Reflections on the Evolution of Language Rights

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L'auteur analyse dans un premier temps comment la langue est devenue un enjeu politique, en particulier du point de vue des théoriciens du nationalisme, et quelle a été son utilisation dans la construction de la nation, puis de l'État moderne. Dans un second temps, l'auteur insiste sur les liens tissés, tant par les théoriciens que les acteurs politiques, entre la langue comme phénomène social et la langue comme source de revendication de droits politiques et moraux.

I. Introduction

In this text, I argue that although the narrative of "rights" can be an appropriate medium through which to comprehend certain language claims today, a better way to understand how many language-related demands arise and how they are contested is, at least insofar as they are presented by sub-state national societies, through what we might call "the politics of language." The idea of language claims as part of the broader political process demonstrates the complexity of the different interests at stake across and within different language groups, a fact which makes the crystallization of these claims as "rights" claims often difficult to formulate. The sense of language as a point of deep political contestation also captures the essence of language claims as a collective activity — a fact which although not making the construction of rights claims impossible, highlights that such claims have to navigate a careful route through often conflicting individual and collective interests. Also, the notion of "the politics of language" encapsulates the extent to which language is often part of a broader set of political claims and, in particular, the ways in which language claims are tied closely to wider constitu-

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tional aspirations of sub-state national groups. In attempting to explain this idea, the text will comprise three parts. First, it will seek to tie the social activity of language to the wider phenomenon of nation-building with which it is inextricably bound. Second, it will attempt briefly to explain how issues of language fit within normative political theory and how the politics of language has metamorphosed in the age of "rights-talk" into moral claims to "language rights." Third, flowing from this second part it will show how in the past two decades efforts have been made, particularly in Europe, towards the protection and the promotion of language rights as a matter of international law. I will conclude by considering how successful such efforts to formalize language claims as positive international, and universalizable, "human rights" have been.

II. Language and Nation-Building

The central theme of the text is that language is invariably part of a broader political and constitutional agenda advanced by sub-state national societies for autonomy, representation and recognition of their national status within plurinational states.[1] It should be noted from the outset that not all language claims today are tied to the issue of nationalism, and that language claims by groups other than politically mobilized national groups may find the language of rights to be the most suitable vehicle through which to advance their political claims. There are at least four types of groups which today make language claims but which do not tie these claims to nationalism: first, minority language groups which, although territorially concentrated and long settled, feel part of the national community of the state: for example, language groups in Switzerland; Gaels in Scotland and Ireland; and francophone communities in Canada outside of Quebec, all of whom are unlikely to frame language claims through the narrative of nationalism. Second, there are immigrant groups who come to a new country with their native language and who may make claims to be able to use their language in the new state (typically, however, such claims co-exist with patterns of social integration into the host society and the acquisition of its national language as the primary language of the immigrant group). Third, a related

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[1] I develop this account more generally in *Constitutional Law and National Pluralism* (Oxford: Oxford University Press, 2004).

but perhaps different category is those groups who have come as immigrants but who have settled in such numbers and in such a degree of territorial concentration that their language survives into second and third generations; on account of this they present different kinds of claims from the classic immigrant (for example, immigrant Hispanic communities particularly in the southwest states of the USA who have joined pre-existing Hispanic territorial communities and whose language may survive as the primary language for several generations if not indefinitely). Fourth, there are those who arrive in a new state as a consequence of forced migration (*e.g.*, Russians throughout the former USSR) or as a consequence of ethnic cleansing; again these groups may bring unique and difficult language claims against their current host state.

Having distinguished these groups, the claims I will concentrate upon are those made by long settled and territorially concentrated national minorities (what I have called elsewhere sub-state national societies). Here nationalist organizations tie language claims to broader nationalist demands for enhanced political and constitutional accommodation within the state, and for some nationalists language claims are in fact made as part of a bigger strategy to secede from the state. Therefore, language claims advanced by these sub-state national societies need to be understood within the context of nation-building, a process which has so shaped the modern era.[2] There are various explanations for the emergence of the modern state; in particular, two main schools of thought — which have been called "the functionalist account" and "the perennialist account" — take up rival positions in the attempt to explain the age of the nation-state. The former tradition, also known as classical modernism,[3] saw the nation as emerging not from the prior historical or cultural attachments of a territorially settled people, but rather as a modern ideological construct created to reflect developing material conditions; the nation was a functional device which was able to mobilize a large demos within a particular territorial space, forging the citizen's commitment to the new economic enterprise of the state: the subject's

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[2] Benedict R. O'G. Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London: Verso, 1991); John Breuilly, *Nationalism and the State*, 2d ed. (Manchester: Manchester University Press, 1993); Ernest Gellner, *Nations and Nationalism* (Oxford: Blackwell, 1983); Tom Nairn, *Faces of Nationalism: Janus Revisited* (London: Verso, 1997); and Anthony D. Smith, *Nations and Nationalism in a Global Era* (Cambridge: Polity Press, 1995).

[3] Anthony D. Smith, *Nationalism and Modernism: A Critical Survey of Recent Theories of Nations and Nationalism* (London/New York: Routledge, 1998) c. 7.

loyalty to the nation would become the citizen's loyalty to the state, and in this process the very notions of state and nation would elide. On the other hand, perennialists eschew the idea of the nation as being in any sense a modern construct and, in contrast to the "civic" formulations found in functionalist accounts, posit a vision of the nation in largely ethnic and cultural terms. They hold that nations are in some sense a "natural" as well as a potent focus of human loyalty; that national identities are embedded; and that "authentic" characteristics of particular nations are capable of articulation. I would submit that the most persuasive accounts we have today of how nation-states formed in the modern age from the 16th century onwards are those which largely accept the connection between the emergence of nationalism and the functional role of the state in the development of modern capitalism, but which nuance this with an account that captures the social and psychological attachments which bound people together within particular societies.[4] In other words, the modern nation-state provided a functional base for the development of an advanced economy but the existence of already nascent national cultures in many cases helped facilitate the adherence of citizens to the nation-building project.

Although explanations for nation-building remain deeply contested, there is general agreement that language was central to the process. Every state language is an essential (in many ways *the* essential) functional device which allows for the development of an effectively functioning collective polity within which citizens can communicate with one another. It is also the case that a language shared by most or at least many of the people of a particular territory pre-dated the formation of the state in that territory and that people therefore became citizens of these new states either in the privileged position of being already attuned to the state language or to some extent marginalized by the priority of the official state language over their own mother tongue. In any event, the state needed a common language; therefore, a policy, explicit or implicit, of prioritizing one language over others was also a natural consequence of nation-building. Although this development was at times chauvinistic, it is important also to note how vital it was in the promotion of important societal goals such as the building of an efficient

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[4] Smith's own work reflects such a balance but see also Luis Moreno, *The Federalization of Spain* (London: Cass, 2001); and Ferran Requejo, "Introduction" in Ferran Requejo, ed., *Democracy and National Pluralism* (London: Routledge, 2001).

state, the promotion of literacy, *etc*. As Patten and Kymlicka have written in the introduction to their recent collection of essays on language rights: "As a practical matter, a state concerned to promote literacy is often forced to direct its energies at encouraging people to acquire some particular language ... Literacy also brings individuals into a kind of virtual contract or 'imagined community', with people in other parts of the country (and world)."[5]

In today's world, where so many commentators have begun to discuss the decline of the state and a coming "post-sovereign" age,[6] it is easy to overlook the pervasiveness and resilience of nationalism embedded within states themselves, and embodied by their official language. It is also easy to forget that at the same time as dominant national societies, institutionally secure through the legal and political facts of statehood, were able to foster their national language as the state language, considerable damage, intentional or unintentional, was done to minority nations when nation-building by the state marginalized their alternative languages and cultures. For example, the *Ordonnance de Villers-Cotterets*[7] of 1539 which privileged the French language; the 1536 *Act of Union of England and Wales* which deprived Welsh of its official status in favour of English; and the *Decreto de Nueva Planta* (new ground plan) issued by King Philip V of Spain at the beginning of the 18th century to promote the Castilian over the Catalan language. In this period, many small nations did indeed assimilate, but others quietly survived as did their languages; a number of these sub-state societies struggled to maintain their distinctiveness, so much so that in certain states alternative processes of nation-building proceeded also at sub-state level often through the communicative medium of the sub-state national language and culture, thereby developing these sub-state territories into modern fully functioning national societies which rivalled the state national society as the principal identity and loyalty resource for the citizens concerned.[8]

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5 Alan Patten & Will Kymlicka, "Introduction" in Will Kymlicka & Alan Patten, eds., *Language Rights and Political Theory* (Oxford: Oxford University Press, 2003) 1, at 38.

6 Neil MacCormick, "Liberalism, Nationalism and the Post-Sovereign State" (1996) 44 Political Studies 553.

7 *Ordonnance de Villers-Cotterêts*, Ordonnance 188 du 25 août 1539, Recueil général des anciennes lois françaises, Bibliothèque de l'Assemblée nationale.

8 Michael Keating, *Nations Against the State — The New Politics of Nationalism in Quebec, Catalonia and Scotland*, 2d ed. (UK: Palgrave, 2001).

An irony in this process is that Europe, which was emerging from a bitter period of religious wars at the end of the 17th century, has been widely presented by historians as becoming a more tolerant place. In fact we may say that new European states were becoming more tolerant of some forms of difference but less so of others; we can detect a process whereby with the emergence of the modern state, pre-existing religious intolerance began to disappear, but tolerance of linguistic difference which was a feature of the pre-modern era now came under strain.[9] Whereas language minorities in the 16th and 17th centuries had been commonly accepted and religious minorities persecuted, with nation-building from the 18th century onwards, religious emancipation moved to an advanced stage, whereas linguistic (national) minorities now faced considerable difficulties. The new dogma was not sectarian, it was political; the state was the new orthodoxy, and as a result, substate nationalism and linguistic identity were the new heresies; for example, in a Protestant country the cardinal offence now was not the saying of Catholic prayers, but the saying of these prayers *in a different language* to that of the dominant national society of the state.[10] States now insisted upon a monistic approach to language — one state, one nation, one language; furthermore, ethnic nationalism was not the explanation for the new orthodoxy, as civic or liberal states such as the USA and France were in the vanguard of this development.

As has been suggested, there is of course a lot of sense in the establishment of a national language. It has several clear social functions: first in terms of efficiency in the running of the state, providing a mode of communication between citizens and between government and citizen. Second, it plays a role in developing democracy, which is a deliberative process dependent upon communication, and again in this context a commonly understood language has evident utility.[11] Third, and in a related way, a national language arguably aids the process of

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[9] Eduardo J. Ruiz Vieytez, "The Protection of Linguistic Minorities: A Historical Approach" (2001) 3:1 International Journal on Multicultural Societies 5.

[10] In relation to this process of marginalisation of linguistic minorities in place of religious minorities, Ruiz Vieytez comments: "This also partly explains why the development of international legal protection of minorities began with treaties referring to religious minorities, and that only after the appearance of the modern concepts of the nation-state and the rule of law would linguistic and national minorities be included in this formal protection." *Id.*, at 9-10.

[11] Alan Patten, "What Kind of Bilingualism?" in Kymlicka & Patten, *Language Rights and Political Theory*, *supra*, note 5, 296 at 310-14.

building social cohesion and national loyalty to the project of the state in the broader search for a unified and coherent civic community.

The difficulty for minority nations as the western world moved towards democracy was that these benefits could only be gained by sacrificing their own national and linguistic identities; in other words, the advantages of the modern state were bought at the expense of difference, which went unrecognized in the new societally monistic national states. Sub-state national identities, the prisms through which so many lives were defined and through which so many people wanted to enjoy the new political and legal fruits of democracy, were now marginalized. Therefore, today multinational democracies such as Canada, Spain and Belgium live with this tension. The sociological importance of a common language in the building of nations and hence of states has made it a central factor in the ideological struggle for national homogenization. But at the same time, despite this process of homogenization, national minorities within states which have found their national languages marginalized have not disappeared; regional language groups did survive and maintained the vision of themselves as discrete national groups adopting the language of nationalism and combining language claims with broader goals of autonomy, representation and recognition. The late 20th century not only bore witness to the survival of these national minorities and of their languages, but saw a revival of them both in a cultural renaissance and more significantly in political terms through demands for recognition of these "nations" as alternative fully functioning societies operating below the level of the state. In many cases, therefore, the language claims advanced by sub-state groups are part of a broader struggle to maintain their own nation-building projects. As such, the debate over language is part of a bigger debate about national pluralism within the state, and the goal of multilingualism within the state is often sought as a step towards broader recognition of the state as a multination state.[12]

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[12] François Rocher, Christian Rouillard & André Lecours, "Recognition Claims, Partisan Politics and Institutional Constraints: Belgium, Spain and Canada in a Comparative Perspective" in Alain-G. Gagnon & James Tully, eds., *Multinational Democracies* (Cambridge: Cambridge University Press, 2001) 176; Daniel Latouche, "'Quebec, See Canada': Quebec Nationalism in the new Global Age" in Alain-G. Gagnon, ed., *Quebec: State and Society*, 2d ed. (Scarborough: Nelson Canada, 1993); Luis Moreno, Ana Arriba & Araceli Serrano, "Multiple Identities in Decentralized Spain: The Case of Catalonia" (1998) 8 Regional and Federal Studies 65.

In this way, the issue of language — tied in the late 18th and early 19th centuries to nation-building, remains tied to this process today, but it now operates at both state and sub-state levels; in other words, as part of a broader political struggle by sub-state national societies for political and constitutional recognition of their distinctiveness and of their aspirations for autonomy and representation within the state and/or the international community of states.

III. Liberal Normative Theory and the Questions Surrounding Language Rights

The importance of language and the intensity of the debates which surround it is in fact an area of enquiry which is heavily under-theorized. As Patten and Kymlicka point out, "there has not been a single monograph or edited volume which examines the issue of language rights from the perspective of normative political theory."[13]

Despite this, there has been a recent increase in work in this area, and I would like to draw out several major questions which are central to the theoretical debates over language rights. I do not propose answers to these questions, but raise them simply to highlight how difficult and protracted much of the debate in this area can be, and in general how difficult it is to conceive of language issues through the concept of rights — at least insofar as they are presented as universal human rights.

The first issue as always in a new normative theoretical area is the ontological one: are there within a liberal society any moral rights in relation to language? This stems from a series of *a priori* questions: for example, does the term "language rights" in itself make sense? And can we in reality juxtapose the rhetoric of positive rights with a fluid phenomenon like language which emanates so organically from our nurturing community? In a sense, there is no right to a particular language when the very existence of so many languages today is threatened;[14] and as such, few would argue that the survival of each one can be claimed as a human right. In the area of language rights, claims emerge from pre-existing social realities: I have been brought up within a particular lan-

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[13] Patten & Kymlicka, "Introduction", *supra*, note 5, at 1.

[14] It has been estimated that 90 per cent of the world's languages (currently numbering 4,000-6,000) could be extinct within 100 years. Thomas M. Franck, *The Empowered Self: Law and Society in an Age of Individualism* (Oxford: Oxford University Press, 1999), at 97.

guage community and I claim the right to manifest my language in community with others within the state to which we belong (such claims may or may not be made in association with broader political claims to self-government, representation within the state *etc.*). Essentially, these claims are case specific to a particular state and its political and constitutional order (although similar claims may, of course, be made by a series of sub-state national societies across a number of states). In other words, insofar as they are "rights" claims, these demands are made not so much from the perspective of universal human rights but rather from a sense of the specific political or constitutional entitlements of a particular sub-state national society within a particular state. They are not claims for the facilitation of the group's language anywhere in the world but rather only within the state itself; nor in general are they moral claims made against the international community but only against the state. It seems therefore that these demands are usually best understood as civil claims made through, and based upon, the political and constitutional process of the state in question; and, as such, it is often a misconception to posit them as based upon an assumption that there exists some universal right to the promotion of particular languages.

This raises a second question: is the right being claimed a negative or a positive right? Is it simply a negative right which demands non-interference by the state or other actors in a particular person's enjoyment of his or her language of choice? In other words, is language a private issue like religious belief for which one seeks to be left alone, or does it demand positive action by the state? Most now accept that the negative model of construction is incoherent because it misses the fact that language is an inherently public activity, and that the social reality is that without positive protections a minority language as a viable system of communication for a fully functioning linguistic community will decay. In other words, the idea that the state can be neutral on the issue of language in the sense that it can be neutral towards religion is fanciful because there is no way for the state to avoid taking a stand on a whole series of language policy issues. For example, public services have to be offered in some language or other, as does public education. Intentionally or wholly unintentionally, the sheer pervasiveness of a majority language debilitates and marginalizes a minority language in a way that a majority religion does not necessarily impact upon a minority religion. Therefore, meaningful language rights often need to be framed in terms of the positive obligations, but this can be difficult as will be seen in terms of the fifth question on duty below.

This leads to a third question: who can claim language rights? Is it the individual or the group? It seems that categorizing language rights as individual rights, just as categorizing language as an issue of private life, misses the inherently communal nature of the activity for which protection is sought. There is a vast literature within liberal theory which debates whether or not group rights are compatible with liberalism, *etc.* To a large extent, epistemological and methodological difficulties can be avoided by accepting that groups can make claims in practice. By accepting this, even the most devout individualist may concede that although the group does not possess these rights in and of itself, it can make claims as representative of an aggregation of individual claims. Although there are important normative issues still at stake, in practice most demands presented by groups on the aggregation basis can be made without any need to resolve these deeper questions, especially if they are situated as civic rather than universal human rights claims. (Again I will return to this issue below in connection with "duty".) Nonetheless, in framing language rights it is important to be mindful of the ongoing contestation and difficulties which attend the presentation of group rights.

A fourth question is a more thorny one because it results in particular practical problems and dilemmas: it is, *which* groups can claim language rights, and are certain groups able to make stronger claims than others? For example, are the moral claims of territorial national minorities different from those of immigrant groups as Will Kymlicka has argued,[15] and, if so, how does this affect the particular language claims which each type of group can make? A major reason for the distinction Kymlicka draws is that the immigrants have migrated voluntarily to the new state and are bound to accept the state language as well as the state's laws, *etc.*[16] But, we should also note a third type of group which I have mentioned, namely, those who have been forcibly removed from

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[15] Will Kymlicka, "Immigrant Integration and Minority Nationalism" in Michael Keating & John McGarry, eds., *Minority Nationalism and the Changing International Order* (Oxford: Oxford University Press, 2001) 61. See also Will Kymlicka, "Misunderstanding Nationalism" in Ronald Beiner, ed., *Theorizing Nationalism* (Albany: State University of New York Press, 1999) 131, at 131-32.

[16] In his introduction written with Alan Patten to their recent book Kymlicka also makes this point: "It is assumed that immigrants will learn the dominant language of their new country, and indeed this is a requirement to gain citizenship in almost all Western countries." Patten & Kymlicka, "Introduction", *supra*, note 5, at 7.

one state to another through mass population movements, for example, during wars or orchestrated by oppressive regimes such as Stalin's. These people cannot be said to have migrated voluntarily, but, on the other hand, can the new host state be said to bear them any duties in respect of protecting their native language? One added complication is the argument that for a state to facilitate an immigrant language too far may in the long term be to do injustice to the group or to some of its members. For example, if a state allows the children of immigrants to be schooled in the parents' native tongue, there is a danger that these groups, already marginalized to some extent, will become more so from one generation to the next by failing to master the language of the state. There is an associated danger which has been called the "cultural theme-park" issue,[17] namely, that the preservation of minority cultures may benefit non-members of the culture more than, or even at the expense of, members whose interests, at least their material interests, would be better served by learning the dominant state language and assimilating into the state culture. There is a real issue here in that "cultural environmentalists", if I may call them this, who argue that maximizing linguistic diversity is good for the world in that it provides the most extensive set of cultural resources from which we can learn and which we can enjoy, often present this argument from the security of membership in a dominant language group and dominant national group, while the people they expect to live out these minority existences may suffer from material marginalization as a consequence.

This leads to a fifth question: that of duty. It is well established in *a priori* normative liberal philosophy that rights can exist without a readily identifiable duty bearer; examples are unquantifiable rights or aspirational rights *e.g.*, the right to work. There can also be duties without rights, *e.g.*, charity: "I have a duty to be charitable but no one can claim a right to my charity."[18] However, even if we accept that language rights claims are both quantifiable and positively enforceable, we still face the question: against whom can language groups claim these rights? The two obvious candidates are the host state and the international commu-

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[17] Burkhard Schafer, "Community Zoos, Theme Park Cultures and the Right to Leave Them All" in Emilios A. Christodoulidis, ed., *Communitarianism and Citizenship* (Aldershot: Ashgate, 1998) 84.

[18] Perhaps we find such an approach in the *European Charter for Regional or Minority Languages* (discussed below) which does not set out language rights as such but instead works on the basis of "obligations" on governments to promote linguistic diversity.

nity. But, in choosing either as duty-bearer, the right-claimant is required to formulate different claims. For example, if his claims are framed as positive legal rights, then obviously different regimes apply at domestic and international levels. But, even as moral rights claims the issues are still different. Against the host state it is usually, at least by territorial minorities, a claim based upon some notion of "union state" — in other words, that the state is composed of a plurality of national communities, each of equal moral worth, and each entitled to equal protection and accommodation of their language and culture.[19] These claims are therefore based upon the particular constitutional or political commitments made between national societies within the one state: once again, civic political or constitutional claims rather than universal human rights claims. On the other hand, moral claims made to the international community are much more difficult to construct and usually manifest themselves as pleas based upon some version of the international right of self-determination, where all peoples have the right to some form of national recognition. This is notoriously a very difficult claim to make and one which enjoys little concrete definition under international law; also, the meaning of terms such as "self-determination" and "minority rights" are so deeply contested under international law that their value as effective norms has been seriously undermined.[20] The fact that many of these claims impose positive duties on the duty-bearer, as discussed above, as also the fact that they are often group rights claims, before the advent of contemporary conventions on language and minority rights (discussed below), each make universal claims against an amorphous international community often both incoherent and futile.

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[19] See Stein Rokkan & Derek Urwin, "Introduction: Centres and Peripheries in Western Europe" in Stein Rokkan & Derek Urwin, eds., *The Politics of Territorial Identity: Studies in European Regionalism* (London: Sage, 1982), at 11; Neil Walker, "Beyond the Unitary Conception of the UK Constitution?" (2000) P.L. 384, at 398; Michel Seymour, "Quebec and Canada at the Crossroads: A Nation Within a Nation" (2000) 6 Nations and Nationalism 227; Enric Prat de la Riba, *La nacionalitat catalana* (Madrid: Biblioteca Nueva, 1998).

[20] For the difficulties inherent in self-determination as a principle of international law see Deborah Z. Cass, "Re-Thinking Self-Determination: A Critical Analysis of Current International Law Theories" (1992) 18 Syracuse J. Int'l L. & Com. 21, at 22-23; and Martti Koskenniemi, "National Self-Determination Today: Problems of Legal Theory and Practice" (1994) 43 I.C.L.Q. 245.

IV. Language Rights as Legal Norms

Flowing from the last point, I will now turn to the issue of language claims as legal rights claims rather than moral rights claims, because with the advent of international conventions on language and minority rights, positive legal rights claims can now be made not only *within* the host state but also *against* the host state to the international community/international legal order.

A. Historical Evolution of Language Rights under International Law

Historically, there have been a number of stages in the development of language rights under international law. In this account, I will focus upon the European experience where the lead has been taken at different times for the international protection of sub-state national and other linguistic communities.

Minority protection in Europe began in the early-Modern period at the end of the religious wars which for over a century had so afflicted Europe. In a series of treaties, the recognition of minorities began to appear. As I have mentioned, originally the focus was upon religious groups, with provision in these treaties for the protection of minority religious communities which were at risk from persecution.[21] The move from religious protection to explicit recognition of national minorities began with international treaties towards the end of the Napoleonic wars, for example, with recognition of Serbian autonomy in the *Treaty of Bucharest* (1812) and with attempts to protect Polish groups at the Congress of Vienna (1814–15). In this period, international or municipal protection of a particular religious or national minority was also in an indirect way protection for that group's particular language, and so the lack of explicit international legal protection for languages and linguistic minorities before 1920 should not be over-stated.

A whole new era in the recognition of national minorities came, however, at Paris in 1919 where the various peace treaties established a system to protect minorities in Central and Eastern Europe; more significantly, this was more than simply an *ad hoc* system; for the first time

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[21] Among those protected were the Roman Catholic communities of Eastern Livonia, which were thereby incorporated into protestant Sweden by the *Treaty of Oliva* in 1660.

a genuinely international organization — the League of Nations — assumed the role of overseeing the implementation of these treaties.[22] Again in this period, the issue of language rights was situated within the broader context of nationality rights; in other words, language was a component of a broader set of issues involving autonomy, representation and recognition of sub-state national groups within the multinational state. Although not always articulated as such, this period marked a watershed in that for the first time there was a serious attempt by international institutions and law to recognize that many states were not uninational in composition and that rival nation-building processes within the state had created a set of fully functioning sub-state national societies.

The context within which international legal protection for minorities has developed in the 20th century is, of course, one of war and instability which together have created new minorities: for example, the boundary changes in Europe after 1918; population displacement after 1945; decolonization in the same period; and also more recently the collapse of the USSR and the SFRY, the shock-waves of which are still reverberating in Chechnya, Georgia, Azerbaijan, Kosovo, *etc.* From 1945, despite this increased level of instability, the impetus globally to protect national minorities in fact receded. The right of external national self-determination existed as a once only opportunity for colonized peoples and the principle of *uti possidetis juris* forbade secession by national minorities within colonial territories; nor was a system of minority rights implemented to protect the national status or even the language rights of minorities. The initial period after the Second World War was therefore not a good one for minority rights. Part of the world's reaction to the War was revulsion with nationalism; nationalism had been expropriated for ideological reasons by the fascist movements of the inter-war period and was in many eyes implicated inextricably with the revanchist sectarianism of the Axis powers in the 1930s.

Although Europe in 1945 was deeply divided, nevertheless liberalism and communism shared one credo — an assumption that the age of nationalism was passing and that the new route for Europe would be cosmopolitanism (whether liberal or Marxist) which would transcend nationalism at state level, and, by implication, at sub-state level; in other

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[22] Before this, certain states began to protect more than one language (*e.g.*, Switzerland and Austria-Hungary), but these were the exception.

words, minority nationalist movements would be swept up in a move to a post-state world, whatever ideological complexion that might take. Both traditions shared a homogenizing aspiration which desired and thought feasible a Jacobin, civic Europe, transcending national pluralism, forming one polity which would free itself of the ideology of nationalism and build itself around either dialectical materialism (Marx), cosmopolitan liberalism (Kant as later rearticulated by Rawls) or communicative republicanism (captured recently by Habermas). Take, as an example, the liberal tradition which has in the end outlasted its socialist protagonist. It contended that the end of state nationalism — which was the ultimate goal of the idealistic founding fathers of the Common Market — would also presage the end of sub-state nationalism; minorities whether national, cultural, linguistic or religious would be accommodated in the state (or the "post-state" EEC) through non-discrimination and the protection of individual rights: minority language and culture would, like religion in the 17th century, pass to the private sphere where the negative rights of non-interference would protect those who were too emotionally and psychologically immature to grasp the bright future offered by the new Cosmopolis.[23]

B. Post 1989 — The New Minority Rights Regime

Therefore, initially in the post-war period there was scant regard for national minorities and for any demand to convert their language claims into legal rights. In the past 15 years, however, the tide has turned with a growing awareness of the resilience of sub-state nationalism and the claims it makes on established states. This awareness has emerged not through a process of soul-searching with regard to the injustice being done to sub-state national and other linguistic communities, but as a result of the deep psychological shock which the rise of nationalism in Central and Eastern Europe post-1989 caused to "end of history" cosmopolitan assumptions, a shock which is still reverberating in the European psyche with its challenges to homogenizing assumptions. Therefore, insofar as Europe has once again embraced the issue of minorities, it has done so just as it did in the 17th century and in 1919 —

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[23] The few dissident voices who pointed out that rumours of the death of the state are much exaggerated — as evidenced by the resistance of state languages and cultures — continue to be drowned out by the advocates of a new pan-European nation-building project.

namely, in response to a potentially catastrophic set of events, this time not internecine religious conflicts, but national conflicts among national groups within the same state or across new state boundaries.

A series of new conventions have been drafted under the auspices of the United Nations ("UN"), the Organization for Security and Co-operation in Europe ("OSCE") and the Council of Europe. Interestingly, they follow similar patterns, in that the issue of language tends to be linked to the broader issue of minority rights.

The challenges in recognizing language and other minority rights in the new Europe have been many, but I will mention two in particular. First has been the resistance of states to any measures which threaten their own monistic national ideologies (this ironically in an age when states tell national minorities that nationalism is passé);[24] and second, the lingering ideological suspicion of anything that smacks of group rights. Europe, of course, has had a vigorous international human rights regime since 1950, but it reflects very much an ideology of individualism as encapsulated in the Council of Europe's *European Convention for the Protection of Human Rights and Fundamental Freedoms* (1950) ("ECHR"). And, since it is the Council of Europe that has taken the lead in response to the new minority issues, there is a deep tension between the collective aspirations of disadvantaged groups and the individualist mind-set of pre-existing European human rights norms and their advocates. The ECHR did not mention linguistic minorities, but there is a reference to national minorities in its anti-discrimination provision (Article 14).[25] But this is a weak provision and, as a consequence, the jurisprudence of the European Court of Human Rights has not been marked by any significant strides in the protection and promotion of national and linguistic minorities. Similarly, at global level, Article 27 of the *International Covenant on Civil and Political Rights* ("JCCPR") in 1966, although referring to the rights of persons belonging to linguistic, religious or ethnic minorities, has also not resulted in major advances

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[24] Joan Ramon Resina, "Post-National Spain? Post-Spanish Spain?" (2002) 8 Nations and Nationalism 377.

[25] "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

for national or language communities, at least as reflected through the jurisprudence of the Human Rights Committee.[26]

Two further treaties have been introduced under the auspices of the Council of Europe: the *Council of Europe Framework Convention for the Protection of National Minorities 1995*, entered into force in 1998 ("Framework Convention") and the *European Charter for Regional or Minority Languages 1992*, entered into force in 1998 ("Minority Languages Charter").[27] Other developments have occurred under the auspices of the OSCE.[28] In particular, the OSCE High Commissioner on National Minorities has attracted a lot of attention for his work in Eastern or Central European countries, and in the territory of the former Soviet Union, although notably these are the only areas where he works.[29]

There are three important issues which arise in respect of the new international legal regime: the extent to which these rights instruments are binding upon states; the degree to which they are enforceable; and the substantive content of the rights they contain. Turning first to the issue of legal status, both the Framework Convention and the Minority Languages Charter create binding international obligations. Interestingly, however, the Minority Languages Charter does not in fact provide language rights for individuals or groups, but rather, it proposes obligations on governments in the area of European language diversity. As such, it refrains from pursuing specific substantive outcomes which must be endorsed by all states in the same way. What does seem bizarre, however, is the way in which the Charter allows states to choose which specific provisions to implement.[30]

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[26] *Ballantyne v. Canada* (1993) CCPR/C/47/D/359/1989, [1993] IIHRL 32 (31 March 1993).

[27] It should also be noted that a number of bilateral treaties also exist concerning "good neighbourliness and friendship" involving the states of Eastern and Central Europe.

[28] *E.g.*, the *Declaration of Copenhagen* (1990) 11 HRLJ 232.

[29] Perhaps in this fact we see the Western anti-nationalist ideology appear again; nationalism is seen as a local and hopefully temporary problem which affects new democracies in their adolescence. Assistance is needed to ensure harmonious inter-communal relations until these states and their minorities are mature enough to join Western states in what is supposed to be the post-nationalist phase of development.

[30] "In respect of each language specified at the time of ratification ... each Party undertakes to apply a minimum of thirty-five paragraphs or sub-paragraphs chosen from among the provisions of Part III of the Charter." *European Charter for Regional or Minority Languages* (Eur. T.S. No. 148), entered into force January 3, 1998, Art. 2(2).

On the second issue, rights under both of these instruments are not enforceable by way of individual petition but are subject to a state reporting system and, it is hoped, voluntary application by individual states. Similarly, the influence of the OSCE is limited to the area of quiet diplomacy, attempting to encourage states to protect and promote language related issues, but without any enforcement powers. Despite the lack of enforcement mechanisms, it is important to note that the effect of these new regimes should not be assessed simply by positivist assessments of their binding nature or their mandatory requirements for state action. Europe is one region where international "soft law" is at its most effective. This is largely a consequence of the economic carrot which accompanies compliance; for many countries in Eastern Europe, ratification of the minority rights treaties, and evidence of compliance with the rights they contain, have been prerequisites for admission to the Council of Europe; and, of course, membership of the EU is itself conditioned upon membership of the Council of Europe. This, therefore, has made the reporting mechanisms — so often an impotent component of human rights treaties — in fact of some significance, as states attempt to show that they have been good citizens and are worthy of joining "The European project."

Finally, however, the content of these mechanisms has come in for most criticism. One broad problem with international law in this area is that the concept of "minority" itself has never been defined from its earliest post-war manifestation in Article 27 of the ICCPR onwards. In fact, when the recent treaties were drafted there was so much controversy over this question that it was decided that it was better not to attempt a definition. While this may be sensible, it highlights how much disagreement exists and also how much resistance there is within certain states to give any recognition to minority groups.

The other crucial question in terms of the content of language rights is the degree of protection and promotion. Traditional human rights provisions such as freedom of expression and non-discrimination speak only to the toleration of linguistic difference, protecting human rights merely in a passive or negative way. Therefore, it is important to enquire how far down the road the new legal instruments go in terms of the substantive *positive* protection and promotion of language rights.

In fact, it is difficult to find in the new international instruments meaningful positive obligations on the state to provide for the use of minority languages in public life. For example, the Framework Convention does not guarantee any positive right to communication with the

authorities in the minority language.[31] In short, this right seems to be little more than a non-discrimination provision, guaranteeing the negative rights of freedom of expression; it does not seem to extend to promotion rights.

By contrast, the Minority Languages Charter does seem to impose positive obligations. Article 7(1)(c) requires states to take positive steps to meet "the need for resolute action to promote regional or minority languages in order to safeguard them."

However, this general requirement is not elaborated upon to any great extent, and, as has been observed above, the Charter is framed in broad aspirational terms. It should also be mentioned that there is good reason for this at a very practical level. Were such an instrument to attempt to impose concrete duties on a state in the promotion of language in the public sphere, it would find strong and probably crippling opposition in many states; a fact which highlights a paradox for those seeking to extend international protection in this area: namely, that the creation of international legal rights for national and linguistic minorities depends upon the consent of the very states whose unjust practices make these rights necessary.

Reference to a few examples of areas where positive promotion rights are often sought by minorities highlights the weakness of the new instruments. Turning first to education, which is, of course, a key component in the maintenance of a national language. Here, the protection offered in the new instruments is weak. For example, where the right to establish educational institutions exists within the Framework Convention (Article 13(1)), there is no obligation on the state to supply financial assistance (Article 13(2)), making this, in the words of Dunbar, "a hollow right at best."[32] Similarly, Article 14 expresses the right of every person belonging to a national minority to learn his or her minority language, but at the same time confirms that this "does not imply positive action, notably of a financial nature, on the part of the State."

Similar deficiencies affect rights of linguistic minorities to access the media. Here, the lack of a positive requirement on the part of the state to supply financial support for the promotion of minority languages

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[31] See the limited and heavily qualified provision regarding the use of the minority language in communications with administrative authorities. Art. 10(2).

[32] Robert Dunbar, "Minority Language Rights in International Law" (2001) 50 I.C.L.Q. 90, at 110.

is also apparent. Although Article 9 of the Framework Convention seeks to ensure that national minorities will have the possibility of creating and using their own radio and television broadcasting services in their own language, these provisions again fail to impose any obligation on states to provide financial assistance for minority language media. Given the cost of radio and television broadcasting, this often makes rights to establish regional media outlets of little practical value, particularly when these have to compete with heavily financed state broadcasting conducted in the dominant language of the state. Although the Minority Languages Charter aspires to more specific provision of state aid, it is, as we have seen, open to very selective application by states.

One area where international guarantees do exist is in the criminal court process where rights to understand the case against the accused may require a translation service. But here the mode of protection is in fact very weak when compared with certain domestic jurisdictions such as Canada which have highly progressive language policies. Under the ECHR[33] and the ICCPR[34] the protection afforded only applies where the individual does not understand the language being employed and does not require the use of the victim's language unless he understands no other. Furthermore, these rights usually only apply in the criminal courts and not also to the civil court process. These provisions are largely mirrored in the Framework Convention Article 10(3), which does not attempt to extend positive protection in this area beyond the limited approach of the ECHR and ICCPR.

A broader issue is use of language in the private sector, and again here international instruments lack provisions with regard to state regulation of language which would benefit minority languages. Instead, most states where they take any interest in the private use of language tend to regulate it in favour of the dominant rather than the minority language (for example, in rules about the packaging of products *etc.*). Where regulation of the private sphere has occurred in favour of minority languages, it has tended to come from the minority national group itself when it finds that it has the institutional infrastructure to make its own law for its own territory in this area.[35]

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33 Arts. 5 and 6.

34 Art. 14(3).

35 *E.g.*, Quebec's *Charter of the French language*, R.S.Q., c. C-11.

Where international human rights law has entered upon this difficult issue, it has tended to operate *against* such regulation of the private sphere even when the regulation is intended to protect and promote a minority language. For example, the case of *Ballantyne v. Canada*[36] before the United Nations Human Rights Committee demonstrated how, by applying freedom of expression in a person's own language as a universal right, international human rights law can fail to take into account the deep power imbalances within a state which might justify particular regulations of the private sphere that are designed to protect a linguistic minority. Here, the HRC accepted that protection of the francophone minority in Canada was a legitimate aim, but that the measures taken here — prohibiting commercial advertising in English — were disproportionate. This may be looked at as a proper decision by an international human rights arbiter primarily concerned with individual rights, or it may be seen as highlighting how the correct balance in these sensitive areas between individual and collective interests is perhaps best left to the political and constitutional processes of the state or of democratic sub-state national societies within it. Furthermore, in general there is certainly no requirement for states to introduce or even permit such private regulation; in fact, there are provisions which seem openly hostile to the idea. For example, some measures provide that the exercise of the positive rights in the Convention in question must not conflict with the rights of others.[37] This type of provision, while on its face entirely justifiable, has the potential to allow members of the dominant language group to object to positive discrimination in favour of minority languages and to permit the state to resist general programs of positive support for minorities.

V. Conclusion: Language Claims as Political Activity

In Part III of the text, I showed some of the difficulties in attempting to frame language rights as universal human rights in terms of political theory. In Part IV, I suggested that the limitations which afflict the new attempts to protect national and minority rights as a matter of international law raise a similar fundamental question about whether we can

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36 *Supra*, note 26.

37 *E.g.*, Framework Convention, art. 20.

really expect the legal concept of universally applicable and enforceable human rights to be of much practical use in the promotion of language rights.

This seems to be a major difficulty for several reasons. The first is that language claims advanced by national minorities are usually promotion claims and these are in essence social and economic in nature, or at least they bear heavy social and economic resource implications. International human rights law is generally queasy about positive rights and about imposing direct financial demands on states. As such, the instruments I have discussed either avoid creating positive rights or they frame them in a heavily non-specific and aspirational way; just as the rights under the *International Covenant on Economic, Social and Cultural Rights* are more aspirational and less dogmatic than the traditional civil and political rights contained in the *International Covenant on Civil and Political Rights*.

Second, the state has responsibilities for all its citizens which may conflict with minority language protection. All public services must work effectively, which means that workers *inter se* and in dealings with clients must be able to understand one another. Again, certain states go well beyond the demands of international law. For example, Canada and Belgium are examples of states which give federal employees the right to use either of two official languages, but they do not do so as a consequence of universal human rights obligations but rather from an understanding of the commitments which spring from the cultural and national diversity which characterize these states.

Third, we cannot ignore the sociological reality of all states, which is that any language policy will privilege a particular language or a particular set of languages; as such, it seems difficult to develop a set of universal rights which can be categorized and defined in any meaningful way when so much turns upon the precise social composition of the state in question.[38]

Perhaps then the structure of the Minority Languages Charter is correct not to try to create legally enforceable rights for individuals or groups and to move away from attempts to crystallize precise standards. The latter strategy will in any event be unsuccessful because states will resist the imposition of strong positive obligations in the drafting or

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[38] Patten & Kymlicka, "Introduction", *supra*, note 5, at 36.

ratification processes of new instruments. Therefore, a more effective strategy is perhaps not to articulate stronger standards, but to frame them in a more general and aspirational way which can then be used by specific minorities to add weight to the political and constitutional arguments they bring within their own state.

In attempting to construct language rights as universal human rights, it is also possible to miss the fact that the very disposition of minority rights conventions tends to be statist in tone. The structure of these instruments seems to take the norm to be the state national society and its language, with the hope being that the state will "give" language rights to minorities, while retaining control of both the process by which these rights will be given and the content which they will have.[39] This misses what sub-state national societies assume to be a social and moral fact, namely, that minority nations are equally valid national societies within the state; it also misses the political reality that language rights claims in most cases cannot be separated from broader political and constitutional claims by national minorities to autonomy, representation and recognition within the state, of which they are a component.

In terms of autonomy, there are some provisions in these international instruments concerning the rights of minorities to participate in decisions which affect them, for example, Article 2 of the *UNGA Minorities Declaration* and Article 33 and 35 of the *Copenhagen Declaration*. But these are fairly limited and vague in their construction (see also Article 15 of the Framework Convention).[40] They definitely fall very far short of any idea of self-government or self-determination, and do not even include a clear right to take part in the formation of language policy. Recent international instruments do not, therefore, tie language rights to political and legal control by national minorities of their own affairs, and their power to direct language policy in their own sub-state territories. There are provisions also which seem to allow for states to override the interests of the minority community. Again, this shows how

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[39] In a sense it is inevitable that if we look to international law, language rights have evolved in this way. In the state-dominated international order, international law and relations are predicated upon the existence of states which operate through a dominant state society functioning in one national language and with one national culture.

[40] "The Parties shall create the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, in particular those affecting them."

these instruments fail, often deliberately, to draw the connection between minority language communities and sub-state nationalism.

With regard to representation, minority nations as language communities do not consider that they should hope to gain language status as an act of largesse from the dominant national society in the state; instead, they demand as an equal partner in the state the right to privilege their own language in their own national territory, and to have a plurality of national languages recognized as official languages of the state. However, none of the recent international instruments provide a right to official language status, or even encourage such a move.

And finally, in reference to recognition, it is important to note that while sub-state national societies seek recognition of their national status, and, for example, may seek official status for their language mainly for practical reasons, they do so also and very importantly for symbolic purposes. This can be a difficult issue, but often the sub-state national group suffers even by the application of the term "minority" in their respect; what these groups seek is recognition of their equality as a fully functioning national society of which its own language as a functional communicative device is but one manifestation of the nationhood and modernity of a discrete demos. Of course, this requires a change of vision: the linguistic minority should no longer be seen simply as a minority; particular languages, after all, are not an indication of societal superiority; any language is simply a manifestation of a distinctive society with its own culture, traditions, mores, heritage and general ways of life; basic democratic commitments demand that no society is or should be seen to be more valid than another. In other words, what is sought is the realization by a state that it comprises a plurality of linguistic societies and, indeed, that by the same measure it comprises a plurality of national societies each worthy of equal treatment and respect.

It seems then that in many normative and practical ways we need to move beyond the discourse of rights if sub-state national societies are to be properly accommodated within the plurinational state. Rights will remain a relevant discourse for those small linguistic groups which find themselves located within a state but which are not fully functioning national societies capable of self-government; however, for larger sub-state societies which operate in their own national language, the issue is political and is about mobilization for constitutional change with the goal being the reorientation of the state's constitutional and political identity in realization of its own national plurality. This is the language of politics and not the language of rights because rights imply a relation-

ship of dependency, with the minority claiming a right against what it accepts to be an appropriate right-giver, namely, the dominant or hegemonic society. It is also important to make clear that the aim of full acceptance of the state's plurinational nature by sub-state national societies is not a separatist aspiration. If it were, then the politics of language *within* the state would be irrelevant; the sub-state national society would be campaigning for independent statehood on the Westphalian model, and this would foreclose the language of rights, of autonomy, of representation and of recognition. Instead, what is being argued for here is a new way of conceiving the societal plurality of the plurinational state; of recognizing linguistic diversity as a key component of this; and of building a modern constitution which can accommodate the societal plurality of which multiligualism is often its most vital manifestation.