
The Tower of Babel: Human Rights and the Paradox of Language

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Abstract

Key human rights instruments and leading scholars argue that minority language rights should be treated as human rights, both because language is constitutive of an individual's cultural identity and because linguistic pluralism increases diversity. These treaties and academics assign the value of linguistic pluralism in diversity. But, as this article demonstrates, major human rights courts and quasi-judicial institutions are not, in fact, prepared to force states to swallow the dramatic costs entailed by a true diversity-protecting regime. Outside narrow exceptions or a path dependent national-political compromise, these enforcement bodies continuously allow the state actively to incentivize assimilation into the dominant culture and language of the majority. The minority can still maintain its distinct language, but only at its own cost. The slippage between the promise of rights and their actual interpretation carries some important political and economic benefits, but the resulting legal outcome does not provide the robust protection of diversity to which lip service is paid. Importantly, the assimilationist nature of the jurisprudence is not indifferent to human rights. However, instead of advancing maximal linguistic diversity as a pre-eminent norm, the regime that is applied by judicial bodies supports a different set of human rights: those protecting linguistic minorities from discrimination, and promoting equal access of the group to market and political institutions. The result is a tension between two human rights values: pluralism and equality.

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If ... the ends of men are many, and not all of them are in principle compatible with each other, then the possibility of conflict – and of tragedy – can never wholly be eliminated from human life, either personal or social. The necessity of choosing between absolute claims is then an inescapable characteristic of the human condition.

Isaiah Berlin¹

At the beginning, the whole world had one language and a common speech. But since the Tower of Babel, or at least so the story goes, languages have been scattered over the face of the whole earth. This raises a question: what is the function of language and is there a benefit to the multiplicity of languages or is diversity merely an historical accident? Human rights law seems conflicted on the answer.

Major human rights instruments and leading scholars identify two key social values of language: for individuals, language is constitutive of cultural identity (we are what we speak), and for society, linguistic pluralism increases diversity. Since language is central to identity, one's freedom to use one's language is seen as 'inherent' in the 'dignity of the human person', and thus falls within the ambit of human rights law.² Because minority groups are more vulnerable in society, they are at a greater risk of losing their languages, and thereby also their distinct identity. Should this happen, injury would be borne both by the minority *and* by the entire society. For heterogeneity in languages has a positive value: it reflects and enhances cultural diversity, which, in turn, 'enriches the world'.³ Having decided both that diversity is a positive good and that international human rights law has a role in promoting it, major treaties and leading scholars take the position that the regime ought to enforce the right of linguistic minorities to maintain a high level of linguistic separatism.⁴

¹ Isaiah Berlin, *Two Conceptions of Liberty* (1958), at 54.

² On the tie between dignity and human rights see, e.g., Preamble, International Covenant on Civil and Political Rights (ICCPR), 1966 ('these rights derive from the inherent dignity of the human person'); Preamble, Universal Declaration of Human Rights (UDHR) 1948 ('inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world').

³ Steiner, 'Ideals and Counter-ideals in the Struggle Over Autonomy Regimes for Minorities', 66 *Notre Dame L Rev* (1990–1991) 1539, at 1550. In fact, diversity is 'as necessary for humankind as biodiversity is for nature': Art. 1 UNESCO Universal Declaration on Cultural Diversity. The value placed on diversity and the idea of equal respect to difference in human rights law is also legalized in the principle of equal protection. See, e.g., ICCPR, Art. 21 or Art. 22; UN Charter Art. 55(c); UDHR, Art. 2; Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, Art. 14; American Convention of Human Rights, 1978, Art. 1.

⁴ See, e.g.: Art. 27 ICCPR ('the right to use [minority's] language'); Art. 2 UN Declaration on the Rights of Persons Belonging to National or Ethnic or Religious Minorities 1992 ('the right to use [minority's] language'); The European Charter for Regional or Minorities Languages ('the right to use a regional or minority language in private and public life is an inalienable right conforming to the principles embodied in the UN International Covenant on Civil and Political Rights, and according to the spirit of the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms'); Art. 10 Framework Convention for the Protection of National Minorities ('every person belonging to a national minority has the right to use freely and without interference his or her minority language, in private and in public, orally and in writing'); Art. 7(1) of the Universal Declaration on Linguistic Rights, UNESCO, Universal Declaration on Linguistic Rights, Art. 7(1) (1996) ('[a]ll languages are the expression of a collective identity and . . . must therefore be able to enjoy the conditions required for their development'). Prominent scholars and advocates make a similar claim. See, e.g., Brownville, *Re the Mackenzie Valley Pipeline Inquiry: Considerations of Public International Law Concerning the Rights of the Dene and Inuit as the Indigenous Peoples of the North West territories of Canada*, Opinion 9 (Mar. 1976) (language rights must

There is, however, another and perhaps more obvious perspective on the function of language. This function could be called communicative.⁵ In this view, language is above all an instrumental tool for communication, and linguistic homogeneity facilitates market cooperation and political unification. Here value is assigned to the smooth operation of the market and the political state, and linguistic diversity is seen as generally imposing costs rather than benefits to society. This is the natural reading of the Tower of Babel story: when God says, 'Come, let us go down and confuse their language, so that they will not understand each other' (Genesis 11:7), he does so in order to impose the cost of confusion, not to bestow the gift of diversity.

In spite of the language of treaties and the writings of scholars, I show in this article that human rights adjudicatory bodies do *not*, in fact, protect language as constitutive of identity and culture, or in order to encourage diversity. Instead it is the second approach – the communicative – that is actually advanced by these courts and quasi-judicial institutions. The former conception demands strong rights of protection, while the latter inclines toward fair terms of assimilation.

I explain the gap between the broad statements of the discipline and actual judicial practice through the courts' deference to the state and its cost considerations, as well as a functional interest in stability. Following through on the commitment of mainstream human rights treaties and scholars to protect minority language as a mode of self-expression would require making linguistic differences costless to minorities,⁶ so that the economic and political opportunities open to minority language speakers

receive strong protection because 'when cultural and linguistic identity or character is lost or degraded, the change . . . [is] irreversible'); Hannum, 'Minorities, Indigenous Peoples, and Self-Determination', in L. Henkin and J.L. Hargrove (eds), *Human Rights: An Agenda for the Next Century* (1994), at 1, 8 ('the international community has agreed that greater and more specific protection for rights of particular concern to minorities and other groups is needed. Each of the more detailed rights reinforces the essential right . . . to protection of physical integrity and identity. . . . The right to enjoy one's own *culture* is integral to one's sense of identity'); Skutnabb-Kangas and Phillipson, 'Introduction', in T. Skutnabb-Kangas and R. Phillipson (eds), *Linguistic Human Rights: Overcoming Linguistic Discrimination* (1994) ('[L]inguistic rights should be considered basic human rights').

⁵ Different authors also refer to these two functions of language that I term the 'identity constitutive' and 'communicative'. But they use different names and give these two functions slightly different contents. E.g., Patten, 'Liberal Neutrality and Language Policy', 31 *Philosophy & Public Affairs* (2008) 363, at 365; Patten, 'Political Theory and Language Policy', 29 *Pol Theory* (2001) 691, at 691–692 (2001) (differentiating between the 'common public language' and the 'language maintenance' models); Berman, 'Nationalism Legal and Linguistic: The Teachings of European Jurisprudence 1520–1521', 24 *Int'l L and Politics* (1992) 1515 (differentiating between a 'greater deference to linguistic community identity' and a greater deference 'to state power'). While not discussed in this article, David Laitin and Rob Reich also talk about a third function of language in relation to children. Laitin and Reich recognize that minority groups may possess certain linguistic rights to language maintenance. But they also argue that the children of these minority groups deserve the opportunity to learn the language of the dominant society and, if they so wish, to assimilate later as adults. This right of the child can be grounded in autonomy interests, in fair equality of opportunity interests, and also on fair terms of assimilation: see Laitin and Reich, 'A Liberal Democratic Approach to Language Justice', in W. Kymlicka and A. Patten (eds), *Language Rights and Political Theory* (2003), at 80.

⁶ I took the phrase of 'making difference costless' from J.E. Halley, *Split Decisions: How and Why to Take a Break from Feminism* (2006) writing in the context of sex harassment and sexual minorities.

would be comparable to those available to the speakers of the majority language with similar characteristics. But, in practice, international human rights enforcement bodies are not prepared to force states to swallow the dramatic cost, financial and otherwise, associated with a robust diversity-protecting regime. In particular, they are not willing to do two things: to allocate the costs of maintaining linguistic difference to the state, and to force the state affirmatively to protect linguistic heterogeneity in the market place by imposing private costs.

In this context of a linguistic *laissez-faire* policy in the market, courts and quasi-judicial institutions only accommodate the language of minorities in three narrow ways.

First, they provide minorities with procedural protection against irrational prejudice that is based on their language status, and they accommodate certain fundamental human rights that are not language-specific but that have an expression in language. This protection is thin and is focused on the needs of individuals rather than groups; it has a strong due process component. Secondly, they accommodate minority languages *en route* to assimilation into the dominant language and culture of the state. Protection here is more robust, but is transitory in nature and is geared towards incentivizing the minority to become ‘like us’ (the majority). A third and final circumstance in which courts protect minority language rights is when doing so is necessary to uphold a pre-existing political compromise between the majority and one or more minority groups. This protection is perpetual and thick. But the scope of positive accommodation is limited and reflects politics and the specific history of the country rather than human rights; it is granted only to the minorities that were part of the original political settlement.

Outside these narrow exceptions, the human rights courts and quasi-judicial institutions continuously allow the state to incentivize assimilation into the dominant culture and language of the majority. The only time they require the state to internalize the cost of linguistic difference is as a transitory measure to assist during the acculturation of the minority. In short, human rights law puts in place strong incentives and pressures toward linguistic and cultural assimilation.

Importantly, the assimilationist character of the jurisprudence does not abandon diversity. These international human rights enforcement bodies may still privilege diversity; they are just not willing to ask the state to pay for it (even if this means that some minority languages will disappear).

Similarly, the assimilationist nature of the law-in-action does not simply support statism at the expense of indifference to human rights. Given that the state is not required to distribute resources based on linguistic distinctions in the market sphere, market pressures will naturally drive society towards linguistic homogeneity. Without intervention in the market to ensure that minority language speakers find employment in significant economic markets, members of the minority who cannot communicate in the majority language might fall behind in the larger economic and political hierarchies of the state. The human rights courts and quasi-judicial institutions ask the state to internalize some of the costs involved in transitioning these individuals into the dominant language of the state and the market. In this strategy of equal opportunity for minorities and majorities groups, these intentional enforcement bodies privilege the normative cause of equality – what the International

Covenant on Civil and Political Rights' preamble calls 'the equal and inalienable rights of all members of the human family'.⁷ The result highlights a tension between two human rights values: pluralism and equality (defined in terms of access of the minority). Ultimately, international courts and quasi-judicial institutions fall on the side of the latter.

To make my claim, I systematically examine the way in which the United Nations Human Rights Committee ('UNHRC'), and the European Court of Human Rights ('ECtHR') dispose of cases bearing on language. I selected these two institutions because they are the most significant international human rights enforcement bodies operating today.⁸ Both also create rights that are judicially enforceable by individual submission and that lead to decisions that are of general application.

To supplement the discussion, I also briefly draw on the protection of language rights under two domestic courts: the American and Canadian Supreme Courts. I choose these two courts because they stand at opposite poles. The relevant law in the US does not recognize language rights as substantive rights and guarantees only negative liberties that prohibit government interference with one's language under the First Amendment.⁹ But the law does offer limited positive linguistic protection, either to help non-English speakers to transition into a monolingual mainstream, or to meet other goals such as due process or perhaps even political participation. The relevant law in Canada (the Canadian Charter of Rights and Freedoms), like US law, protects a number of negative liberties, including freedom of expression, freedom of association, natural justice, and a right against discrimination based on membership of a linguistic community.¹⁰ But the Canadian Charter also undertakes actively to preserve and promote Canada's two 'official languages', French and English, and to protect the positive rights of English- and French-speaking citizens, even when they are a minority. Canadian French and English speakers have the right to use their language in some courts and legislatures, to receive federal government services in

⁷ ICCPR, *supra* note 2.

⁸ The jurisdiction of the UNHRC has become 'a key component in the human rights movement': R. Mackenzie, C. Romano, Y. Shany, and P. Sands, *The Manual on International Courts and Tribunals* (2009), at 427. The ECtHR, in turn, is considered 'a success story': *ibid.*, at 356, and 'has become a source of authoritative pronouncements on human rights law for national courts that are not directly subject to its authority': A.M. Slaughter, *A New World Order* (2004), at 80. While I also examined the practice of the Inter-American Court of Human Rights (IACtHR), there were insufficient cases to justify its inclusion in this study.

⁹ For a detailed discussion of the treatment of minority languages under the American legal system see a series of articles by Cristina Rodríguez: e.g., 'Language and Participation', 94 *California L Rev* (2006) 687, at 709–718; 'Accommodating Linguistic Difference: Toward a Comprehensive Theory of Language Rights in the United States', 36 *Harvard Civil Rights-Civil Liberties L Rev* (2011) 133; 'Language Diversity in the Workplace', 100 *Northwestern U L Rev* (2006) 1989.

¹⁰ The regulation of any language in Canada may constitute a violation of a universal right under the Canadian Charter of Rights and Freedoms, including, *inter alia*, freedom of expression (s. 2(b)), equality (s. 15), the right to a fair trial (s. 14), or the right to counsel (s. 10). Importantly, while language is not specified as a prohibited ground of discrimination under s. 15(1) of the Charter, it is 'clear that irrational or discriminatory treatment based on language will be forbidden under the clause': Woehrling, 'Minority Cultural and Linguistic Rights

those languages, and, when numbers warrant, to have their children educated in their mother tongue.¹¹

I examined all the cases and communications that reached the UNHRC and the ECtHR from their inception to January 2012 in two main areas of conflict: (i) whether the state must facilitate the use of minority language in court proceedings by providing free translators; (ii) whether the state must subsidize parents' choices concerning the main language in which their children are educated in public schools. In total, I surveyed a little short of 200 communications and cases.

1

Both the UNHRC and the ECtHR adopt a rights avenue to language issues. But the nature of the rights provided is different.

The laws to which the UNHRC is expected to adhere under the International Covenant on Civil and Political Rights (ICCPR) guarantee a direct and absolute right to the use of a minority language. Article 27 of the ICCPR provides that 'persons belonging to . . . minorities shall not be denied the right . . . to enjoy their own culture, [and] . . . to use their own language'.¹² This directive is framed in negative terms – people 'shall not be denied the right' to their language. However, the UNHRC, the body charged with interpreting the ICCPR,¹³ has made it clear that Article 27 calls for a positive 'legislative, judicial or administrative' commitment on the part of the state 'to protect the identity of a minority'.¹⁴ Similarly, prominent human rights scholars have also argued in favour of enforcing such a strong affirmative right that contains, in the words of one scholar, 'no limitations'.¹⁵

and Equality Rights in the Canadian Charter of Right and Freedoms', 31 *McGill LJ* (1985–1986) 50. In addition, s. 27 – guaranteeing that the Charter shall be 'interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians' – in combination with s. 15 (equality) promises minority language speakers the potential of a set of more 'ambiguous' (*iid.*, at 54) language rights.

¹¹ Ss 13–16 of the Charter. For a detailed analysis of the Canadian language rights regime see, e.g., Réaume, 'Official Language Rights', in L.I. Rotman, B. Elman, and G.L. Gall (eds), *Constitutional Law Cases, Commentary and Principles* (2008), at 1272–1311; A.-G. Gagnon and J. Tully (eds), *Multinational Democracies* (2001), in particular chapters 2, 5, 6, 9, 10, and 13.

¹² ICCPR, *supra* note 2, Art. 27.

¹³ The UNHRC is charged with offering "'authentic" interoperations' of the ICCPR: Weller, 'The Contribution of the European Framework Convention for the Protection of National Minorities to the Development of Minority Rights', in M. Weller (ed.), *The Rights of Minorities in Europe* (2005), at 621. In terms of mechanism, the UNHRC adjudications are not binding on states, but are highly significant recommendations. In addition, the UNHRC is empowered to entertain individual complaints only under the Optional Protocol (which means that the state must consent to its jurisdiction). This Protocol has 114 states parties, and the USA is not one of them but Canada is. For more on the working of the UNHRC see Mackenzie *et al.*, *supra* note 8, at 415–431.

¹⁴ General Comment 23 on Minority Rights, 'The Rights of Minorities', A/49/40, I (1994) 107, s. 6.1. The implications of Art. 27 were further elaborated in the 1992 UN Declaration on the Rights of Persons Belonging to National or Ethnic or Religious Minorities. The Declaration is '[i]nspired by the provisions of article 27' (Preamble). Art. 2 replaces the negative formulation of Art. 27 of the ICCPR with a greater readiness to accept the collective rights of minorities: '[p]ersons belonging to . . . linguistic minorities . . . have the right to enjoy their own culture . . . and to use their own language'.

¹⁵ Sohn, 'The Rights of Minorities', in L. Henkin (ed.), *The International Bill of Rights – The Covenant of Civil and Political Rights* (1983), at 285. See also, e.g., P. Thornberry, *International Law and the Rights of Minorities* (1991), at 197 ('the function of Article 27 is to go . . . toward a more positive notion of

The laws that the ECtHR is supposed to enforce under the European Convention on Human Rights (ECHR) simply make discrimination on the basis of language in the enjoyment of one of the rights enshrined in the Convention a suspect classification.¹⁶ The Convention does not include any specific minority rights or any general standards for the use of language.¹⁷ In recent years, however, the ECtHR has greatly expanded the scope of the provision,¹⁸ and has developed a 'burgeoning' minority rights jurisprudence.¹⁹ In addition, the ECtHR had confirmed that positive action can be justified under Article 14 to redress situations of systemic disadvantage that are brought about by a history of discrimination.²⁰ Indeed, the Court had previously interpreted Article 14 as a provision that requires positive action to promote material equality when it dealt with some of the other prohibited classifications under Article 14, including race,²¹ religion,²² gender, and age.²³ In theory, the Court could also expand Article 14

conservation of linguistic identity'); Henkin, 'Introduction', in Henkin, *supra* this note, at 21 ('[Article 27 should not be confused with] . . . rights, for all persons . . . Article 27 gives additional protection to the . . . linguistic needs of minorities'); de Witte, 'Language Rights: The Interaction between Domestic and European Developments', in A.L. Kjaer and S. Adamo (eds), *Linguistic Diversity and European Democracy* (2011), at 168 (Art. 27 provides 'explicit protection' to linguistic minorities); F. Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities* (1979), at 22 ('at least in the field of culture, the states are under a duty to adopt specific measures to implement Article 27').

Other authors, however, give a negative interpretation of Art. 27: see, *inter alia*, F. de Varennes, *Language Minorities and Human Rights* (1996), at 217–218 ('Article 27 only affords a minimal guarantee of non-interference'); Anghie, 'Human Rights and Cultural Identity: New Hope for Ethnic Peace?', 33 *Harvard Int'l LJ* (1992) 341, at 344 ('Article 27 only requires the state to desist from interfering with minorities wishing to practice their own culture'); Hannum, *supra* note 4, at 5 (Art. 27 as 'minimalist . . . text').

¹⁶ ECHR, Art. 14 ('The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as . . . language').

¹⁷ In the words of the Court, 'Linguistic freedom as such is not one of the rights and freedoms governed by the Convention': App. No. 59894/00, *Bulgakov v. Ukraine*, (2007), at 9, 11.

¹⁸ For discussion on the transformation of Art. 14 see, e.g., O'Connell, 'Cinderella Comes to the Ball: Art 14 and the Right to Non-Discrimination in the ECHR', 29 *Legal Studies* (2009) 211; Cuenca, 'Prohibition on Discrimination: New Content (Art. 14 ECHR and Protocol 12)', in J. Garcia Roca and P. Santolaya (eds), *Europe of Rights: A Compendium on the European Convention of Human Rights* (2012), at 467–485.

¹⁹ Gilbert, 'The Burgeoning Minority Rights Jurisprudence of the European Court of Human Rights', 736 *Hmn Rts Q* (2002) 736, at 738. Indeed the ECtHR has held that Member States are under an obligation to uphold 'international standards in the field of the protection of human and minority rights': App. Nos 25316–25321/94 & 27207/95, *Denizci v. Cyprus*, 2001-V ECtHR 225, 317 (emphasis added).

²⁰ App. No. 34369/97, *Thlimmenos v. Greece* (2000) established the precedent that Art. 14 not only imposes negative obligations on states, but also puts positive obligations to provide more favourable treatment of collectivities that are in situations of historical disadvantage. The Court held that the right to non-discrimination was also violated 'when states, without an objective and reasonable justification failed to treat differently persons whose situations were different'. After *Thlimmenos*, the Court used the doctrine of the right to different normative treatment in several other judgments, but without finding an Art. 14 violation. Finally, in 2006, in App. Nos 65731/01 and 65900/01, *Stec and Others v. UK* (2006), at paras 51–64, the Court used the *Thlimmenos* precedent to justify the adoption of positive action measures intended to favour socially disadvantaged collectives.

²¹ App. No. 57325/00, *D.H. v. Czech Republic* (2007), at para. 175 ('indeed in certain circumstances as failure to attempt to correct inequality through different treatment may in itself give rise to a breach of the Article').

²² *Thlimmenos v. Greece*, *supra* note 20, at para. 44.

²³ *Stec v. UK*, *supra* note 20.

to mean positive commitment in matters bearing on language, and some prominent scholars have argued that it should do so.²⁴

According to the standard account of both the UNHRC and the ECtHR, the rights of minorities to use and preserve their own languages derive from two of the essential functions mentioned above: the identity-constitutive and diversity-providing natures of language. For example, in its authoritative interpretation of Article 27 ICCPR, the UNHRC explained that the right of a minority to ‘enjoy and develop . . . [its] culture and language’ is ‘directed towards ensuring the survival and continued development of the cultural . . . identity of the minorities concerned, thus enriching the fabric of society as a whole’.²⁵ Similarly, in *D.H v. Czech Republic*, the ECtHR, acting as a Grand Chamber, noted that the ‘obligation to protect’ the ‘identity’ of the minorities under Art. 14 is ‘not only for the purpose of safeguarding the interests of the minorities themselves but to preserve a cultural diversity of value to the whole community’.²⁶ The US Supreme Court has also referred to the identity-constitutive role of language: ‘[l]anguage permits an individual to express both a personal identity and membership in a community’.²⁷

These two functions of language also figure prominently in the writings of leading human rights academics. For example, in his famous *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, Francesco Capotorti, the Special Rapporteur of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, explains the centrality of language to identity: the ‘dividing line between culture and language’, he notes, ‘is not as clear as it may appear’.²⁸ In fact, the international legal historian Nathaniel Berman argues that ‘for over a century [language] has been a crucial element, often *the* element, in European nationalists’ understanding of identity’.²⁹ Henry Steiner, the former Director of Harvard’s Human Rights Program, emphasized that Article 27 ‘insists on respect for difference’, and that human rights more generally is ‘hostile’ to the imposition of ‘cultural uniformity’.³⁰ For Steiner, the rationale for ‘encouraging’ cultural diversity is derivative of ‘[a] basic assumption – namely that differences enrich . . . the world’.³¹

²⁴ See, e.g., de Witte, *supra* note 15, at 172 (arguing that there is ‘no doubt’ that the ECHR includes potential protections for language).

²⁵ UNHRC, Comment 23, *supra* note 14, sect. 9.

²⁶ *D.H.*, *supra* note 21, at paras 176 and 181. For more on the link between the prohibition of discrimination and the positive interest of the Council of Europe in diversity see, e.g., Preamble, European Charter for Regional or Minority Languages (‘Realising that the protection and promotion of regional or minority languages . . . represent an important contribution to the building of a Europe based on the principles of democracy and cultural diversity’); Framework Convention for the Protection of National Minorities, Art. 5(1) (‘Considering that the creation of a climate of tolerance and dialogue is necessary to enable cultural diversity to be a source and a factor, not of division, but of enrichment for each society’).

²⁷ *Hernandez v. New York*, 500 US 352, US Sup. Ct, No. 89–7645, 1991 (upholding exclusion of bilingual individuals from jury).

²⁸ CAPORTORTI, *supra* note 15, at 99.

²⁹ Berman, *supra* note 5, at 1517.

³⁰ Steiner, *supra* note 3, at 1550.

³¹ *Ibid.*

Given the existing legal framework, we should expect that when members of minorities submit language claims before the UNHRC, the protection that is afforded them will be robust. Equally, we could reasonably anticipate that the ECtHR would be willing to expand Article 14 to provide positive protection for minority languages. Finally, we would assume that for both bodies, linguistic diversity will be the primary concern and the motivation for protection.

2

The reality is, however, quite different. In practice, the UNHRC and the ECtHR do not insist on a minority group's right to linguistic preservation. Despite large differences in the law on the books, courts in these jurisdictions converge in practice on a common standard for the protection of minority language speakers. They do not protect minority language rights as fundamental human rights in the conventional sense of necessarily constraining a state's policy within the sphere of sovereignty.³² They do, however, accommodate three different, and much narrower, interests that are not themselves language-specific: they enforce minority language accommodation as a subsidiary mechanism to realize another right, as a transitory right for linguistic assimilation, or as the outcome of a path dependent political arrangement to protect specific languages in a particular country.

I will now turn to how these interests emerge in case law. While I will provide only one or two examples for each category of protection, these cases and communications are exemplary of decision-making by the UNHRC and the ECtHR (further examples are referred to in the footnotes).

A Subsidiary Protection

In the first category, courts accommodate a minority language when doing so is necessary to promote another universally recognized human right – for example, the procedural right to a fair trial.

Consider, for example, *Guesdon v. France*,³³ a communication that came before the UNHRC and that dealt with a Breton-speaking person who was charged in French criminal proceedings. In the case, the defendant and his witnesses demanded to give evidence in Breton (a Celtic language very different from French) with the assistance of an interpreter paid by the state. But the French court denied this request, noting that the defendant and his witnesses were able to speak fluent French.³⁴ The author argued that Breton was the 'language [of their] ancestors'³⁵ and 'the language which . . . [they] normally speak'.³⁶

³² On human rights as trump see, e.g., L. Henkin, *The Age of Rights* (1970), at 4 ('human rights enjoy a prima facie, presumptive inviolability, and will often "trump" other public goods').

³³ Human Rights Comm., *Communication No. 219/1986, Guesdon v. France*, CCPR/C/39/D/219/1986 (1990).

³⁴ *Ibid.*, at 2.1–2.2.

³⁵ *Ibid.*, at 6.4.

³⁶ *Ibid.*, at 6.2.

Guesdon alleged violations of both ICCPR Article 14, a right to a fair trial,³⁷ and Article 27, minority language rights. But the UNHRC declined to consider the Article 27 allegation and instead decided the case solely on the grounds of Article 14, structuring the language component as a subset of the procedural guarantee. The decision read:

[A]rticle 14 is concerned with procedural equality . . . [T]he requirement of a fair hearing [does NOT] mandate State parties to make available to a citizen whose mother tongue differs from the official court language, the services of an interpreter, if he is capable of expressing himself adequately in the official language.³⁸

After the Committee overruled a due process violation, it ‘did not find it necessary to address . . . article 27 of the Covenant in this case’.³⁹

This move of the UNHRC is surprising. The right to a fair trial and the right to speak a minority language afford very different kinds of protections to linguistic minorities. The right to a fair trial protects minority speakers only insofar as is necessary to guarantee due process. Due process is satisfied with merely ‘adequate’ mutual comprehension between an accused and the court. The test for what constitutes an adequate level of linguistic proficiency is pragmatic; fairness dictates *only* that an accused must understand the charges against him. When the accused cannot do so unaided, a translator must be provided. But the accused does not have a right to choose the language in which he will defend himself or in which the trial will be held. This standard ties language to the value of instrumental communication alone.

In contrast, Article 27 confers on linguistic minorities a fundamental right to ‘use of their language’. The fact that protected minorities may be bilingual – as many are – is irrelevant to Article 27 protection. Were the Human Rights Committee faithful to this more robust language entitlement, it would have had, at least, to consider whether the accused should be allowed to speak in the minority language, even if he could understand the court’s majority language. *Guesdon* is not an isolated decision; the Human Rights Committee followed the same reasoning in multiple other communications.⁴⁰

In ignoring Article 27 protection, the UNHRC effectively converged on the lower standard of protection of minority language speakers in court settings that is offered by the ECHR. The ECHR does not provide a direct right to the use of minority languages equal to

³⁷ *Ibid.*, at 6.2; ICCPR, Art. 14(3)(a), (f).

³⁸ *Guesdon v. France*, *supra* note 33, at 10.2.

³⁹ *Ibid.*, at 7.3.

⁴⁰ See, e.g., Human Rights Comm., *Communication No. 323/1988, Cadoret v. France* (1991) (‘fair trial’ merely demands that the accused is ‘sufficiently proficient in the court’s language’ and ‘need not take into account whether it would be preferable for [the accused and/or his witnesses] to express themselves in a language other than the court language’: at 5.7. After the Committee found that there was no Art. 14 violation, it announced that ‘the facts of the communications did not raise issues’ under Art. 27: at 5.3.); Human Rights Comm., *Communication No. 220/1987, S.K. v. France* (1989) (no ‘irreparable harm’ to an accused that demonstrated proficiency in the dominant language of the Court and was forced to use the majority language ‘to pursue his remedy’); Human Rights Comm., *Communication No. 760/1997, Diergaardt v. Namibia* (1998) (no violation of the right to a fair trial of applicants that ‘were forced to use English throughout . . . court proceedings, a language they do not normally use and in which they are not fluent’ (para. 3.3) because they ‘have not shown how the use of English during the court proceedings has affected their right to a fair hearing’ (para. 10.9)).

that provided by Article 27 ICCPR. Instead, the ECHR requires language protection only insofar as it is strictly needed for an accused to 'understand' the charges against him.⁴¹ The test for what constitutes a sufficient level of linguistic proficiency is fairly undemanding: in *Lagerblom v. Sweden* the Court held that the accused should be able 'to have knowledge of the case . . . and to defend himself'.⁴² Thus, the *Brozicek v. Italy* decision found a violation of the right to a fair trial when the national court did not provide an interpreter for an accused who had no skill in the majority language.⁴³ But in *Isop v. Austria* the Commission dismissed an application by an accused person who had some skill in the language of the proceedings but felt that his 'knowledge of the . . . [language] . . . [was not] sufficient for a successful prosecution of his claim'.⁴⁴ Even though it was not the claimant's first and best language, the Court concluded that he suffered no irreparable procedural harm because he was able to understand the proceedings. Protection ends the moment an accused overcomes the language barrier and assimilation into the majority language has begun. The Court repeated this position in numerous other cases.⁴⁵

Interestingly, the international standard linking the protection of a minority language to due process also aligns with decisions by American courts. This is unexpected; while Article 27 ICCPR provides a seemingly absolute right to the use of minority languages and Article 14 ECHR carries at least the potential of a language right, US law recognizes no substantive language entitlements. In *United States of America ex rel. Rogelio Nieves Negron v. State of New York*, the US Court of Appeals, Second Circuit, held that the court would accommodate the accused's minority language status only as far as was needed to permit him 'to participate effectively in his own defense'.⁴⁶ As with the UNHRC and the ECtHR, the emphasis is on fairness: '[c]onsideration of fairness' in the proceedings, the judges explained, demands that the accused does not 'sit in total incomprehension as the trial proceeded'.⁴⁷ But while the defendant has a right to be 'present at his own trial',⁴⁸ he has no right to choose the language he uses in court.⁴⁹

⁴¹ See Arts 5(2) and 6(3) of the ECHR. More recently, Art. 7(3) of the Draft Protocol on Minorities proposed a general right for national minorities 'to use their mother tongue . . . in proceedings before the courts and legal authorities', but the Protocol was never adopted by the Committee of Ministers of the Council of Europe.

⁴² App. No. 26891/95, *Lagerblom v. Sweden*, ECtHR (2003), at 61.

⁴³ App. No. 10964/84, *Brozicek v. Italy*, 167 Eur. Ct. H.R. (ser. A) (1989). See also App. No. 32771/96, *Cuscani v. UK* (finding a similar violation of paras 1 and 3 of Art. 6).

⁴⁴ App. No. 808/60, *Isop v. Austria*, [1962] Yrbk Eur. Conv. on HR 108, at para. 8.

⁴⁵ See, e.g., App. No. 11261/84, *Bidault v. France* (1986); *Luedicke v. Germany*, 29 ECtHR (ser. A) (1978); App. No. 10210/82, *K. v. France*, ECommHR Dec. & Rep. 203, 207 (1983).

⁴⁶ *USA ex rel. Rogelio Nieves Negron v. State of New York*, 434 F2d 386, at 390–391 (2nd Cir. 1970) (a Spanish-speaking homicide defendant was entitled to the services of a translator and the failure to provide a translator rendered the trial constitutionally infirm). In *US v. Rosa* (946 F2d 505 (7th Cir. 1991) the Court held that if the defendant can speak some English and her language barrier is not obvious to the Court, it is up to the defendant to bring to the court's attention her inability to understand the proceedings fully.

⁴⁷ *Negron*, *supra* note 46.

⁴⁸ *Ibid.*

⁴⁹ For the courts' accommodation of language ability in civil cases see *Bank and Trust Co.*, 497 P2d 833 (Ariz. Ct. App. 1972) (the court invalidated a default judgment on the basis that the lack of English fluency caused the defendant to miss his court date).

As with the decisions of the UNHRC and the ECtHR, here, too, linguistic protection ends as soon as the person has become proficient in the majority language.

B Transitional Protection

A second circumstance in which human rights courts and other judicial bodies offer protection to minority languages is when doing so is necessary to assist minorities in their efforts to acquire the dominant language and culture. Here the courts accommodate the minority language, but only as a way to its elimination. The interest in language is purely assimilationist and transitional in nature.

Let us look at the treatment by the ECtHR of minority languages and their speakers in public schools.

In the *Belgian Linguistic Case*,⁵⁰ the ECtHR dealt with the claim of francophone parents living in Flanders. The petitioners argued that Belgium implicitly violated the rights of French-speaking minority parents by offering education in state-financed schools in Dutch only, while also withdrawing subsidies from private schools operating in French in that region. In the decision, the Grand Chamber interpreted the right to education under Article 2 of the First Protocol to mean education in the majority language (or languages, as the case may be).⁵¹ Outside the national language(s) there are no language rights in the public school system. In fact, the Court emphasized that ‘conferring on everyone . . . a right to obtain education in the language of his own choice would lead to absurd results’.⁵² But the *Belgian Linguistic* Court also provided minorities two possible exits from the regime of ‘linguistic uniformity’ in public schools: parents are free either to bus their children to schools that better reflect their linguistic and cultural preferences or to open unsubsidized private schools where they can direct the education of their children.⁵³

In subsequent cases, the ECtHR elaborated further on the terms of negative linguistic freedom in school settings. In *Cyprus v. Turkey* the Court held that the option of travel to private schools using the minority tongue as the language of instruction must be ‘realistic’,⁵⁴ meaning that students ought to be able to return home after their education is completed. More recently, the *Catan and Others v. Moldova and Russia*

⁵⁰ *Case ‘Relating to certain aspects of the laws on the use of languages in education in Belgium’*, [1968] Yrbk Eur. Conv. on HR 832 (ECommHR), at 4 (*‘The Belgian Linguistic Case’*).

⁵¹ *Ibid.*, sect. 3 (the right to education ‘would be meaningless if it did not imply the right to be educated in the national language’). See also on the same point App. Nos 43370/04, 8252/05, and 18454/06, *Catan and Others v. Moldova and Russia* (2012) (‘the right to education would be meaningless if it did not imply in favour of its beneficiaries, the right to be educated in the national language or in one of the national languages, as the case may be’); App. No. 25781/94, *Cyprus v. Turkey*, ECtHR (2001), at 51 (Art. 2 of the First Protocol ‘does not specify the language in which education must be conducted in order that the right to education be respected’).

⁵² *Belgian Linguistic Case*, *supra* note 50 at para. 13. On the same point see *Catan and Others*, *supra* note 51, at para. 137.

⁵³ For more on the right of minorities to set up private schools at their own expense, to provide instruction in their language see, *inter alia*, *Catan and Others*, *supra* note 51, at paras 143 and 144; Distein, ‘Cultural Rights’, 9 *Israel Yrbk Hmn Rts* (1979) 118; V. Van Dyke, *Equality and Discrimination in Education: A Comparative and International Analysis* (1973), at 385–389; Art 15(1)(c) of the Convention Against Discrimination in Education.

⁵⁴ *Cyprus v. Turkey*, *supra* note 51, at 278 (‘having to travel 40 kilometres each day’ is not a realistic travel time).

decision emphasized that the state cannot go out of its way to interfere with the operation of private schools in the minority language.⁵⁵

At the same time that the ECtHR protects a private zone of negative linguistic freedom for those students who opt out of public education, it also requires the state to provide transitional positive support for those minority students who *do* seek to assimilate into the dominant language and cultural practices in schools. Consider here *Oršuš v. Croatia*,⁵⁶ a case brought by Roma primary school students. These petitioners asked to integrate into public-school classes in Croatia that were taught in Croatian (the dominant language). But they were barred from joining these classes, as they failed to pass entry exams conducted in Croatian.

In deciding the case, the Grand Chamber explained that ‘the decisive factor’ of the case was the Roma students’ ‘lack of knowledge or inadequate knowledge of Croatian, the language used to teach in schools’.⁵⁷ As such, ‘the central question to be addressed’ was ‘whether adequate steps were taken by the school authorities to ensure the applicants’ speedy progress in acquiring an adequate command of Croatian’.⁵⁸ In answering this inquiry, the Court held that Croatia was under an obligation ‘to take appropriate positive measures to assist the applicants in acquiring the necessary language skills in the shortest time possible, notably by means of special language lessons’.⁵⁹ During this transitional time, Roma students could be placed in special classes conducted in Romani with only ‘supplementary tuition in the Croatian language’.⁶⁰ But the goal, the Court said, is to get them ‘quickly integrated into mixed classes’ where education ‘was in Croatian only’.⁶¹

Once again, the regime developed by the ECtHR converges with the level of protection offered by the American Supreme Court in surprising ways.

In *Lau v. Nichols*,⁶² the US Supreme Court dealt with a scenario that echoes *Oršuš*. The case concerned the failure of the San Francisco school system to provide English language instruction, or other adequate instructional procedures, to approximately 1,800 students of Chinese ancestry who did not speak English and were thus unable meaningfully to participate in the public educational programme.

Like the ECtHR decision in *Oršuš*, for the US Supreme Court public education means instruction in the majority language: ‘[b]asic English skills’, the judges explained, ‘are at the very core of what . . . public schools teach’.⁶³ But, similar to the position of

⁵⁵ *Catan and Others*, *supra* note 51, at para. 143 (e.g., students must not be subject to ‘long journeys and/or substandard facilities, harassment and intimidation’).

⁵⁶ App. No. 15766/03, *Oršuš and Others v. Croatia*, ECtHR (2010).

⁵⁷ *Ibid.*, at para. 60 (ECtHR referring to the Constitutional Court decision).

⁵⁸ *Ibid.*, at para. 145.

⁵⁹ *Ibid.*, at para. 165.

⁶⁰ *Ibid.*, at para. 60.

⁶¹ *Ibid.*

⁶² 414 US 563 (1974).

⁶³ *Ibid.* See also, e.g., *Valeria G. v. Wilson*, 12 F Supp 2d 1007 (N.D. Cal. 1998), at para. 300(c) (‘[t]he government and the public schools of California have a moral obligation and a constitutional duty to provide all of California’s children, regardless of their ethnicity or national origins, with the skills necessary to become productive members of our society, and of these skills, literacy in the English language is among the most important’); *Martin Luther King Junior Elementary School Children v. Ann Arbor School District Board*, Civ. A. No. 7-71861, US DC, Michigan, S.D. (1979) (‘a major goal of a school system is to teach reading, writing, speaking and understanding standard English’).

the ECtHR, the state is under an obligation to provide non-English speakers with limited positive linguistic protection to transition them into the monolingual system of education. And so the decision in *Lau* called on California to ‘take affirmative steps to rectify the language deficiency’ of students whose ‘inability to speak and understand the English language’ excludes them from ‘effective participation in the educational program’.⁶⁴

Yet again, much like the ECtHR, linguistic protection is narrow. Indeed in *Rios v. Read*, the US District Court announced that the state’s obligation towards the minority students ‘is not of indefinite duration’; the purpose of legal protection of minority languages in the public school system ‘is not to establish a bilingual society’.⁶⁵ In another case, *Guadalupe Organization, Inc. v. it Tempe Elementary School District No. 3*, the Ninth Circuit explicitly noted the assimilationist nature of linguistic accommodation in public schools: ‘linguistic and cultural diversity within the nation state . . . can restrict the scope of the fundamental compact. Diversity limits unity.’⁶⁶ For the court, the survival of the nation-state depends on the existence of a political culture which ‘attenuates as it crosses linguistic and cultural lines’.⁶⁷

At the same time, the US Supreme Court, like the ECtHR, couples the regime of positive transitional linguistic protection for those who seek to assimilate with a regime of linguistic tolerance in the private sphere for those who choose to opt out. And so, as early as the 1920s, the Court already rejected the states’ attempts to make it a crime to open private schools that use a minority language as the medium of instruction.⁶⁸

⁶⁴ *Lau v. Nichols*, *supra* note 62. Though the continuing validity of *Lau* is in doubt for reasons unrelated to the specific rights of linguistic minorities, the case’s commitment to protecting non-English speakers through anti-discrimination law remains valid. Following *Lau*, subsequent cases have continued to ask the state to provide transitional accommodation to minorities’ language speakers in public schools. See, e.g., *Guadalupe Organization, Inc. v. it Tempe Elementary School District No. 3* (school districts must ‘take affirmative steps to rectify the language deficienc[ies] of non-English-speaking students’); *Castañeda v. Pickard*, 648 F2d 989, 1015 (5th Cir. 1981) (‘the essential holding of *Lau*, i.e., that schools are not free to ignore the need of limited English-speaking children for language assistance to enable them to participate in the instructional program of the district, has now been legislated by Congress’) The *Lau* court left open the question what is the best affirmative help to non-English speakers (see for discussion: *Valeria G. v. Wilson*, *supra* note 63, citing *Lau*, *supra* note 62, at 563). By far the majority of decisions that came after *Lau* lean in the direction of immersion rather than bilingual education: see, e.g., *Horne v. Flores and Speaker of the Arizona House v. Flores*, 129 Sct. 2579 (2009) (‘Research on ELL instruction indicates there is documented, academic support for the view that SEI is significantly more effective than bilingual education. Findings of the Arizona State Department of Education in 2004 strongly support this conclusion’); *Valeria G. v. Wilson*, *supra* note 63, at 1007 (‘this court must conclude that the English immersion system is a valid educational theory’). For a rare example that supports a bilingual approach to language protection see *US v. Texas*, 06 FSupp. 405 (ED Tex. 1981) at 436–439. But even in this case, the decision still emphasized the transitory nature of bilingual education, at 419 (‘bilingual education is designed to fill an educational vacuum until a particular child is able to function adequately in an all-English classroom’).

⁶⁵ *Rios v. Read*, US DC, ED NY, No. 75 Civ. 296 (1978).

⁶⁶ *Guadalupe*, *supra* note 64, at 1027.

⁶⁷ *Ibid.*

⁶⁸ *Meyer v. Nebraska*, 262 US 390 (1923) (‘That the state may . . . go very far, indeed, in order to improve the quality of its citizens . . . but the individual has certain fundamental rights which must be respected. The protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue’); *Pierce v. Society of Sisters*, 268 US 510 (1925) (‘The fundamental theory

The model of linguistic accommodation developed by the ECtHR, just like the American Supreme Court, is, in short, minimal and transitional. The protection presumably lasts only as long as it is needed to prevent irreparable harm to individual students who might otherwise fall behind because of their linguistic status. Minority speakers are accommodated in the public school system, but only to promote their assimilation into the state and the market. As soon as the language barrier is overcome, the right to special linguistic support may disappear.

C Political Protection

A third and final circumstance in which courts protect minority language rights is when doing so is necessary to uphold a pre-existing path-dependent political compromise between the majority and one or more minority groups. In contrast to the interest in minority languages that is directed towards subsidiary or assimilationist ends, this third kind of protection is perpetual and very strong. But, importantly, this thick protection is afforded to only a limited number of languages, and is thus a far cry from a universal human right.

In order to introduce this category of protection, I begin by examining the way in which the Canadian Supreme Court disposes of cases bearing on language conflicts.⁶⁹

In the seminal case of *Mahé v. Alberta*⁷⁰ the Canadian Supreme Court dealt with the claim of French-speaking parents dissatisfied with the quality of the French-language schools provided by their government. They asked for a new school that would be administered by a committee of parents with an autonomous French school board. Their request was rejected and they took action against the government of Alberta. In reaching the decision, the Court upheld the position of the parents. The judges reiterated the standard account of minority language rights by emphasizing the critical role of language in cultural identity.⁷¹

Ultimately, however, the Court did not decide the case on the basis of the identity-constitutive function of language. Instead the judges explained that the protection of language rights in Canada was the result of a 'compromise'⁷² to 'preserve and

of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations').

⁶⁹ Canada is only one example. Others include, e.g., Spain, Switzerland, India, and South Africa.

⁷⁰ [1990] 1 SCR 342.

⁷¹ 'Language is more than a mere means of communication, it is part and parcel of the identity and culture of the people speaking it': *ibid.* See also on the same point, *inter alia*, *Reference re Manitoba Language Rights* [1985], 1 SCR 721, at para. 46 ('The importance of language rights is grounded in the essential role that language plays in human existence, development and dignity'); *Ford v. Quebec (Att. Gen.)* [1988] 2 SCR 712, at 40 ('Language is not merely a means or medium of expression . . . It is . . . a means by which a people may express its cultural identity. It is also the means by which the individual expresses his or her personal identity and sense of individuality').

⁷² The Court in *Mahé v. Alberta* [1990] 1 SCR 342, at s. 1 relies for support on an earlier statement by Beetz J. in a case dealing with s. 16 of the Charter, *Société des Acadiens du Nouveau-Brunswick Inc. v. Association of Parents for Fairness in Education* [1986] 1 SCR 549, at 578.

promote the two official languages of Canada, and their respective cultures, by ensuring that each language flourishes, as far as possible, in provinces where it is not spoken by the majority of the population'.⁷³ The Supreme Court repeated its position of language rights as 'expression of a valid political choice'⁷⁴ in many other cases.⁷⁵

Here, the protection of French and English is robust and is much more generous than either subsidiary accommodation of minority languages in the service of another right or transitory protection on the way to linguistic assimilation. It involves a genuine commitment of the majority to the minority language and 'places positive obligations on government to alter or develop major institutional structures' and to enact specific 'legislative schemes providing for [the] minority language'.⁷⁶ But this thick accommodation is carefully fenced and the judges are explicit about who is protected and who is not. The 'precise scheme'⁷⁷ provides positive rights only to the two official languages and their speakers. The result is a persistent inequality between linguistic

⁷³ *Ibid.*

⁷⁴ *Nguyen v. Quebec* [2009] SCC 47, [2009] 3 SCR 208, at para. 38.

⁷⁵ See, e.g., *Societe des Acadiens du Nouveau-Brunswick*, *supra* note 72 ('Language rights . . . [are] founded on political compromise'); *Nguyen v. Quebec*, *supra* note 74 ('language rights are the embodiment of a political compromise'); *AG Quebec Association of Protestant School Boards* [1984] 2 SCR 66 ('language rights are the embodiment of a political compromise'); *Whittington v. Saanich School District no 63* (1987) 16 BCLR 2d 255, at para. 25 ('Section 23 of the Charter is not . . . a codification of essential, preexisting and more or less universal rights that are being confirmed and . . . most importantly, are being given a new primacy and inviolability by their entrenchment in the supreme law of the land. The special provisions of s. 23 of the Charter make it a unique set of constitutional provisions, quite peculiar to Canada'); *Arsenault-Cameron v. The Government of Prince Edward Island* (2000), at para. 27 ('language rights resulted from a political compromise'); *Gosselin (Tutor of) v. Quebec (Attorney General)* [2005] 1 SCR 238, [2005] SCC 15, at para. 2 ([s. 23 is a] 'crafted compromise'); *Reference re Minority Language Educational Rights* (1985), 69 Nfld & PEI R 236 ('There can be little question that s. 23 was a political compromise'); *MacDonald v. City of Montreal* [1986] 1 SCR 460, at para. 117 ('language rights in Canada are "based on a political compromise rather than on principle"'); *Bilodeau v. Attorney General of Manitoba* [1986] 1 SCR 449 (s. 133 of the Constitution Act, 1867 – the language provision – guarantees a limited and precise group of rights resulting from a political compromise); *R. v. Beaulac* [1999] 1 SCR 768, at para. 24 ('constitutional language rights result from a political compromise'). The notion of a political compromise is dynamic. In a series of fascinating articles, Denise Réaume explains that when the notion of a political compromise first entered the Canadian jurisprudence, it carried a restrictive interpretation, suggesting that the reason to uphold language rights is that they have been agreed to in the political process and not necessarily because they represent fair treatment of both sides. However, over the years, the meaning of the political compromise evolved in jurisprudence in the direction of a genuine commitment to language rights whose normative foundation is accepted by both majorities and minorities as just. See, e.g., Réaume, 'Official-Language Rights: Intrinsic Value and the Protection of Difference', in W. Kymlicka and W. Norman (eds), *Citizenship in Diverse Societies* (2000), at 245; 'The Demise of the Political Compromise Doctrine: Have Official Language Use Rights Been Revived?', 47 *McGill LJ* (2002) 593, at 599; Réaume and Green, 'Education and Linguistic Security in the Charter', 34 *McGill LJ Revue De Droit De McGill* (1989) 777, at 778.

⁷⁶ *Mahe*, *supra* note 72.

⁷⁷ *MacDonald*, *supra* note 75, at para. 104. See also in *Ford v. Québec (A-G)*, *supra* note 71 ('The language rights in the Constitution impose obligations on government and governmental institutions that are . . . a "precise scheme," proving specific opportunities to use English or French . . . in concrete, readily ascertainable and limited circumstances').

communities.⁷⁸ In fact, in delivering the *Mahé* judgment, Chief Justice Brian Dickson recognized that this special status would create inequalities between linguistic groups in that ‘it accords . . . the English and the French, special status in comparison to all other linguistic groups in Canada’.⁷⁹ But this inequality is accepted precisely because it is the product of political compromise and negotiation. As the Chief Justice noted, ‘it would be totally incongruous to invoke in aid of the interpretation of a provision which grants special rights to a select group of individuals, the principle of equality intended to be universally applicable to “every individual”’.⁸⁰

This type of linguistic protection, derivative of an original political arrangement that is specific to the particular history of the country, affords protection only as a collective benefit that is attached to people who are defined as members of the linguistic group. Thus individualized decision-making as to linguistic identity is unavailable.⁸¹ Indeed French speakers in Québec were denied access to publicly-financed English language schools because they ‘are members of the French language majority’⁸² and, as such, their objective in having their children educated in English simply does not fall within the purpose of the law. Similarly, English-speaking students outside Québec were refused public education in French as they ‘do not have a constitutional right to have their children educated in French as a matter of choice’.⁸³

While the terms of the linguistic settlement afford positive protection to the French and English languages (and the normative basis of protection is generally accepted by the majority as justified), it leaves Canadian speakers of other tongues not much better protected than if they lived in a country that recognized no substantive language rights. In this situation, their language is accommodated only if it falls under the same two narrow categories – subsidiary and transitional – identified earlier. A Vietnamese immigrant to Canada is, therefore, not treated any differently under the Canadian language regime than had she lived in the USA.

What happens when such national compromises reach international human rights courts and quasi-judicial institutions? In *Ballantyne v. Canada*, certain stipulations of

⁷⁸ For more on this inequality see Woehrling, *supra* note 10, at 75 (‘It is obvious . . . that an individual whose mother tongue . . . is neither English nor French is not at a situation of equality with anglophones and francophones’). For explanations for this different treatment see Heath, ‘Immigration, Multiculturalism, and the Social Contract’, 10 *Canadian J L & Jurisprudence* (1997) 355 (‘the key point is simply that [immigrants] have no right-based claim to special institutional arrangements to protect their heritage culture as a “context of choice”’); W. Kymlicka, *Politics in the Vernacular: Nationalism, Multiculturalism and Citizenship* (2001), at 156 (‘National minorities have resisted integration and fought to maintain or rebuild their own societal culture, while immigrants have accepted the expectation they will integrate into the dominant societal culture’). For a criticism of the paradigm that differentiates between national minorities and immigrant see Rodríguez, ‘Language and Participation’, 94 *California L Rev* (2006) 687 and Rodríguez, ‘Language Diversity in the Workplace’, 100 *Northwestern L Rev* (2006) 1989.

⁷⁹ *Mahé*, *supra* note 72, at 71.

⁸⁰ *Ibid.*, at 2; see also at 369. The Court refers to this point in subsequent cases: *Sloski v. Québec* [2005] SCC 14, at para. 20; *Adler v. Ontario* [1996] 3 SCR 609; *Gosselin*, *supra* note 75, at para. 21.

⁸¹ I received inspiration here from an earlier argument by Pamela Karlan and Daryl Levinson. See ‘Why Voting Is Different’, 84 *California L Rev* (1996) 1202 (arguing that in the context of voting in the USA, race operates as an externally imposed category that leaves individual decision-making unavailable).

⁸² *Gosselin*, *supra* note 75, at para. 30.

⁸³ *Abbey v. Essex County Board of Education* (1999), 42 OR 3d 481, at 488–489.

the Canadian national bargain were challenged before the UNHRC. The communication dealt with the claim of English-speaking business owners in the province of Québec who disputed local legislation prohibiting them from using English in advertising. In its decision, the Human Rights Committee was extremely deferential to the terms of the historic compromise between the majority and minority language speakers in the country. The Committee emphasized that the objective of the Canadian government 'to protect the vulnerable position in Canada of the francophone group' is 'legitimate'.⁸⁴ Indeed, Canada is permitted to choose that only the French language will be used in 'the sphere of public life' in Québec.⁸⁵

Like the UNHRC, the ECtHR also differs to the terms of national political settlements reached between linguistic minorities and majorities on the national level. The treatment of French speakers in Belgium is a case in point.

In the 1960s to 1980s, Belgium concluded a complex set of legal arrangements that essentially divided the country into separate territories, each with a single official language.⁸⁶ This 'territorial system' created linguistic minorities within each separate territory. During the same period, French speakers living in Flemish regions brought a series of cases that contested this settlement. I will give one example to demonstrate the way in which the ECtHR upheld the terms of territorial monolingualism in Belgium.⁸⁷

*Mathieu-Mohin and Clerfayt v. Belgium*⁸⁸ concerned two French-speaking citizens who resided in the Flemish region and were elected to political positions. They had to take a parliamentary oath in Dutch, which they refused to do. They were therefore prohibited from assuming their positions and appealed to the ECtHR.

The Court denied the application and forced the petitioners to conform to the terms of the national bargain. The judges explained that the criterion used to pick the language of oath-taking 'fits into a general institutional system of the Belgian State, based on the territoriality principle'.⁸⁹ This system 'is designed to achieve an equilibrium between the Kingdom's various regions and cultural communities by means of a complex pattern of checks and balances'⁹⁰ and its 'aim is to defuse

⁸⁴ *Ballantyne, Davidson, and McIntyre v. Canada*, Communications Nos 359/1989 and 385/1989, UN Doc CCPR/C/47/D/359/1989 and 385/1989 Rev. 1 (1993), at 11.4.

⁸⁵ *Ibid.* However, the Committee held that while the public use of languages is within the control of the state, the state cannot regulate the private use of language. See also on the same point *Hoffman v. Canada*, UN Doc. CCPR/C/84/D/1220/2003 (2005) (the Committee dismissed the communication but expressed no interest in revisiting its determination that equal protection was not at issue in considering the French language requirements for commercial signs in Quebec); *Diergaard v. Namibia*, *supra* note 40 (the state can only regulate the official use of language in public administration and 'when dealing with public authorities').

⁸⁶ For the Belgian linguistic compromise see, e.g., K. McRae, *Conflict and Compromise in Multilingual Societies: Belgium* (1986).

⁸⁷ There are other examples: see, e.g., App. No. 10650/43, *Clerfayt, Legros and Others v. Belgium*, ECtHR, Judgment (Merits) Court (Plenary) 02/03/1987; *Belgian Linguistic Case*, *supra* note 50, at 7.

⁸⁸ App. No. 9267/81, *Mathieu-Mohin and Clerfayt v. Belgium*, ECtHR, Judgment (Merits) Court (Plenary) 02/03/1987.

⁸⁹ *Ibid.*, at para. 57.

⁹⁰ *Ibid.*

the language disputes in the country by establishing more stable and decentralised organizational structures'.⁹¹ This objective, the judges held, is not only 'legitimate in itself',⁹² but also 'clearly emerges from the debates in the democratic national Parliament', and 'is borne out by the massive majorities achieved in favour of the Special Act',⁹³ the legislation that made elections subject to the territoriality principle.

In short, both the UNHRC and the ECtHR are highly deferential to the kind of political community the state seeks to create and to the privileged role of language in this creation. Other authors already described language as 'the crucial criterion of nationality'⁹⁴ and an important mechanism through which collectivities, and their individual members, come to visualize themselves as a nation.⁹⁵ The two enforcement bodies protect certain fundamental human rights that are not language-specific but that map themselves to language (fair trial or the right to education are examples). But beyond these narrow accommodations, they turn over to the state the job of imagining its community, including its language, or the 'soul of the nation'.⁹⁶ The only time the UNHRC and the ECtHR recognize a strong accommodation of more than one national language (e.g., Canada or Belgium), is *after* a compromise has been achieved on the local level that defines for the Court the state's accommodation of multiple languages – that is, after the majority has already accepted the normative foundations of the language settlement. This recognition, then, is an expression of local politics and historical peculiarities rather than of support for a universal language right. A better way to think about this 'right', it follows, is as a selection mechanism for distributing scarce resources among linguistic communities.

3

There are at least two implications for language rights advocates of the gap between the broad official declarations of rights and the much narrower actual judicial practice. First, international lawyers who seek to advance language claims on behalf of minorities before international or national judicial bodies would probably do best by highlighting the communicative rather than identity-constitutive function of language. This suggests that arguments centring, for example, on access to opportunities

⁹¹ *Ibid.*

⁹² *Ibid.*

⁹³ *Ibid.*

⁹⁴ E.J. Hobsbawm, *Nations and Nationalism Since 1780* (1992), at 95.

⁹⁵ *Ibid.* See also, e.g., A. Benedict, *Imagined Communities* (1991) (describing the processes through which nations, and their nationals, come to visualize themselves through print language). For an earlier example see J.G. Herder in F.M. Barnard, *Herder's Social and Political Thought: From Enlightenment to Nationalism* (1965), at 57 (language is 'the criterion by means of which group's identity can be established. Without its own language a Volk is an absurdity (*Unding*), a contradiction in terms').

⁹⁶ Hobsbawm, *supra* note 95, at 103. And see App. No. 71074/01, *Mentzen v. Latvia* ('the official language is, for these States, one of the fundamental constitutional values in the same way as the national territory, the organisational structure of the State and the national flag. A language is not in any sense an abstract value') Repeated in *Bulgakov v. Ukraine*, *supra* note 17.

(‘ability to escape poverty’⁹⁷ and ‘possibilities for further and higher education or employment’⁹⁸) will probably lead to more favourable treatment by international courts than arguments that focus on the role of language in the constitution of the self (minority language speakers have ‘a right to expect full development of their personality through their own form of culture’⁹⁹).

Secondly, in terms of resource allocation, minorities who seek to protect their language and culture may be better off directing their energies towards battles on the national rather than international stage. The international regime is most effective once a political settlement has already been achieved at the local or national level. The persistence of discrimination against Roma pupils in Croatia after they secured a legal victory in the *Oršuš* decision provides a cautionary lesson here. The claimants won the legal battle, yet ‘[t]he situation in the schools remains the same; the majority of Romani children continue to attend Roma-only classes’.¹⁰⁰ The ECtHR held Croatia liable for the violation of the rights of Roma students. But it never addressed the private arrangements of Croatian citizens or what the judges referred to as ‘hostility’¹⁰¹ from the non-Romani parents who opposed mixed classes.

In addition to implications for advocates, there is a broader normative question underlying this entire area of law – namely, what goals ought we to serve in promoting language rights? Most importantly, is language of value primarily as a mode of cultural self-expression (the good we are protecting is diversity) or as a method of communication (the good we are protecting is the operation of the market and the political state)? These two conceptions of language are both worthy, but they cannot be easily reconciled. Universal communication between market and political actors – which is necessary for the functioning of the state and civil society – is attained by linguistic homogeneity, which pulls in an opposite direction to that of linguistic diversity. This is an impossible dilemma.

Language rights scholars and advocates square the circle by privileging the identity-constitutive conception of language over the communicative. This foregrounds the minority, the victim of violation, and the cultural realm where the minority generates its self-understanding.¹⁰² They structure an entire debate on the allocation of scarce resources among linguistic communities, without ever talking about the cost of non-assimilation. These costs are dramatic. Given finite resources within a single

⁹⁷ *Catan and Others*, *supra* note 51, at para. 125.

⁹⁸ *Ibid.*, at para. 127.

⁹⁹ App. No. 2335/64, *Inhabitants of Leeuw-St. Pierre v. Belgium*, ECommHR (1965).

¹⁰⁰ The European Roma Rights Centre’s evaluation after a visit to Croatia in June 2010. See Idaver Memedov, ‘European Court Denounces Segregated Education Again: *Oršuš and Others v Croatia*’, available at: www.errc.org/cikk.php?page=10&cikk=3613.

¹⁰¹ *Oršuš*, *supra* note 56, at 154.

¹⁰² I received inspiration here from an earlier argument made by Susan Marks in a series of articles: see, e.g., ‘Exploitation as an International Legal Concept’, in S. Marks (ed.), *International Law From the Left: Re-Examining Marxist Legacies* (2008), at 302; ‘Human Rights and Root Causes’, 74 *MLR* (2011) 57. For a discussion on the relational and mutual character of struggles between minorities and majorities see also Tully, ‘The Practice of Lawmaking and the Problem of Difference’, in O.P. Shabani (ed.), *Multiculturalism and Law: Critical Debate* (2007), at 19, 21.

economy, efforts to accommodate linguistic heterogeneity in the market sphere compete with other legitimate demands. For instance, the funds used to hire instructors to teach in multiple languages could instead be accommodating the needs of students with disabilities.

Human rights treaties and scholarship muddy this question of cost, or counter pressures for linguistic assimilation, in two separate ways. First, the emphasis on diversity as a valuable cultural asset makes cost considerations disappear. Diversity is constituted as a collective good with normative value for the whole society, such that for the average member the gains of diversity outweigh its costs. This approach conceals the direct and indirect interaction between accommodations and their price, and the fact that both the minority and the majority may have legitimate demands on the public resources. Secondly, using the vocabulary of human rights makes cost considerations irrelevant. A human right is a demand for priority;¹⁰³ the right to the use of minority languages prioritizes the linguistic interests of the minorities over the countervailing cost and policy interests of the majority.

Erasing the larger context also blurs the difference between two very different projects: protecting languages that are on the verge of extinction (for example, Breton) and protecting the languages of immigrants or other communities that suffer systematic exploitation in society (for example, the Roma). The former seeks to avoid the loss of the language at the global level. Accommodation would probably mean things such as primary education in the language that can ensure the survival of the language. But accommodation would most likely not include asking the market to operate in the near-extinct language. For the latter, the claim is about structural, economic, and political marginalization, not language-protection. For example, even if all Turks in Germany spoke nothing but fluent German, Turkish would remain a viable language. Further, even if they spoke perfect German, they might still be disadvantaged in the market place and the political state. By focusing on language preservation as a cultural right, advocates risk overlooking forms of discrimination that only seem to be about language but are really about ethnicity or religion.

Thus far, I have analysed the gulf between the general pronouncements of human rights law and the actual resolution of case law dealing with linguistic disputes, and argued that the former embodies a normative commitment to diversity while the later demands fair terms of assimilation. I now turn to offer an analytical framework that suggests at least some of the concrete policy regimes that can actualize language rights.¹⁰⁴ Each choice of language accommodation is different in the details of its

¹⁰³ See, e.g., Alston, 'Making Space for New Human Rights: The Case of the Right to Development', 1 *Harvard Hmn Rts Yrbk* (1988) 3 ('[T]he characterization of a specific goal as a human right elevates it above the rank and file of competing societal goals, gives it a degree of immunity from challenge and generally endows it with an aura of timelessness, absoluteness and universal validity'). For rights as trumping policy see R. Dworkin, *Taking Rights Seriously* (1978), at xi ('[i]ndividual rights are political trumps held by individuals').

¹⁰⁴ On the argument that the move from rights as abstract good to concrete policy proposals requires making political choices on what the good society is see Koskenniemi, e.g., 'Human Rights, Politics and Love', 4 *Mennesker & Rettigheter Nordic J Hmn Rts* (2001) 33; Koskenniemi, 'Human Rights Mainstreaming as a Strategy for Institutional Power', 1 *Humanity. An International Journal of Human Rights, Humanitarianism and Development* (2010) 47.

compromises and the stakes involved – the constituencies obliged to bear the costs of linguistic preservation, and the nature of the costs in terms of both power and resources.¹⁰⁵ While I present these possible policy responses as separate regimes, in reality the divisions between them are rarely cut and dried.

Regime 1: Preservation. In this policy regime, linguistic diversity is construed as intrinsically positive, such that it would result in a worse society were everyone to speak the same language. To bring society closer to this ideal, the state both (i) intervenes in the public sphere to support endangered languages by guaranteeing formal equality to their speakers, so that they are not subject to invidious and malicious treatment, and (ii) provides strong accommodation and remedies to private actors that use the minority language, so that they do not suffer disadvantageous outcomes in the market and civil society on the basis of their language. An example is a state which, when numbers warrant, subsidizes public education in the minority language and requires employers to hire a certain percentage of minority language speakers. From a distributional perspective, this regime is grounded in the supposition that all of society is invested in diversity,¹⁰⁶ such that *all* taxpayers within the jurisdiction are asked to pay for linguistic preservation.

Regime 2: Tolerance. In this regime, there is nothing inherently desirable or undesirable in linguistic heterogeneity; the state is neutral towards linguistic heterogeneity as a value. It picks the majority language as the sole *lingua franca* of the public sphere but tolerates linguistic multiplicity in the private sphere (possibly because the costs of eradicating it outweigh the likely benefits). As a result of privatizing all linguistic decisions in civil society and the market, the possibility of diversity is maintained in the private realm. For instance: the state would subsidize public schools that use the majority language and would permit, but not finance, the operation of private schools in other languages. Here, the minority bears all the costs of maintaining its separate language. Some of these costs are direct – for example, paying for private schools that use the minority language as the medium of instruction. Other costs are indirect – for instance, if members of the minority fail to master the majority language they may be penalized in the market place. Because of the costs associated with speaking the minority language, over time members of the minority may choose to integrate into the dominant language of the state. But the state remains passive in these processes of assimilation.

Regime 3: Assimilation. In this scheme, the state *actively* intervenes in order to incentivize assimilation into the dominant language and culture. As in a tolerance policy,

¹⁰⁵ In mapping the way in which language rights can be actualized, I have gained from Richard Wasserstrom writing in the context of racism and sexism; see ‘Racism, Sexism, and Preferential Treatment: An Approach to the Topic’, 24 *UCLA L Rev* (1976–1977) 581.

¹⁰⁶ E.g., see Grin, ‘On the Costs of Linguistic Diversity’, in P. van Parijs (ed.), *Cultural Diversity versus Economic Solidarity* (2004), at 193–196 (‘Our brief overview of the costs entailed by maintaining diversity through measures protecting or promoting smaller languages suggests that the costs involved are not massive . . . if such costs must indeed be borne in order to ensure the diversity of our linguistic and cultural environment, this may be money well spent, just like devoting resources to environmental equality is widely recognized as a sensible choice’).

the state imposes the majority language as the common language of public, but not private, communication. Thus heterogeneity in languages is maintained in civil society and the market. But now the state also takes positive steps to ensure that minorities assimilate into the dominant language. Again, a good illustration is education: the state would provide public schooling only in the national language and allow parents to opt out and to operate private schools in minority languages. But the state might also provide special accommodations – such as smaller classes, extra language lessons, private tutoring, etc. – to assist minority language speakers in mastering the majority language.

The existing international human rights regime is vague enough to sustain all three broad schemes for the protection of minority languages – preservation, tolerance, and assimilation. Ultimately, absent a pre-existing national settlement that honours a thick form of diversity, and despite significant doctrinal differences in the law on the books, the UNHRC and the ECtHR, I have argued, converge on the assimilationist regime: they allow the state actively to incentivize the assimilation of the minority into the dominant language and culture of the public sphere. In addition, they also demand that the state spend public resources both to provide narrow procedural guarantees for non-majority language speakers, such as ensuring that they are not subject to irrational bias based only on their linguistic status, and to protect the difference of linguistic minorities when language becomes an issue in other substantial (non-cultural) commitments of human rights law (e.g., due process). In this, these international enforcement bodies ask the state to bear some of the costs associated with the language transition. There is, therefore, at least some transfer of resources from the majority, whose language is being learned, to the minority that needs to acquire the majority's language.¹⁰⁷ Minorities are welcome to remain different and to preserve their separate linguistic identity; however, they must internalize all the costs of maintaining their difference.¹⁰⁸ Major human rights enforcement bodies refuse to allocate the cost of difference to the state (even if this means that some minority languages will disappear). This is very close to the American model – a regime that recognizes *no* substantive language rights and views language difference in transitional and anti-discriminatory terms. These courts and quasi-judicial institutions set a floor (which resonates with the American model) on the protection afforded to linguistic minorities; they do not set a ceiling. The state is free to give greater rights to some linguistic minorities (as in Canada), if the majority deems it appropriate in light of the state's particular historic, economic, cultural, and political constraints.

The resulting regime carries some significant economic and political benefits, reconciling communicative efficiency (which is necessary to facilitate the flow of commerce and the efficient operation of the political state) with one notion of linguistic

¹⁰⁷ For a similar argument see Philippe Van Parijs in a series of articles, e.g., 'Linguistic Justice and the Territorial Imperative', 13 *Critical Rev Int'l Social and Political Philosophy* (2010) 181.

¹⁰⁸ In thinking about the way in which the courts honour diversity only in the realm of anti-discrimination and voluntarism I benefited from Michael Waltzer's writing on pluralism, e.g., *Spheres of JUSTICE: a Defense of Pluralism and Equality* (1983).

fairness (which guarantees access on fair terms to the market and the state, ensures narrow procedural justice, and demands sharing the cost burden of language assimilation with the majority). This may have the best chance of producing politically feasible and economically practical solutions to the multiplicity of languages within a state. At the same time, the limited character of the jurisprudence is also a boon to one important cluster of human rights: rights to equality of access of the minority group in the market and in political processes. However, while the ensuing order is grounded in a normative commitment to equality of opportunities for minorities and majorities, it also permits the state actively to incentivize minorities to become 'like us'. This, clearly, does not embody diversity. Ultimately, then, the commitment of human rights to pluralism is, at best, skin deep.