolution (1994) on Linguistic and Cultural Minorities in the European Community, OJ 1994 C061/110.
- ~~///~~ Resolution (2001) on Regional and Lesser Used Languages, OJ 2002 C177 E/334.

Commission Communications and Proposals

- ~~///~~ *Community Action in the Cultural Sector*, EC Bulletin Supp. 6/77.
- ~~///~~ *Stronger Community Action in the Cultural Sector*, EC Bulletin Supp. 6/82.
- ~~///~~ *A Fresh Boost for Culture in the European Community*, EC Bulletin Supp. 4/87.
- ~~///~~ *New Prospects for Community Cultural Action*, COM (92) [1992].

- ✂ *Euromosaic: The Production and Reproduction of the Minority Language Groups in the European Union*, (Luxembourg: Office for Official Publications of the European Communities, 1996).
- ✂ *Proposal for a Decision of the European Parliament and of the Council amending ... the Culture 2000 Programme*, COM (2003) 187 final; COM (2004) 79 final.
- ✂ *Proposal for a European Parliament and Council Decision establishing a Community action programme to promote bodies active at European Level in the field of Culture*, COM (2003) 275 final; COM (2004) 3 final.
- ✂ *Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions – Promoting Language Learning and Linguistic Diversity: An Action Plan 2004-2006*, COM (2003) 449 final.

Case Law

- ✂ Case G-281/98 *Angonese v Cassa di Risparmio di Bolzano* [2000] ECR I-4139 (free movement of workers).
- ✂ Case C-274/96 *Criminal Proceedings against Bickel and Franz* [1998] ECR I-7637 (free movement of services; EU citizenship).
- ✂ Case C-33/97 *Colim v Bigg's* [1999] ECR I-3975 (free movement of goods).
- ✂ Case C-379/87 *Groener v Minister for Education and the Dublin Vocational Education Committee* [1989] ECR 3967 (free movement of workers).
- ✂ Case C-424/97 *Haim v Kassenzahnärztliche Vereinigung Nordrhein* [2000] ECR I-5123 (freedom of establishment).
- ✂ Case 137/84 *Ministère Public v Mutsch* [1985] ECR 2681 (free movement of persons).
- ✂ Case C-106/96 *United Kingdom and others v Commission* [1998] ECR I-2729 (EU budgetary principles).

- ✂ Case T-107/94 *Kik v. Council and Commission* [1995] ECR II-1717; Case C-270/95, [1996] ECR I-1987; Case T-120/99 *Kik v. Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [2001] ECR II-2235; Case C-361/01P *Estate of Christina Kik deceased v OHIM*, judgment of 9 September 2003, not yet reported (language use in EU institutions and bodies).

C. Provisions of the Draft Constitutional Treaty

Article I-2

('values')

The Union is founded on the values of respect for human dignity, liberty, democracy, equality, the rule of law and respect for human rights. These values are common to the Member States in a society of pluralism, tolerance, justice, solidarity and non-discrimination.

Article I-3

('the Union's objectives')

...

3 ...

The Union shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced.

Article I-46

...

2. The Union institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society.

...

4. No less than one million citizens coming from a significant number of Member States may invite the Commission to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing this Constitution.

...

Article III-3

In defining and implementing the policies and activities referred to in this Part, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

Article III-12

The languages in which every citizen of the Union has the right to address the institution or advisory bodies ... and to have an answer, are those listed in Article IV-10. ...

Article III-181

[essentially – as Article 151 EC *without*, however, the requirement of unanimity]

Article III-339

The Council of Ministers shall adopt unanimously a European regulation laying down the rules governing the languages of the Union's institutions, without prejudice to the Statute of the Court of Justice.

Article IV-10

The Treaty establishing the Constitution, drawn up in a single original in the Danish, Dutch, English, Finnish, French, German, Greek, Irish, Italian, Portuguese, Spanish, Swedish, Czech, Estonian, Latvian, Lithuanian, Hungarian, Maltese, Polish, Slovak and Slovenian languages, the texts in each of these languages being equally authentic, shall be deposited in the archives of

...

D. Selected Submissions to the Convention

CONV 495/03, 'Freiburg Draft of a European Constitutional Treaty', 20 January 2003

Article 11

1. The Union acknowledges the multitude of languages as part of the cultural heritage of the Union.

2. Every citizen of the Union and every natural or legal person residing or having its registered office in a Member State may contact the institutions of the Union in any of the languages of this Constitutional Treaty and shall be entitled to a reply in the same language.

3. In Formal administrative procedures a second language shall be nominated which the affected person agrees on using as procedural language. This second language may either be English, French, German, Italian, Polish or Spanish.

4. The institutions reserve the right to establish rules on the internal working languages in their Rules of Procedure. The number of working languages must be at least three.

EBLUL, *Package for Linguistic Diversity: Three Proposals to the Convention on the Future of the European Union*, (Bilbao, 24 June 2002; see (2002) June, special edition, *Contact Bulletin*)

Article ...

1. The Community shall, within its spheres of competence, respect and promote linguistic diversity in Europe, including regional or minority languages as an expression of that diversity, by encouraging cooperation among Member States and utilizing other appropriate instruments in furtherance of this objective.
2. Community action shall particularly include:
 - Promoting exchange of experiences and good practices;
 - Facilitating cooperation and joint projects between state, regional and local authorities;
 - Promoting, where appropriate, trans-border cooperation;
 - Supporting cooperation among the organisations of civil society.
3. The Community and the Member States shall foster cooperation with competent international organisations in the promotion of linguistic diversity, in particular the Council of Europe.
4. The European Union shall endeavour to ensure that no EU policies or measures are adopted or applied in ways that are detrimental to the linguistic diversity of Europe.
5. In order to contribute to the achievements of the objectives referred to in this Article, the Council:
 - Acting in accordance with the procedure referred to in Article 251, after consulting the Economic and Social Committee and the Committee of the Regions, shall adopt incentive measures, excluding any harmonisation of the laws and regulations of the Member States;
 - Acting by a qualified majority on a proposal from the Commission, shall adopt recommendations.

Europa Diversa (available at <http://www.linguapax.org/pdf/europadiversa2.pdf>)

... Europa Diversa –

...

Propose the following to the Convention on the Future of Europe, the institutions of the European Community and the governments of its member states:

1. Including in the Treaty establishing the European Community an article on the safeguarding and promotion of linguistic and cultural diversity in Europe. This might be either an entirely new article or a revised and expanded form of Article 151 (Culture). It would make more explicit both the commitment to linguistic as well as cultural diversity, and the need for an active policy in this area. ...
2. Amending Article 13 of the Treaty establishing the European Community to include discrimination based on language. ...
3. Putting into place a multiannual Community action programme to support and promote linguistic diversity. This programme would give practical effect to the principles enshrined in the proposed article (see point 1 above). ...
4. Extending all current EC language programmes, or actions that are language-specific, to cover all autochthonous European languages. ...
5. Establishing a public debate to reform the rules governing the languages of the institutions of the Community and enshrining the general provisions in an Article of the Treaty, (while empowering each to lay down its own language rules), so as to ensure efficiency and a substantial redistribution of the very large budget of the present arrangement. ...
6. Ensuring that the principle of subsidiarity is reflected in matters of language policy, so that all tiers of government work together, with sufficient resources, in order to safeguard linguistic diversity. ...