

1.1. Language as a Right in International Law : Limits and Potentials

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1. Introduction

The question of language is fundamental in human society because *homo sapiens* are, by definition "language animals". Language also plays a central role in terms of economic opportunity and success, since the dominance of one language in a State will be advantageous in terms of access to and distribution of public resources to individuals who have greater fluency of the official or majority tongue. Those who have a different primary language will often be seriously disadvantaged.

Yet it is impossible for a State to be absolutely neutral in terms of linguistic preferences. All governments must use at least one language for the conduct of their affairs and to communicate with their population. By preferring an official, national or dominant language, the State is also at the same time giving an advantage and favouring those individuals who are fluent in this official, national or dominant language (s).

The reality in most countries of the world is of course that some part of the population, what is usually a linguistic minority, has a language which is different from the official or dominant language, which often means that individuals can be disadvantaged by a government's choice of official or preferred language(s).

At the same time, international human rights law, and especially non-discrimination, are founded on the recognition of the importance of the human person's dignity and worth. These rights are based on tolerance of human differences, whether it involves language, religion or ancestry.

That is what could be described as the basic premise of human rights, of States operating within a democratic framework. Tolerance of human differences permits the peaceful coexistence of individuals who have diverse ethnic and linguistic backgrounds. But this does not mean in practice that any demand in language matters must be accepted by the State, regardless of the costs or practical difficulties this may raise. At the same time, it also means that States do not have *carte blanche* as to how they can disadvantage or even exclude individuals through linguistic preferences.

2. Conflict and Interest within States

There must be a balance between the different interests involved, such as the disadvantages or burdens for individuals these linguistic choices create, but also the legitimate state interests and concerns such as those of a practical nature where a state tries to provide services in minority languages but may be restricted because of the lack of financial or human resources.

This balance can and must be based on principles of tolerance, coexistence and integration. Integration does not mean trying to eliminate human differences, but rather taking them into account and accommodating them to the extent possible and practical so that individuals may be able to participate in the life of the community to which they belong as well as of the larger national community.

This balancing of interests can be found in documents which explain the obligations of governments such as the United Nations' *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities*, the *Oslo Recommendations Regarding the Linguistic Rights of National Minorities*, and the Council of Europe's *Framework Convention on the Rights of National Minorities*. They are all part of a process to increase understanding and respect for human rights which are anchored upon principles of tolerance, coexistence and integration. It is in this spirit that the rights of linguistic and other minorities must be seen.

These documents should therefore be understood as involving the direct application of certain rights such as non-discrimination on the basis of language in international law. For example, the *Oslo Recommendations* deal among other things with the right to have access to state services or to communicate with public entities in a minority language where members of a minority are in "significant numbers". If the number of people who use a minority language is too small, it is not unreasonable for a government not to provide for access to state services or communication with public entities in this minority language. But if the number of speakers of a minority language is "significant", a State's refusal to provide public services in their language would appear unreasonable, and therefore discriminatory, since it denies them a benefit or advantage that is available to others: the benefit of public services in their own language.

But non-discrimination does not mean that a State cannot have an official or preferred language. The right of non-discrimination based on language means that while it is quite legitimate to be more favourable towards an official language(s) or national language, there are situations where you may also have to use an additional language.

This and other rights represent an attempt to reach a proper balance between the different interests of individuals who belong to minorities and of the State. They do not involve a loss of sovereignty or threat to unity. On the contrary, they may help avoid tensions and conflicts involving language issues in a number of countries.

Unfortunately, a weakness of many political systems, including democracies, is that rules relating to language (and to a lesser extent religion) are often designed to

win the political support of the majority of a State's population. In other words, a democratic government by its very nature tends to represent in its legislation and actions the attitude and interests of the majority or its representatives, as well as their language and religion.

Generally speaking, the dynamics of ethnic tension leading up in some cases to actual conflicts involving language occur not where language compromises are made or language rights are recognised, but where they have been avoided, suppressed or ignored when a major segment of a State's population is composed of a linguistic minority. Countries likely to be the setting for conflicts are those where members of ethnic groups feel that they are being discriminated against, treated unfairly, or denied rights and opportunities allowed to members of the majority.

This chapter considers how some human rights may circumscribe a State's margin of manoeuvre in all of its activities. It is not only a question of a government being convinced to adopt a flexible policy towards its minorities. There are also in some cases minimum human rights standards that must be respected, as reflected in documents such as the United Nations' *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities*, the *Oslo Recommendations Regarding the Linguistic Rights of National Minorities*, and the Council of Europe's *Framework Convention on the Rights of National Minorities*. The latter the minority involved the higher the level of rights they are entitled to. The human rights approach for language policies in multi-cultural and multi-ethnic societies could prove particularly appropriate to a large diversity of situations by providing a flexible formula applicable to all democracies, established and aspiring.

This also provides some clues on how one can predict areas of problems where language tension is more likely. Although probably an oversimplification, the following factors should be considered in trying to identify some kind of early warning system: demographic importance of a minority and its geographic concentration; proximity and status of a kin-state; geopolitical considerations; historical grievances of linguistic minority or majority; threats to existing language or autonomy rights; factors accentuating community boundaries (religion, script); is the minority "national" or the result of recent migration, and; integration of linguistic minorities.

International human rights standards that impact on language policies should be emphasised as appearing fairly clear in a number of areas:

- (a) restrictions that exclude use of a particular language in private affairs (privately-operated newspapers, radio or television stations, signs, etc...) are a violation of freedom of expression.
- (b) a ban on privately-operated and financed schools using a minority language as the medium of instruction, or prohibition of names or first names in non-official languages, or restrictions on any other use of their language by members of a linguistic minority, would likely be either a violation of freedom of expression and/or Article 27 of the *International Covenant on Political and Civil Rights*, as well

as corresponding provisions in OSCE principles and other international instruments.

- (c) when a linguistic group is sufficiently large, State services should be available in those areas where members of this group represent a substantial part of the population, even if they are not the majority. Failure to do so is a violation of the right to equality and non-discrimination based upon language. This does not imply that a State must declare every minority language as official, but there is a minimum level of services, increasing progressively as the percentage of the minority population rises, that must be offered in a minority language if the right to non-discrimination is to be respected.

It must also be pointed out that the above are minimum standards : a State is always free to extend far more generous measures for its linguistic minorities if it feels it is appropriate or required in their particular case.

As far as State language policies in any type of government activities, use of a particular language by State officials, functions and documentation have a highly visible impact on employment opportunities, since it signifies that those who do not master this language will find government jobs largely inaccessible. The basic principle that would seem applicable in this area appears to be the "sliding-scale" approach inherent in arriving at a reasonable policy that does not discriminate on the basis on language. This would require, in general, the more generous policies when dealing with large and geographically concentrated linguistic minorities, to progressively lesser rights in language matters as the size of the minority decreases.

3. The Continuing Evolution of Language Rights

It is increasingly evident that in recent years international law has developed in such a way that governments no longer have *carte blanche* in relation to language policies and planning. They have legal and political – even moral – obligations to not only respect, but in some cases use other languages and even promote others. The reasons for this are diverse, but mainly follow three basic trends :

1. Human rights instruments (individual rights)
2. Protection or promotion of linguistic diversity
3. Protection of endangered languages

The first trend involves international legal obligations which can best be described as involving individual human rights, including particularly those of minorities or indigenous peoples. The second in some documents or treaties – and in this category you have in particular the *European Charter for Regional or Minority Languages*,

consider that linguistic diversity itself is worthy of protection. They are not interested in individuals or their rights, and seek instead to impose obligations on governments to take steps to try to support and use these languages as far as is possible. A final third trend that has become more noticeable in recent years, and especially from UNESCO, involves attempts to save some of the most threatened languages in the world. All three of these strands potentially restrict in some way the kind of language decisions and preferences of all governments.

The existence of three different categories of treaties dealing with 'language rights' may initially seem illogical, but it is important to keep in mind that international law involves treaties created by governments over a period of time for different reasons, and because of this language issues have been dealt with different objectives in mind in a number of distinct documents.

If one starts with the third category, the reasons for adopting specific instruments for the legal protection of endangered languages are in a way very simple. Many of the world's minority or indigenous languages are threatened with more or less immediate extinction. The 6,000 or so languages in the world are extremely different, some only spoken by a few individuals, and other spoken of course by hundreds of millions. The rate of language extinction has increased dramatically in the last few hundred years. It seems that at least one language disappears every two weeks, and that more than half of the world's languages will probably be lost within four generations.

- Over 50 % of the world's 6,700 languages are seriously endangered and liable to be lost within 1 to 4 generations.
- At least one language disappears every two weeks

There are a few treaties such as the two here that are part of the rather timid response in international law to the extinction of so many languages. For example, UNESCO has the 2003 *Convention for the safeguard of intangible cultural heritage*¹ which only really provides support for short term projects and specific aspects of heritage of international interest, and only those proposed by governments occasionally. In other words, it does not create any rights to use indigenous languages, it is left to the discretion of national governments to submit occasionally some kind of proposal for specific action which can then be supported – usually financially – by the UNESCO Fund for this purpose. There is also the 1992 *Convention on Biological Diversity*² also only covers the endangerment of linguistic diversity when connected to the biological diversity and not as directly for most languages. It has no really impact or consequence to same languages from extinction.

The second category of treaties where you can find some kind of language protection in international law is more general and in a sense applies to almost all lan-

¹ Paris, 17 October 2003.

² Rio de Janeiro, 5 June 1992.

guages, and these are treaties that aim to protect and promote linguistic diversity, not only those that are endangered. This kind of treaty does not create any individual rights for persons who speak an indigenous or minority language, but it does create obligations for governments that have ratified the treaties to take steps in favour of languages.

This is very well developed in Europe with the *European Charter for Regional or Minority Languages*. It explains that each language should be treated in terms of its use by a government, in a way that reflects the situation of each language: in other words essentially following the principle of proportionality. There is another treaty that also covers linguistic diversity generally, and that is the *UNESCO Convention on the Protection and promotion of the diversity of cultural expressions*.³ It is very different from the treaty in Europe and really is not useful for most languages: whereas the *European Charter* can be used to guarantee some degree of right to education in minority languages, the *UNESCO Convention* cannot. Like the treaty on intangible heritage, it creates some obligations on states to protect and promote linguistic diversity, encourage translations and permits UNESCO to be involved in many activities to promote linguistic diversity, such as the International Mother Language Day, and other activities, but that is about the maximum of what the treaty provides for. Frankly, it is rather minimal and is of little or no consequence for most languages in the world in practical terms. While it is certainly a good development, it is still very weak and cannot be used in order to claim any substantive language rights.

Finally, there is the first category of 'language rights' in international law which involve in fact human rights treaties which – through individual rights such as freedom of expression, non-discrimination and others – can be used by individuals in areas of language choice and usage. These documents are quite different from the other categories of treaties of international law. They do not deal with languages at all: they give rights to individuals, including individuals who are members of minorities or indigenous peoples that sometimes, often indirectly, have a linguistic dimension. Additionally, these types of language rights from these human rights treaties are not well established: they are still developing and being clarified as the next section will try to demonstrate.

4. International Human Rights Standard and Language

4.1. Standards Relating to the Private Use of a Language

State conduct which prevents or controls the use of a particular language in private activities can be in breach of a number of rights that are already well established in

international law, or that are increasingly being recognised in a variety of bilateral and multilateral treaties and other documents. Generally speaking, state attempts at regulating the language used in the private sphere, be they in commercial activities, in publications, in meetings or cultural events, etc. could be in violation of the right to private and family life, freedom of expression, non-discrimination or the right of persons belonging to a linguistic minority to use their language with other members of their group.

4.1.1. *To Speak or Write in a Minority or Non-official Language*

To forbid family members from using a minority language among themselves would be in breach of the right to private and family life, in addition to breaching freedom of expression. Article 27 of the *International Covenant on Civil and Political Rights*, and would also in all probability be a form of discrimination.⁴ To prevent individuals from using a minority (or any) language in private would also be against most of the above rights recognised in international law.

To ban the private use of a minority language in public areas (such as prohibiting individuals from having a private conversation in their language in public streets or in a public park, etc.) also breaches freedom of expression and Article 27, and is probably discriminatory. Many international treaties and other documents dealing with human rights or the rights of minorities have a provision where this right is at least implied.

Furthermore, it would seem clear that a state cannot forbid individuals from using a minority (or any) language in private correspondence or communications (including in private business or commercial correspondence, by telephone, electronic means, etc.). Such an attempt would breach a number of rights recognised as international standards, including freedom of expression, right to private life, non-discrimination, and the non-denial of a person's right to use their own language with other members of their group in the case of a minority in provisions such as Article 27 of the *International Covenant on Civil and Political Rights*.

There are of course possible limitations permitted depending on the nature of the right or freedom involved. For example, some restrictions are permitted to freedom of expression where necessary for purposes of public health. However, in a general sense none of the permissible limitations under international law would allow for a blanket prohibition on the private use of a particular language for correspondence or communication.

4 See *Ballanyne, Davidson and McIntyre v. Canada*, United Nations Human Rights Committee Communications Nos. 359/1989 and 385/1989, 31 March 1993 and *Love-lace v. Canada*, United Nations Human Rights Committee Communication 24/1977, UN Document A/36/40.

A number of treaties and other international documents also contain a direct reference to such a right.⁵

4.1.2. *Names and Toponymy*

The private use in areas of an individual's name as well as private topographical descriptions are also protected in international law.

In the case of an individual's name and surname, the right is clearly recognised as a part of the right to private and family life.⁶ It is also likely part of the rights of ethnic and linguistic minorities under Article 27 of the *International Covenant on Civil and Political Rights* and is contained in a number of international and regional treaties and other documents dealing with minorities.⁷ A state cannot prevent an individual from having a name or surname which is not on an official language or not contained on a prescribed list. Names and surnames constitute a means of identifying persons within their families and the community, and as such are an inseparable part of private and family life.

This right does not mean a state is obliged to officially register an individual's preferred name or surname. As long as individuals are not prevented by the state from using their preferred names or surnames privately, there may not be a violation under the above rights.⁸ Nevertheless, state conduct of this type could be deemed as discrimination, as will be explained in a later section.

In addition, it would seem that the private use of topographical names in a particular language cannot be prohibited by a state. This would constitute a violation of freedom of expression, and possibly Article 27 of the *International Covenant on Civil and Political Rights* if it involves a minority language. A number of treaties and other international or regional documents directly mention such a right.⁹

5 Including paragraph 32.5 of the *Document of the Copenhagen Meeting of the Conference on the Human Dimension*, and Article 10 of the *Framework Convention for the Protection of National Minorities*.

6 *Coeriel and Aurik v. Netherlands*, United Nations Human Rights Committee, Communication No. 453/1991, U.N. Doc. CCPR/C/52/D/453/1991 (1994); *Burghartz v. Switzerland*, European Court of Human Rights, judgment of 22 February 1994, 18 E.H.R.R. 101.

7 See Article 11 of the *Central European Initiative for the Protection of Minority Rights*, and Article 11 of the *Framework Convention for the Protection of National Minorities*.

8 See *Guillot v. France*, European Court of Human Rights, 52/1995/558/644, judgment of 24 October 1996, and *Stjerna v. Finland*, judgment of 25 November 1994, Series A no. 299-B.

9 Article 14 of the *Central European Initiative Instrument for the Protection of Minority Rights*, and Article 11 of the *Framework Convention for the Protection of National Minorities*.

While a government cannot ban the private use of topographical or place-names in a particular language, it does not mean the state itself must officially recognise or use these names or designations as is shown in the section dealing with official toponomy.

4.1.3. Displays in a Particular Language (and Script)

Treaties such as the *Framework Convention for the Protection of National Minorities* clearly show that "every person belonging to a national minority has the right to display in his or her minority language signs, inscriptions and other information of a private nature visible to the public".¹⁰

In addition to these specific guarantees, freedom of expression includes the right to linguistic expression. Individuals – including minorities – therefore have under this heading the right to use their language of choice in private "expression" activities under this freedom. This includes outdoor commercial signs and posters.¹¹ This applies to the language used in the private display of signs, posters, etc of a commercial, cultural or even political nature.

It should be emphasised that the right to use a particular language does not prevent the state from requiring some use of an official language in conjunction to that language if it does not prevent the actual exercise of this right.¹²

Since language is a constituent of freedom of expression, the private use of a particular script, including the script of a minority language (Cyrillic, Greek, Latin), is protected. A particular script is a component of a language.¹³

4.1.4. Media, Telecommunications and Languages

Members of a minority – or users of any other language – cannot be prevented from publishing privately in their own language. Recognition of this right is found in many treaties and other documents.¹⁴

- 10 Such as Article 11 of the *Framework Convention for the Protection of National Minorities*.
- 11 *Ballantyne, Davidson and McInyre v. Canada*, United Nations Human Rights Committee Communications Nos. 359/1989 and 385/1989, 31 March 1993.
- 12 See *Ballantyne, Davidson and McInyre v. Canada*, United Nations Human Rights Committee Communications Nos. 359/1989 and 385/1989, 31 March 1993.
- 13 See specifically on this point de Vareannes, Fernand (1996), *Language, Minorities and Human Rights*, Martinus Nijhoff, The Hague, Section 4.6. See also D.A.V. College, *Bhatinda v. State of Punjab* (1971) 2 S.C.R. 261 (India) and the *Special Report No. 345/97 on Freedom of Expression* of the Human Rights Ombudsperson for Bosnia and Herzegovina of 2 April 1997 regarding a proposed law on language and alphabet.
- 14 Including Article 9 of the *Framework Convention for the Protection of National Minorities* and Article 11(2) of the *European Charter for Regional or Minority Languages*.

Furthermore, media and publication activities fall squarely within the realm of freedom of expression. It is also likely protected under Article 27 of the *International Covenant on Civil and Political Rights* and similar provisions.

There is no state obligation to provide financial assistance or resources to make publishing in a particular or minority language possible. However, if states provide financial or material assistance to private publication activities, others must be entitled to such assistance in conformity with the right to equality and non-discrimination.

In general, it can be said that a state which attempts to prevent the use of a particular language in private radio or television broadcasting would clearly be in breach of a right recognised in international legal and political documents.¹⁵ Such a restriction would also be breaching freedom of expression, would in all likelihood constitute a form of discrimination, and may very well be inconsistent with Article 27 of the *International Covenant on Civil and Political Rights* and similar provisions.

4.1.5. *Private Educational Activities and Languages*

Minorities have a long recognised right to create and operate their own educational facilities.¹⁶ This includes the right to use their language as medium of instruction in private schools.

This right is not absolute: states may still require that all minority students learn the official language up to a reasonable level of fluency.¹⁷ States may also impose “non-linguistic” standards as to the quality of instruction. While states would have the obligation to officially recognise the validity of the education received in these facilities (diploma, university admission, etc.) as long as educational quality standards are met, there is no general obligation to provide financial or other support for these facilities. If states do provide financial or material assistance to private schools, other educational facilities – including those of minorities – would have to be entitled to such support in a non-discriminatory manner. There is widespread recognition of this right in legal and political documents.¹⁸

15 Article 18 of the *Central European Initiative Instrument for the Protection of Minority Rights*, Article 9 of the *Framework Convention for the Protection of National Minorities*, and Article 11(3) of the *European Charter for Regional or Minority Languages*.

16 See for example *Advisory Opinion on Minority Schools in Albania*, (1935) Permanent Court of International Justice, Series A/B, No. 64, 3, at p. 17.

17 Article 17 of the *Central European Initiative Instrument for the Protection of Minority Rights*, paragraph 34 of the *Document of the Copenhagen Meeting of the Conference on the Human Dimension*, and Article 14 of the *Framework Convention for the Protection of National Minorities*.

18 Including Article 16 of the *Central European Initiative Instrument for the Protection of Minority Rights*, paragraph 32.2 of the *Document of the Copenhagen Meeting of the*

4.1.6. Languages and Religious Activities

A prohibition by the state on the use of a particular language during religious worship or other religious practices would be in breach of specific provisions in a number of international documents,¹⁹ as well as freedom of expression. It could furthermore constitute a form of discrimination, and be inconsistent with the international obligations under Article 27 of the International Covenant on Civil and Political Rights and similar provisions if it involves a minority language.

In the same way, when a particular religious ceremony also involves an official act as can be the case in marriage rites, a state cannot prevent the use of a language during the private part of the ceremony. To do so would constitute a breach of freedom of expression, and possibly a breach of private and family life. It would in all likelihood also involve a denial of the rights of individuals to use their own language with other members of their minority group.

4.1.7. Language Use and Private Economic Activities

As in other private activities, a state cannot prevent an individual from using their preferred language in the economic field. This means that private persons cannot be prevented from using a particular or non-official language in private business relationships.²⁰

It is clear that legislation or restrictions that would exclude the use of a minority language between an employer and his or her employees, between employees, between a business owner and a client, or on the advertisements or posters put up as part of private commercial activities, would be a violation of freedom of expression.²¹

A state may nevertheless validly require that the official language in addition to a particular language be used in private commercial activities in some cases. If a state adopted measures requiring the use of an official language, but not excluding the use of a minority language, then both languages could be used and there would generally not be a breach of freedom of expression in these business activities.²²

Conference on the Human Dimension, and Article 13 of the *Framework Convention for the Protection of National Minorities*.

19 See Article 12 of the *Central European Initiative Instrument for the Protection of Minority Rights* and paragraph 32.3 of the *Document of the Copenhagen Meeting of the Conference on the Human Dimension*.

20 Article 13 of the European Charter for Regional or Minority Languages.

21 *Human Rights in the Republic of Estonia*, Raimo Pekkari and Hans Danelius, Special Rapportsurs (1991), in *Human Rights Law Journal* Vol. 13, No 5-6, 236-256, at p. 241, and *Ballantyne, Davidson and McIntyre v. Canada*, Communications Nos. 359/1989 and 385/1989, 31 March 1993.

22 *Ballantyne, Davidson and McIntyre v. Canada*, Communications Nos. 359/1989 and 385/1989, 31 March 1993.

There are however situations where the requirement to use an official language in conjunction with the preferred language of an individual or corporation in private economic activities could be prohibited. For example, a requirement that all of the employees of a private business be able to speak perfectly the official language would in all likelihood be an unreasonable demand and therefore discriminatory. Furthermore, in the case of smaller businesses, a bilingualism requirement could more likely be seen as a discriminatory measure than for large businesses. Such a requirement imposes on those who prefer a non-official or minority language an additional burden: they must hire additional or new employees in order to comply with the requirement, may have to translate documents at their own expense in both languages, etc.

With larger commercial activities, a bilingualism requirement in the workplace is not a heavy or cumbersome burden, but it can be for much smaller operations. In the balancing act between the national interests of protecting and promoting the official language and the burden or disadvantages this imposes on some individuals, it could be unreasonable, and therefore discriminatory, to impose such requirements on smaller commercial enterprises.

4.1.8. *Languages and Private Organisations*

Attempts to prevent the use of a minority language in the activities of private groups or organisations, such as cultural societies, minority associations, etc., would constitute a breach of freedom of expression as well as be a form of discrimination.

A state could nevertheless require that a private group or organisation keep its financial records and other types of official documentation in an official language, but must not prevent the group or organisation from also keeping these same documents in their own language. This attempt to prevent the use of a minority language would not only be a breach of freedom of expression, it would also probably be a form of discrimination and, in the case of a linguistic minority, a probable violation of Article 27 of the *International Covenant on Civil and Political Rights*, as would also be any attempt by the state to prohibit the use of a minority language during meetings or other activities of private groups or organisations

The same could be said about restrictions affecting political parties or associations. These are not part of the administrative structure of the state and therefore cannot be prevented from using a minority language if they so desire, even during elections. Their activities are therefore part of the private domain, even if heavily regulated by the state. A prohibition on the use of a particular language would therefore be in violation of freedom of expression, Article 27 of the *International Covenant on Civil and Political Rights* (in the case of a minority language), as well as probably discriminatory.

4.2. Standards Relating to the Public (State) Use of a Particular Language

There is a growing legal acceptance that states have the obligation to provide public services, benefits and privileges in the language of a minority or non-official in appropriate circumstances, essentially where the numbers and geographic concentration of the speakers of a minority language make it a reasonable conduct. The *Framework Convention on the Rights of National Minorities* and the *European Charter for the Regional or Minority Languages* both describe how these standards can be applied by public authorities in some specific areas. Furthermore, an increasingly large number of documents contain political commitments in relation to the obligation of public authorities to use minority languages in appropriate situations. Examples include documents of the United Nations and the Organisation for Security and Co-operation in Europe.

4.2.1. Use by Administrative and Public Authorities in General

Many treaties and international instruments dealing with the rights of minorities contain at least impliedly the concept of a "sliding-scale" approach as a proper response to the use of the language of minorities by public authorities. The *Central European Initiative Instrument for the Protection of Minority Rights* (Article 13: "whenever in an area the number of persons...reaches...a significant level"), the *Framework Convention for the Protection of National Minorities* (Article 10: "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...",) and the *European Charter for Minority or Regional Languages* (Article 10: "within the administrative districts...in which the number of residents...justifies the measures specified below and according to the situation of each language"), to name but a few, all recognise that there is a gradation that must be respected as to what constitutes the degree at which public authorities should use a minority language. While these documents refer specifically to minority or regional languages, the same principles could be extended to any non-official – or even official – language under the prohibition of discrimination on the ground of language.²³

Essentially, this "sliding-scale approach" requires that where public authorities at the national, regional or local levels face a sufficiently large number of individuals who use a minority language, these authorities must correspondingly provide an appropriate level of service in this language.

For example, in the case of local districts and their administration where minorities are concentrated, local authorities should generally provide for an increasing level of services in their language as the number of speakers of that particular language

23 See on this point Ballantyne v. Canada.

increases. Beginning at the lower end of what will be called a “sliding-scale model”, and moving to a progressively higher end, this would imply:

1. making available widely used official documents and forms for the population in the non-official or minority language or in bilingual versions;
2. the acceptance by authorities of oral or written applications in the non-official or minority language;
3. the acceptance by authorities of oral or written applications in the non-official or minority language, and response thereto in that language;
4. having a sufficient number of officers, who are in contact with the public, in place to respond to the use of the non-official or minority language;
5. being able to use the non-official or minority language as an internal and daily language of work within public authorities.

Not to provide an appropriate, i. e. “sliding-scale”, response could also be a form of discrimination as to language. Individuals whose fluency in a state’s official language is generally lower than that of a native user of the language favoured by public authorities would experience a disadvantage. In some situations, especially where it is relatively simple for public authorities to accommodate to some degree the language of a large minority, not to use their language as is “appropriate” in the circumstances could be deemed to be unreasonable or arbitrary in light of the disadvantages caused, and therefore discriminatory.

4.2.2. *Public Education and Minority and Other Languages*

It is increasingly accepted that where appropriate or reasonable, a minority (or any other language) language must be used to some degree as a medium of instruction in public schools.²⁴

Furthermore, where a substantial number of students of a particular language group are concentrated territorially, it would be unreasonable – and therefore a breach of non-discrimination – for a state not to use their language as medium of instruction in public schools as appropriate. In other words, equality and non-discrimination in public education may require the use of a particular language as medium of instruction to some degree because of the disadvantage suffered by members of a minority who are less fluent in the official language of the state.

There is also the recognition that public education in a particular language must not exclude instruction of the official language. Everyone must be able to learn the official language to a reasonable degree of fluency. To do otherwise would represent

²⁴ For example, Article 4 of the *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, Article 17 of the *Central European Initiative Instrument for the Protection of Minority Rights*, Article 14 of the *Framework Convention for the Protection of National Minorities*, and Article 8 of the *European Charter for Regional or Minority Languages*.

the creation of "linguistic ghettos" or exclude minorities and others from employment or educational opportunities – which would in turn constitute a discriminatory policy.

However, where the speakers of a particular language are concentrated but their numbers are not sufficient to make it possible to use their language as medium of instruction in public schools, they must at the very least be taught their language if this is practical.

4.2.3. *Judicial System and Proceedings*

A number of treaties and non-legal documents recognise the need to use a minority or non-official language to an appropriate level in the judicial system. For example, one of the more detailed treaty provisions that apply a sliding-scale model to this area is Article 9 of the *European Charter for Minority or Regional Languages*. The treaty describes the need to increase the use of a minority language in criminal, civil and administrative tribunal proceedings where "the number of residents... justifies the measures", and then goes on to describe in detail how this can be done in criminal, civil and administrative proceedings.

The language used during court proceedings and by officials is also an issue of state endorsed "disadvantage" affecting individuals who are not as fluent as native speakers of the official language. In some situations, because of the scale of this disadvantage, it may be discriminatory not to provide for some appropriate degree of use of the non-official language by judges and other court officials. Once again, what this implies is the application of a sliding-scale model which takes into account these disadvantages and a state's resources and ability to respond in a reasonable way.

Most treaties dealing with human rights also include a provision on the right to an interpreter in certain situations. Any accused, including persons belonging to minorities, has the right to an interpreter in criminal cases for the translation of proceedings, including court documents, if s/he does not understand the language used in criminal proceedings.²⁵

This right does not depend on "practical" considerations, such as the number of speakers of a minority other language, or their territorial concentration in a state. It is an absolute right which cannot be set aside once it has been shown that an accused does not understand the language of proceedings.

There is also the right to be informed promptly in the case of a criminal accusation which is universally recognised.²⁶ This is a "linguistic" right available to members of minorities, as well as any other individual. Public authorities must in this situation use the language of the accused, although once again this is limited to situations

25 *Isop v. Austria*, Application 808/60, 5 Yearbook of the European Convention on Human Rights 108; *Dominique Guesdon v. France*, Communication No. 219/1986; *Kamarsinski v. Austria*, judgment of 19 December 1989, European Court of Human Rights.

26 *Brojick v. Italy* (1989) European Convention on Human Rights, Series A, No. 167.

where an individual does not understand the language used by state official in criminal charges.

In the case of civil ceremonies conducted by public officials exercising state authority, individuals who belong to a minority and users of a non-official language can only claim a right to the use of its language where they are territorially concentrated and sufficiently concentrated to make it unreasonable for the state not to respond to their preference. This is recognised under the "sliding-scale" approach which provide for the use of a minority language by authorities in public services where minorities are concentrated in sufficient numbers.²⁷ It also involves the application of the right of non-discrimination.

4.2.4. *Official Use of Names and Toponymy*

The right to private and family life mentioned earlier does not oblige public authorities to use or officially recognise an individual's name or surname in a minority or non-official language. Such a refusal could nevertheless be seen as a discriminatory practice if it is deemed to be unreasonable. Since some individuals are denied a benefit or privilege enjoyed by others (the benefit or privilege of having their name recognised and used by public authorities in their own language), there is a distinction as to language that could be argued as unreasonable and therefore discriminatory. A number of treaties and other documents specifically make reference to this right.²⁸

In the case of official toponymy, both legal and political international documents now seem to recognise that it is "reasonable" for states to accommodate the language of minorities and others where they are territorially concentrated in sufficient numbers. The name of towns, geographical places, even street or road names in a non-official language must be used, usually in conjunction with the official language, by local and regional authorities.²⁹

4.2.5. *Public Media and Non-official Languages*

Like other types of state service, benefit or activity, the involvement of the state in public media must conform to the requirements of non-discrimination. Public authorities must adopt a sliding-scale model: if the state controls, operates or finances

²⁷ See Article 13 of the *Central European Initiative for the Protection of Minority Rights*, Article 11 of the *European Charter for Regional or Minority Languages*, and Article 10 of the *Framework Convention for the Protection of National Minorities*.

²⁸ There are among others Article 11 of the *Central European Initiative Instrument for the Protection of Minority Rights*, and Article 11 of the *Framework Convention for the Protection of National Minorities*.

²⁹ Including Article 14 of the *Central European Initiative Instrument for the Protection of Minority Rights*, Article 11 of the *Framework Convention for the Protection of National Minorities*, and Article 10(2)(g) of the *European Charter for Regional or Minority Languages*.

any media, they must do so in a non-discriminatory fashion and generally reflect in the time and resources allocated the relative demographic importance of linguistic minorities and speakers of any other language.

This view of non-discrimination, as well as the provisions of some human rights treaties and political commitments in a number of documents, suggest that an appropriate and reasonable policy by public authorities involves the "sliding-scale model", based on the numerical importance of the speakers of a language, their location and geographic concentration, etc.

The distribution of radio and television frequencies by the state to private parties and decisions linked to broadcasting licensing are also issues that may face minorities and the speakers of other languages. If a state refuses to license or grant frequencies to private media such as radio and television broadcasts which use these languages, or make it very difficult to obtain, this could constitute a form of discrimination by public authorities.

Airwave frequencies are not part of the private realm, which means that public authorities are not legally obliged to grant a private broadcasting frequency every time it is demanded by a minority under international standards such as Article 27 of the *International Covenant on Civil and Political Rights*.

However, the European Court on Human Rights in *Informationverein Lentia and Others v. Austria*³⁰ pointed out that public authorities, when exercising their regulatory powers by allocating airwave frequencies, had to observe their obligations under international legal instruments. Thus, this means that a state must consider a minority's or other linguistic group's right to communicate with its members in its language, via the airwaves.

In a state where public authorities favour exclusively the majority or official language, the linguistic and cultural needs of speakers of other languages are qualitatively and quantitatively disregarded. Such a policy could be discriminatory, and probably a violation of Article 27 of the *International Covenant on Civil and Political Rights* in the case of minorities, if individuals find themselves unreasonably excluded or disadvantaged in terms of operating private stations using their language.

When the number of speakers of a particular language is fairly large in an area, to refuse a private radio or television licence for broadcasting services in their language would appear unreasonable, and therefore discriminatory, since it denies them a benefit or advantage that is available to others, namely the benefit of radio or television programmes in their own language.

4.2.6. *Political Representation, Languages and the Electoral Process*

A law or other state measure which excludes individuals from being candidates or from holding an elected public position because they do not speak the official language could constitute an unreasonable, and therefore discriminatory, restriction.

30 Case 36/1992/381/455 - 459.

In light of the importance of a free and democratic process open to all citizens, the exclusion of individuals because of the linguistic preferences of public authorities is an extremely serious measure which would likely be prohibited in most situations as discrimination as to language.³¹

Similarly, the denial of the right to vote because of insufficient fluency in the official or other prescribed language would almost certainly constitute a violation of discrimination as to language, since it excludes individuals who are only or mainly fluent in a minority language or other language from the right or benefit of voting because of a language distinction.³²

It should be pointed out that neither freedom of expression, nor the limited non-discrimination provision of the *European Convention*, guarantee a right to use a particular language in official state activities connected to the electoral process. In the case of the registration of a political party, the European Court of Human Rights has indicated there is no unqualified obligation for public authorities to accept such a document.³³

However, under a general non-discrimination provision such as contained in Article 26 of the *International Covenant on Civil and Political Rights* or Protocol 12 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*,³⁴ this type of function is an example of an administrative activity by public authorities. When dealing with a numerically important or territorially concentrated minority, it could be described as unreasonable for public authorities not to use a particular language to some degree. This means that under the sliding-scale model of what is "reasonable" or "appropriate", public authorities would have to use a particular language in terms of proceeding with the registration of documents and in other aspects of the electoral process as may be required in consideration of what is non-discriminatory.

Another situation where similar issues can occur involves an elected parliament, assembly, chamber or municipal government which may have a number of restrictions on the use of languages for official deliberations. Even within these political institutions, there are rights which have a significant effect in what the state can or cannot impose in terms of language preferences. For example, under general non-discrimination guarantees such as Article 26 of the *International Covenant on Civil and*

31 Previous attempts by national minorities to obtain the right to use of their language in the electoral process, such as in *Fryske Nasionale Partij v. Netherlands* (1986) 45 Decisions and Reports 240, at p. 243, by claiming a state is obliged to respect their freedom of expression have failed at the international or European levels because the electoral process is part of the "public" sphere and not a private activity.

32 This is referred to in *Mathieu-Mohin and Clerfayt*, (1987) European Convention on Human Rights, Series A, No. 113.

33 *Fryske Nasionale Partij v. Netherlands* (1986) 45 Decisions and Reports 240 (European Commission of Human Rights), at p. 243.

34 Rome, 4 November 1950.

Political Rights and Protocol 12 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, to ban an elected politician from using a non-official language during meetings or sessions of Parliament, the National Assembly, or other level of government, such as a municipality, could be discriminatory.

To prohibit or prevent the use of a particular language during sessions of a municipal council (either by an elected politician or a member of the public) would be unreasonable if a significant proportion of the population of this municipality. According to the "sliding-scale" approach, it would be a form of discrimination not to respond to the exclusion or disadvantage imposed on individuals who are speakers of this non-official language and not to accommodate the use of their language where this is practical and feasible. This does not signify that every language must be accommodated in every situation.³⁵ The costs and difficulty of providing, for example, translation must be taken into account in determining whether not using a language is discriminatory in a particular context.

In view of the fundamental role and prominence of political activities in a democratic setting, it would seem that political institutions should be flexible in taking measures to permit the use of a non-official language in order to ensure the effective participation of minorities and others in public affairs.³⁶

5. Conclusion

There would seem to be well-established human rights in international law that not only incorporate some form of language rights – even if in many cases this is rather indirect – which can have a considerable impact in addressing and responding to language tensions and the legitimate demands of minorities. These include the basic principle of non-discrimination on the ground of language; the recognition of the right of members of a linguistic minority to use their language amongst themselves, and freedom of expression. When properly applied and understood, these rights provide a flexible package consistent with traditional democratic principles and

35 In the situation where elected politicians were prevented from taking up their office for refusing to take a parliamentary oath in Dutch in *Mathieu-Mohin and Clerfayt*, 1987) European Convention on Human Rights, Series A, No. 113, at p. 25, the European Court on Human Rights essentially concluded that such a linguistic requirement affecting the principles embodied in Article 3 of the *First Protocol of the Convention for the Protection of Human Rights and Fundamental Freedoms* could not be deemed to be unreasonable, and therefore discriminatory.

36 See Article 10(2)(c) & (f) of the *European Charter for Regional or Minority Languages*, and paragraph 35 of the *Copenhagen Meeting of the Conference on the Human Dimension*.

conductive to greater stability within a State and throughout the international community.

No State has unfettered discretion in regard to restrictions or conditions affecting the language used by public authorities or by private individuals. In the latter situation, a State cannot generally prevent individuals from using their language of preference in private affairs. Whilst the value of a unifying bond created by a common language cannot be dismissed, some type of accommodation and balance must be reached even when it involves the language used by public authorities if a State has a substantial number of individuals who do not have the official or dominant language as their primary tongue. The disadvantage and burden imposed on these individuals when a State prefers a language not their own may be discriminatory if it cannot be justified through objective and rational criteria after due account is taken of the number of people disadvantaged, their geographic concentration, etc. Whilst there is no universal formula applicable to every situation or magic recipe on how to identify the appropriate language response by a government, the first step may be to recognise the importance of finding a proper balance between the requirements of nation-building and the reality of the presence, within the boundaries of many countries, of large groups of individuals speaking a non-official or non-dominant language. It is generally when individuals are subjected to discrimination, denied freedom of expression, are unable to use their language, or cannot obtain an appropriate degree of use of their language by public authorities as suggested by a growing number of international documents, that a minority or ethnic problem is created.

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