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LANGUAGE RIGHTS IN THE LIGHT OF INTERNATIONAL LAW

Abstract

This paper examines language rights in the light of international law instruments. The paper contends that although international law provides for a number of language rights only very few of them can be regarded as universal human rights. First, the paper describes the purpose of language rights protection. Second, it analyses the scope of language rights protection and distinguishes between individual and collective language rights. Third, three basic categories of individual rights addressing language questions are analysed, i.e. procedural linguistic human rights, freedom of expression and non-discrimination on the grounds of language. Next, language rights of persons belonging to minorities are examined. Finally, the paper concludes that under international law language rights which are universal human rights include linguistic aspects of the right to a fair trial and the right to liberty and security as well as the right of non-discrimination on the grounds of language use in private sphere. The language rights protected otherwise do not fall within the category of human rights and their protection is not universal.

Keywords

language rights – human rights – individual rights – collective rights – procedural linguistic human rights – non-discrimination on the grounds of language – language rights of minority members

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INTRODUCTION

In this era of mass migrations of both individuals and groups (minorities) a question arises as to what language rights are granted to migrants under international law. The matter needs deep investigation and an interdisciplinary approach, as migrants who settle in communities and participate in social life may claim different rights related to language use in the host country. The matter of language rights is not clearly regulated in international law and requires systematisation.

International law has explicitly dealt with language rights since the early 90s by granting them at different levels and for different purposes¹. Yet, there is no comprehensive, overarching framework for the protection of language rights under international law and there is no international treaty dedicated to language rights. The main reason for this is the fact that international law does not recognise 'language rights' in a clear, codified form. As a result, language rights are barely protected by universally binding international law. Moreover, it remains a matter of dispute among scholars whether international law is an appropriate tool to use in language conflicts.

There are three schools of thought as regards the perception of the regulation of language rights. According to the first approach, a universal legal framework on language rights should be entrenched in international law, primarily in multilateral treaties or other universally binding legal instruments. The main reason justifying this way of regulating language rights is the fact that most of the rights relating to language are negative assurances of non-interference of the state in the private uses of language². Second, a valiant linguistic human rights movement promotes a platform of international law to protect language rights and endangered languages so that they are in an equal position to freely develop in language communities. Although the representatives of this approach are aware that there are a number of universally binding instruments

¹ *Final Report for the Study on translation in international law and EU law*. European Commission, DGT/2011/MLM2, 30 July 2012, at p. 6.

² S. Abayasekara, *A Dog without a Bark: A Critical Assessment of the International Law on Language Rights*, "Australian International Law Journal" 2010, vol. 17, at p. 108.

that protect the rights of minorities and their respective languages with the bulk of international law instruments relating to language rights having no binding force, they stress that certain rights to language are also implied in international instruments protecting other areas of rights, including national minority rights, cultural rights, non-discrimination rights, freedom of expression, children's rights, the right to a fair trial, and education rights. In line with this approach, creating a comprehensive international legal instrument on language rights would be the next logical step. There have been academic attempts to draft such an agreement. Gromacki drafted a/the Universal Declaration on Linguistic Rights which aimed to provide both positive language rights as well as a negative guarantee against language-based discrimination³. However, it turned out that the reduction of guidelines on language rights to a single, universal set of standards is not easy, as international law has great difficulty defining what the linguistic justice would look like in different states. The very act of reducing language rights to a single, international legal code inevitably involves some measure of essentialism, universalism, apolitical abstraction, and tensions with national sovereignty seem to be unavoidable⁴. In this context, the third approach could play a role. This approach promotes the idea that language rights are best promoted through regional or national laws and international law sets the minimum standards. Mälksoo (2000) maintains that international law can only set minimum standards, and situations of linguistic injustice must be fought with the tools of domestic and regional politics. Mälksoo states that regional law is seen as more effective because it is more sensitive to local conditions than the remote, invisible, and anonymous institutions of international law. One telling example is the European approach to achieve progress in the field of language rights on a case-by-case basis, primarily through the European Court of Human Rights, rather than through regional norms of hard treaty law, enforced by legal mechanisms⁵.

³ J. Gromacki, *The Protection of Language Rights in International Human Rights Law: A Proposed Draft Declaration of Linguistic Rights*, "Virginia Journal of International Law" 1992, vol. 32, pp. 515, 576-9.

⁴ Abayasekara, *supra* note 3, at p. 111.

⁵ L. Mälksoo, *The Language Rights in International Law: Why the Phoenix is still in the Ashes?*, "Florida Journal of International Law" 1998-2000, vol. 12, p. 454.

In this study, I attempt to find out if there are any absolute language rights (linguistic human rights) that can be seen as universal human rights under international law. The relevant literature is not consistent in this regard. In order to answer the above question I must analyse the legal status of language rights enshrined in international law instruments. Moreover, I need to address the purpose and scope of the protection of language rights, the individual and collective nature of rights, as well as the protection of linguistic minorities. The results of the study are unexpected.

I. PURPOSE OF LANGUAGE RIGHTS PROTECTION UNDER INTERNATIONAL LAW

Regardless of the approach towards the role of international law in language rights protection, three main objectives of guaranteeing language rights to their users are distinguished. They can be summarised as preserving peace and security, the promotion of fair treatment of individuals, and the preservation of linguistic diversity⁶. The objectives are interrelated and may both compete with and contradict each other, thus posing challenges for language rights lawyers in the case of conflict. Moreover, it must be noted that there is no unanimity in respect of the goals of protecting languages, either in state practice or in scholarly literature. The division of the purposes of language rights protection helps to understand the nature of language rights and divide them into three main categories: language rights of minorities, language rights of individuals, and language rights of persons using languages in danger of extinction (protection of linguistic diversity).

1. LANGUAGE RIGHTS AS A TOOL FOR PRESERVING PEACE AND SECURITY

The employment of language rights as a tool to preserve peace and security was an underlying idea of minority protection in the post-World

⁶ Ibid. at pp. 431-434.

War I era, when language rights were explicitly endowed to the minority as a group. Later, the idea that language rights should serve as a tool to preserve peace and security developed and found its legal grounds in the 1992 United Nations Declaration on the Rights of Persons Belonging to National, Ethnic, Religious, and Linguistic Minorities adopted by the General Assembly⁷. The Preamble of the Declaration sets forth that protection of rights of persons belonging to national, ethnic, religious, and linguistic minorities contributes to the political and social stability of the states and to the strengthening of friendship and cooperation among the states. The Declaration expressly stipulates that persons belonging to linguistic minorities should have the right to use their own language, both in private and in public, freely without interference of any kind of discrimination. Moreover, the Declaration recommends that the states adopt appropriate legislative and other measures to achieve those ends and create favourable conditions for linguistic minorities to express themselves in their language and have adequate opportunities to learn their mother tongue. Notably, the Declaration does not create a legally binding obligation on its signatories and cannot be legally enforced, but it establishes certain standards and aspirations in the area of the protection of minorities.

In the light of the Declaration, preservation of peace and security by means of language rights primarily refers to the protection of the rights of persons belonging to minorities. The languages of minorities need protection as in principle they are either threatened or prohibited, which may cause the minority to feel suppressed and hence willing to start revolting. Granting rights for minorities may help to avoid the initiation or escalation of ethnic conflicts. Prohibiting discrimination and intolerance against linguistic minorities corresponds with the interests of most states, in so far as it helps to avoid the outbreak of internal conflicts that can affect the security of other states and international security. Noting that the rights protected in international and national law are generally interpreted subject to national interests such as security, the dominant argument in the literature on language rights is that granting

⁷ A/RES/47/135, 92nd plenary meeting, 18 December 1992, available at <http://www.un.org/documents/ga/res/47/a47r135.htm> [last accessed 19 April 2018].

minority language rights in fact contributes to peace and stability by improving state relations with aggrieved minorities⁸. Conversely, the prohibition of use of a native language may cause ethnic conflicts, destabilise the states, and threaten peace and security in the world.

As noticed by Arzoz (2010), states often agree on a regime of linguistic tolerance, but linguistic activism of the state and language promotion does not correspond with the interests of most states⁹ and therefore is not practised. International law promotes the linguistic diversity of national minorities, often doing so at the expense of national unity. As a result, the language rights of minorities may actually have an adverse effect and create potential conflicts. The idea of the language rights protection of members of a certain group collectively became contentious and was challenged with reference to Central and Eastern Europe where instead of enhancing security, the measure aiming to protect linguistic minorities in a way threatened and damaged security¹⁰. It is still argued whether granting language rights to a minority understood as a group reduces or actually creates or even escalates potential conflicts. This also poses an unanswered question as to what is the status of such language rights if they are granted collectively.

2. LANGUAGE RIGHTS TO ENSURE THE FAIR TREATMENT OF INDIVIDUALS

Promoting language rights as a means to ensure justice for individuals and respect for human dignity is perceived under international law instruments as decisive for the protection of language rights in general. In compliance with this approach reducing the potential for conflicts between the majority and minorities is not the ultimate goal for the protection. This is the individual rather than a minority as a whole who is in the spotlight of international protection. An individual should be

⁸ Mälskoo, *supra* note 6 at p. 435.

⁹ X. Arzoz, *The Nature of Language Rights*, "Journal on Ethnopolitics and Minority Issues in Europe" 2010, vol. 1, at p. 13.

¹⁰ *Final Report for the Study on translation in international law and EU law*. European Commission, DGT/2011/MLM2, 30 July 2012, at p. 66.

granted certain language rights, prerogatives and guarantees. The idea of the protection of the language rights of individuals became widely accepted after World War II with the main argument that language rights can only be protected through individual human rights. This approach was the motivation behind the principal universal norm of international law on language rights, i.e. Article 27 of the International Covenant on Civil and Political Rights (ICCPR)¹¹ which, according to its narrow binding interpretation, guarantees rights to persons belonging to minorities, but not to minorities as such.

The human-rights approach to language rights appeared to be controversial as according to some scholars language rights always involve some collectivity mainly owing to the fact that linguistic and ethnic minorities are usually tightly interrelated. Therefore, such an approach where solely individual rights are recognised and the aspect of collectivity is avoided does not solve the problem and represents only one side of the issue¹². The core of the issue is that language rights serve to protect individual rights and they constitute the core of an issue, yet the collective aspect must be considered.

3. LANGUAGE RIGHTS AS A TOOL FOR PRESERVING LINGUISTIC DIVERSITY

The third objective of language rights protection is the preservation of linguistic diversity through the protection of languages, in particular those in danger of extinction. Although international law does not offer ultimate models or a set of unambiguous principles and rules to accommodate linguistic diversity, the underlying idea is that humanity suffers losses with the extinction of a language and a lost language leaves an irreparable gap in the cultural heritage of mankind¹³. According to Mälskoo (2000), the recognition of a need to protect endangered languages inevitably leads

¹¹ *International Covenant on Civil and Political Rights of 16 December 1966*, available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx> [last accessed 17 September 2017].

¹² Mälskoo, *supra* note 6 at p. 440.

¹³ T. Skutnabb-Kangas, R. Phillipson, *Linguistic Human Rights*, 1989, p. 3.

to the recognition of language rights as the collective rights of a linguistic group. International law is concerned with language rights from the perspective of the protection of national minorities and of indigenous people, mainly because minorities speak a language different from the majority and these groups deserve special protection for preserving their cultural identity. Moreover, it is often argued that the idea of "endangered languages" is often a subjective criterion as in the era of globalisation even the speakers of major languages may feel endangered in the global competition of languages under free-market conditions¹⁴. Protection of linguistic diversity acquires a special dimension in the context of the European Union policy of multilingualism. Yet this is a complex matter which does not fall within the scope of this paper.

II. SCOPE OF LANGUAGE RIGHTS PROTECTION

The three objectives of language rights protection prove that language rights in public use may be perceived either as collective rights granted to a group or to members of a group or to any individual. This division leads to a question on the legal status and scope of language rights, whether granted individually and collectively. Such dual understanding of language rights protection in international law is often described as a system of concentric circles. According to the system, the larger the circle, the broader, but the weaker the scope of protection. The function of protection is different in different circles. The first circle constituting the centre of international language rights protection includes language rights understood as fundamental human rights. Granting language rights to individuals implies that the government of the state assumes some duties to take appropriate measures, which means that the state has to provide the personnel to facilitate linguistic services in administration, education, justice, and so on. The central circle comprises classic human rights which are key with regard to a human identity and dignity. In fact, the rights in the central circle are not primarily concerned with languages, but imply the right to use a language by an individual rights holder in particular

¹⁴ Mälskoo, *supra* note 6, at p. 444.

circumstances. Such rights include freedom of expression in respect of the choice of the language in which one would like to express their opinion, prohibition of discrimination on the grounds of language, as well as procedural human rights, including specific aspects of the right to liberty and security and the right to a fair trial. The protection of such rights constitutes the core of language rights protection under international law, and such rights are protected in internationally binding law.

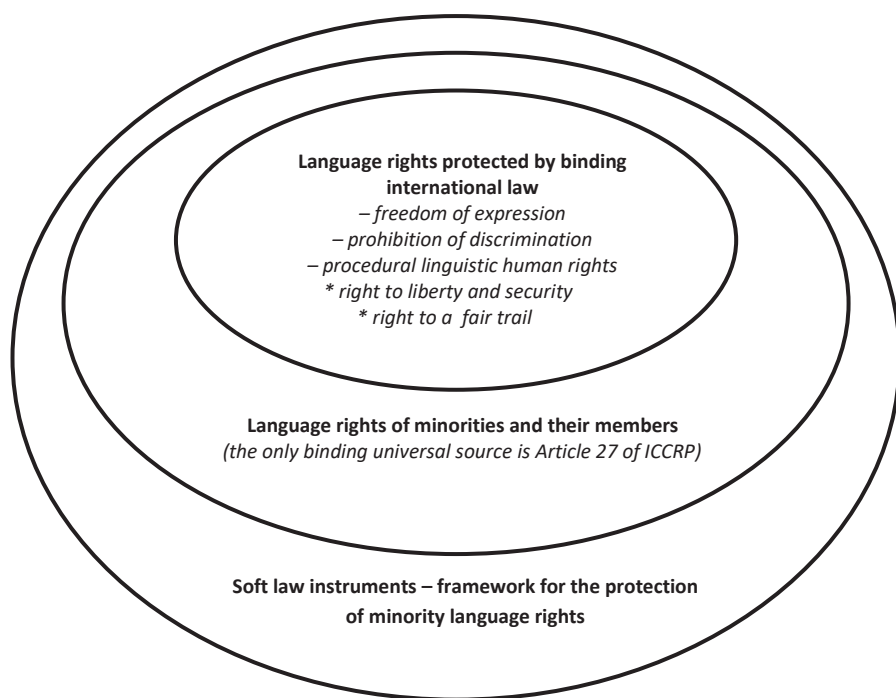


Figure 1: Scope and nature of language rights

The broader circle, which implies broader and weaker protection, refers to the protection of minority languages and promotion of group interests. Express guarantees of the language rights of minorities are found in some conventions for the protection of these groups and their members. However, the only binding universal source in this area is Article 27 of the International Covenant on Civil and Political Rights, which contains an obligation to support minority language maintenance or revitalisation. The broadest circle includes a good deal of soft law

international law instruments which create a framework for the protection of minority language rights. Soft law instruments guarantee the weakest protection as they do not lead to a formal obligation on the part of states, which is why they often contain far more reaching provisions on protecting language rights than binding sources of law. The overview of relevant instruments on the one hand indicates the unwillingness of the international community to grant detailed, enforceable rights to minorities and on the other hand indicates some concern for the minority language rights.

The figure below presents graphically the circles reflecting the strength of language rights protection under each circle.

The above indicates that there are language rights which may be understood in the light of international law as universal human rights. Clearly, such language rights constitute only some aspects of broader classic human rights. Their content and scope require systematisation. Moreover, the language rights of the members of minorities, despite falling into a broader circle, may also be treated as human rights, in particular in the light of the interpretation of Article 27 ICCPR.

III. LANGUAGE RIGHTS AS COLLECTIVE RIGHTS

As highlighted above the meaning of the term language rights is not straightforward under international law, as it may refer both to individual and collective rights. The notion of language rights has proved to be elusive and requires contemplating language rights in a dynamic way. Four different aspects of any language right should always be considered. First, who is or can be the right-holder; second, what is the content of the right; third, who is the addressee of the right, or who bears the correlative duty; and fourth what is the right's degree of stringency, i.e., what is its weighing force as compared to competing considerations¹⁵. The analysis of all the aspects allows one to decide what is the nature and status of the right and what legal implications it bears for the right-holder and what are the obligated entities.

¹⁵ M.T. Méndez, *Language Rights as Collective Rights: Some Conceptual Considerations on Language Rights*, "Res Publica: Revista de Filosofía Política" 2012, vol. 27, at p. 113.

The debate on the nature of language rights does confirm that they have some collective nature, which leads to further analysis of the nature of collective rights. Two conceptions of collective rights prevail. These are corporate conception and collective conception. Under the corporate view, collective rights are defined according to the right-holder and are assigned to a group as such and not to its individual members. In that sense, a group is seen as a single, integral entity, like a collective agent having legal personality separate from its members. This approach seems to have been inherited from the post – World War I era system of the League of Nations, which gave the impression that language rights were implicitly endowed to a minority as a group and, thus, language rights were perceived as collective rights. In contrast, according to the collective conception, collective rights are defined by the kind of good to which individuals are entitled and not by who is a right-holder. In this sense, the holders of the collective right are always individual human beings inasmuch as they share a common interest in a collective good. According to the collective conception, a language right is a right to a public good and only individuals are entitled to that public good. The collective conception of collective rights seems much more suitable to understanding language rights than the corporate conception. Linguistic communities typically lack the legal personality of corporations and, more importantly, they should not be considered as legal persons with rights of their own¹⁶.

Although the above explanations of the nature of language rights seem to be satisfactory, the matter of the individual and collective nature of language rights was complicated even more by some eminent sociolinguists and their definition of language rights. Stephen May, Tove Skutnabb-Kangas, and Robert Philipson note that the notion of collective rights is problematic and may be easily misunderstood. They maintain that language rights may be considered in some cases both as individual and collective rights¹⁷. Stephen May, an international authority on language rights, coined the term of “group-differentiated rights” in

¹⁶ Ibid., at pp. 114–115.

¹⁷ T. Skutnabb-Kangas and R. Philipson, *Linguistic human rights, past and present*, [in:] T. Skutnabb-Kangas and R. Philipson (eds), *Language Rights*, London/New York: Series Critical Studies in Language Studies, 2017, at p. 2.

order to cover different possibilities regarding the holder of the rights as “they can in fact be accorded to individual members of a group, or to the group as a whole, or to a federal state/province within which the group forms a majority¹⁸”. Despite that, this paper focuses on the legal analysis of language rights, and the different views of sociolinguist should not decide on the legal nature of rights.

In order to verify if the collective right may be treated as a human right and be protected by a binding legal instrument, Article 27 of the International Covenant on Civil and Political Rights should be examined. Actually, a debate in the international legal and human rights literature about the beneficiaries of Article 27 and the precise nature of the legal obligations that follow from this provision has been held. For some scholars, Article 27 may attach rights to the group itself or merely to the individual members therein, or to both. Such diverging interpretations result from the fact that the provision may be interpreted broadly or narrowly. The broad interpretation would include both the corporate and collective conception of language rights, the narrow one only the collective conception¹⁹. As maintained by Fernand de Varennes, a leading expert on human rights, a narrow interpretation of Article 27 must be applied as it was never an intention of the drafters of Article 27 to provide too many concessions to linguistic minorities. Conversely, the drafters wished to grant rights to individual members of minorities. Such a narrow interpretation of Article 27 of the ICCPR was also approved in the 1992 United Nations Declaration on the Rights of Persons Belonging to National and Ethnic or Religious Minorities, which insists that “persons belonging to [...] linguistic minorities have the right to enjoy their own culture [...] and to use their own language²⁰”. The above interpretation of Article 27 made it clear that language rights are under international law first and foremost individual in nature and not with reference to the entire group, and despite some other views on this matter, this approach

¹⁸ S. May, *Language Rights: The ‘Cinderella’ of Human Rights*, “Journal of Human Rights” 2011, vol. 3, issue 3, p. 268.

¹⁹ F. de Varennes, *Language, Minorities and Human Rights*, “International Studies in Human Rights” 1996, vol. 45, pp. 217-218.

²⁰ A/RES/47/135, available at <http://www.un.org/documents/ga/res/47/a47r135.htm> [last accessed 20 March 2018].

prevails. Hence, the term collective rights is used in the meaning of rights awarded to individuals belonging to a certain group. De Varennes maintains that the rights of national minorities are not collective rights and language rights derive from individual human rights, in particular non-discrimination, freedom of expression, the right to a private life, and the right of members of a linguistic minority to use their language with other members of the community. He claims that these well-established human rights provide a flexible framework capable of responding to many of the demands of individuals, minorities or linguistic minorities²¹.

IV. LANGUAGE RIGHTS AS INDIVIDUAL RIGHTS

As demonstrated above, language rights are primarily the domain of individuals. Still language rights understood as individual rights have a more legally disputed character than what some seem to claim. In order to understand the merits of language rights, one needs to go back to Heinz Kloss, a ground-breaking scholar in the field, who coined the term *language right* in 1971 and later reshaped it in 1977. He divided language rights into *tolerance-oriented language rights* and *promotion-oriented language rights*. According to him, the former are the rights of individuals to preserve their language(s) in the private, non-governmental sphere of national life and ensure non-interference by the state in the private uses of language. Such rights include the right of individuals to use their language, and are regarded as inviolable and constitute the minimum standard in liberal democracies. The key principle of such rights is that the state does not interfere in the private domain of a minority to use of their language in the private domain. The latter are described as the rights which regulate the extent to which such rights are recognised within in all formal domains of the nation-state, thus allowing a minority to care for its internal affairs through the public authorities. Promotion-oriented language rights are more substantial, extending to positive measures to improve language access in public institutions, such as courts, state

²¹ F. de Varennes, *Language Rights as an Integral Part of Human Rights*, "IJMS: International Journal on Multicultural Societies" 2001, vol. 3, issue 1, available at www.unesco.org/shs/ijms/vol3/issue1/art2 [last accessed 5 April 2018], p. 15.

schools, and public services. Although international law only imposes an obligation to guarantee the tolerance-oriented language rights of individuals²², as noticed by Stephen May, promotion-oriented language rights are constantly developing in international law and the question of who should be eligible for them still remains unanswered. National minorities and indigenous people are gaining some ground here, but migrants remain largely excluded²³.

Another definition of individual language rights was introduced by the sociolinguists Tove Skutnabb-Kangas and Robert Philipson in 1994. In the spirit of the truth that human rights are the rights granted to a human being by virtue of the mere fact that he or she is human, enthusiastic advocates of a human rights approach to language rights²⁴ claim that language rights should be accorded the status of fundamental human rights and should be recognised as such by states and international organisations. Skutnabb-Kangas and Philipson coined the term “linguistic human rights” and specified its scope. According to them, linguistic human rights may be used either in relation to a mother tongue(s) or other languages. With respect to a mother tongue, linguistic human rights consist of the right to identify oneself with it/them, to education and public services through the medium of it/them. With respect to other languages, linguistic human rights consist of the right to learn an official language in the country of residence in its standard form. Skutnabb-Kangas and Philipson narrow the focus of linguistic human rights to educational linguistic human rights for minorities and by that fact acknowledge that such rights are more urgently needed for minorities than for majorities and that formal education plays a decisive role in the maintenance and development of languages. They also stress the inalienability of a right to learn one of the official languages of the country of residence²⁵. In this context, they differentiate between necessary linguistic rights

²² Mälskoo, *supra* note 6, at pp. 431, 441.

²³ S. May, *Language, imperialism, and the modern nation-state system*, [in:] O.G. Nelson and M. Spotti (eds) *The Oxford Handbook of Language and Society*, Oxford: Oxford University Press, 2016.

²⁴ Stephen May, Tove Skutnabb-Kangas and Robert Philipson.

²⁵ T. Skutnabb-Kangas and R. Philipson, *Linguistic human rights, past and present*, [in:] T. Skutnabb-Kangas and R. Philipson (eds), *Language Rights*, London/New York: Series Critical Studies in Language Studies, p. 1.

and enrichment-oriented linguistic rights. *Necessary* linguistic rights mean rights to use and learn one's mother tongue and learn an official language of the country of residence, i.e. they have to do with learning and use of mother tongues and second languages, and only such rights are considered inalienable linguistic human rights. Necessary linguistic rights guarantee that an individual builds up a linguistic repertoire by learning his mother tongue or a second language in order to satisfy basic social and psychological needs and participate in economic and political life. *Enrichment-oriented* linguistic rights are concerned with the right to learn and use foreign languages and as such they are not inalienable. They are language rights understood as a privilege or liberty adding to the linguistic repertoire of an individual by learning foreign languages when their mother tongue is not at risk of being replaced or not fully learnt. The enjoyment of enrichment-oriented linguistic right is not necessary for individual or group survival, but can be important for personal or professional purposes or for international understanding²⁶. The above distinction of linguistic human rights confirms the fact that even if the group of rights may be applied with reference to a minority which should be protected owing to its very status of being weaker living amongst the majority, specific rights are entitlements granted to individual members of the community. A clear message from the above is that individual members of a minority are unconditionally entitled to enjoy their educational linguistic human rights, i.e. to learn their mother tongue and an official language of the country of residence.

Like Skutnabb-Kangas and Philipson, De Varennes makes a crucial distinction between the private use of a language by individuals and the use of a minority language by public authorities. He claims that as language rights are an integral part of human rights, the private sphere cannot be arbitrarily or unlawfully interfered in by public authorities²⁷. This human rights approach to language rights is not shared by all legal scholars. Its opponents claim that talking of a language right as "a fundamental human right" is unfortunate because this implies a single unqualified right to use a language. They argue that language rights should be understood as implications of other well-established

²⁶ *Ibid.*, p. 21-22.

²⁷ De Varennes, *supra* note 20 at pp. 15-25.

fundamental rights, such as the right to a fair trial, an example being the right of a defendant to be informed of the charges in a language they can understand (not necessarily their mother tongue), or the right to an interpreter paid for by the state for translating criminal court proceedings and documents, but language rights cannot be expressly named fundamental human rights²⁸.

Xabier Arzoz (2010) notes that international human rights instruments provide basic protection of specific language rights within the framework of general human rights such as a right to anti-discrimination measures, freedom of expression, of assembly and association, and rights of respect for private and family life. Legal obligations imposed on states in the area of the use and promotion of languages by public authorities are scarce and lack legal bite²⁹. Arzoz also touches upon an important discussion on the fundamental character of language rights understood as a particular category of constitutional rights of domestic legal orders. He presents three approaches towards treating language rights as fundamental rights. The first approach resorts to the minimal position of language rights as fundamental rights. Fundamental rights with a linguistic dimension tend to be, explicitly or implicitly, universally recognised. The enjoyment of those rights is accorded to everyone, whatever the language (s)he speaks or the place where (s)he is. Such rights include freedom of speech/expression, the right of respect for private and family life including respect for the language spoken within the family and in the private sphere, the right to a fair trial or the right to education. However, not all fundamental rights that could have a linguistic dimension do necessarily have it, the example being the right to education. The second approach is a relativist one. It makes the point that language rights are fundamental rights only when they are constitutionally entrenched as such. In this sense, they are conditional upon domestic legal orders. According to this approach, the right to the language will become an effective fundamental right only to the extent it is enshrined as such in mandatory domestic norms. Arzoz maintains that national constitutions committed to protect linguistic diversity tend to separate provisions concerning language promotion and maintenance on the one hand, and classical fundamental rights on

²⁸ Méndez, *supra* note 16, pp. 109–111.

²⁹ Arzoz, *supra* note 9 at p. 9.

the other. The third approach stresses the specificity of genuine language rights. Classic fundamental rights are designed to protect individual freedom and autonomy against the repressive or intrusive state and to guarantee individual autonomy by virtue of some social, cultural, and economic rights (education, health care, accommodation and so on). The purpose of language rights protection is the freedom and equality of all individuals and groups. In line with this approach the recognition of language rights purports to protect specific linguistic minorities, but every linguistic minority, or to secure equal status to specific languages, but to every language³⁰.

Arzoz also notices that while in principle human rights do limit state behaviour, language rights are, more often than not, an issue devolved to the political process. The recognition of language rights in national constitutions is primarily based on contingent historical reasons. Moreover, Arzoz claims that international organisations contribute to creating a false image of an extended level of protection of language rights and one may have the impression that language rights are a consolidated category with a sound basis in contemporary international law³¹. He presents a more rigorous characterisation of language rights by arguing that the general assimilation or equation between language rights and human rights is not only erroneous, but it leads to a distorted image of the relationship between law and politics. Constitutions and national legal orders illustrate a diversity of solutions, approaches and regulatory models, which demonstrate that language rights are not at the heart of human rights. This seems to run against the notion of linguistic human rights³² approach. The widely diverging approaches to language rights adopted by states in their legislation on the use or recognition of languages other than official language(s) reveal the difficulty of establishing common principles on human rights. According to Arzoz, one should keep in mind the difference between the rights which are currently characterised as

³⁰ *Ibid.*, p. 25–30.

³¹ *Ibid.*, p.1.

³² *Linguistic human rights* understood as human rights related to language use. The meaning is broader than the one used by by Skutnabb-Kangas and Philipson, who narrowed the focus of linguistic human rights to educational linguistic human rights for minorities.

human or constitutional rights, and the aspirations which one believes also ought to be characterised as such.

Proponents of language rights understood as human rights disagree with the current arrangements and advocate the development of international law with a view to recognising further language rights of individuals³³. Yet an overview of key international and regional human rights instruments uncovers the gap between the promise of language rights protection and the judicial meanings of these rights developed in practice by competent courts. Normatively, it suggests that treating language interests, irrespective of how valid and worthy they may be, under the rubric of human rights cannot be defended in practice³⁴. Maria Paz, a fellow in international law and human rights at Stanford University, claims that resorting to linguistic human rights in cases of linguistic disputes runs the risk of devaluing the larger human rights endeavour and does not advance reaching a compromise in concrete disputes. Language strife will likely be settled by ad-hoc solutions with very different distributional consequences for different minority groups, not by the overriding power of absolute and universal rights. By advocating the human rights approach to linguistic conflicts between minorities and majorities, human rights scholars transform political questions into legal questions, and then transform legal questions into questions of universal abstract language rights, or human rights more generally. With this movement, they promise a solution the law cannot really deliver³⁵. Paz states that treating language interests under the rubric of human rights cannot be normatively defended. She maintains that a universal human rights approach to linguistic claims is ill-suited as a mechanism to reach stable resolutions for language conflicts. She notes that idea at the core of the political, not legal, questions. For Paz, language is the primary good, and the aim of its legal protection is to ensure that individuals enjoy a safe linguistic environment in which they speak their mother tongues and where vulnerable linguistic groups retain a fair chance to flourish. Language is not a substantive right *per*

³³ Arzo, *supra* note 9, p. 3.

³⁴ M. Paz, *The Failed Promise of Language Rights: A Critique of the International Language Rights Regime*, "Harvard International Law Journal" 2013, vol. 54, issue 1, p. 163.

³⁵ *Ibid.*, p. 213.

se, but a solution to protecting other rights that may have expression in language. The analysis carried out by Paz demonstrates that there is a striking discrepancy between the announced declarations and the actual decisions of the transnational bodies of the Council of Europe and the United Nations³⁶. Moreover, no provision of a binding international legal instrument expressly guarantees the liberty of one's language use. Such a view was confirmed by the ECtHR with reference to the provisions of the ECHR³⁷.

In view of the above, it can be stated that there is no universal understanding of language rights as human rights and a heated debate on this issue is still in progress. Yet, three basic categories of individual rights which address language questions are categorised as human rights. Firstly, procedural human rights with linguistic aspects (procedural linguistic human rights), secondly, freedom of expression which covers the choice of the language in which one would like to express one's opinion and thirdly, the prohibition of discrimination on the grounds of a language. Now the three rights will be examined in order to verify what is their true legal nature in the light of specific legal provisions and their enforceability. Only afterwards will it be possible to assess if the rights can be viewed as universal linguistic human rights.

1. PROCEDURAL LINGUISTIC HUMAN RIGHTS

Procedural linguistic human rights constitute fundamental human rights which prohibit arbitrary detention and guarantee fair and certain legal process for individuals and thus are a cornerstone of a just society. Procedural linguistic human rights are derivative from the other procedural human rights, in particular the right to liberty and security and the right to a fair trial. The right to liberty and security and the right to a fair trial were first recognised in 1948 by the United Nations in the Universal Declaration of Human Rights (UDHR, UN Declaration)

³⁶ *Ibid.*, pp. 166–169.

³⁷ *Igors Dmitrijevs v. Latvia*, judgment of 30 November 2006, not published, available at: <http://echr.coe.int/echr/en/hudoc>, [last accessed 25 September 2008], at para. 85, with further references. The judgment is available only in French.

as a response to the horrors of the Second World War. Although the Declaration has no legally binding force, it has affected a number of binding human rights instruments, including regional ones, in terms of language matters. The right to liberty and security and the right to a fair trial which are aimed at preventing abuses by the state and putting an obligation on the state to provide actively for the realisation of the right encompass linguistic aspects of the legal proceedings. Article 9 of the UN Declaration guarantees the right to liberty and security, also called the ban on arbitrary detention, by stating that “no one shall be subjected to arbitrary arrest, detention, or exile”. The right is also enshrined and reinforced in Articles 9 and 11 of the International Covenant on Civil and Political Rights (ICCPR) which as a legally binding instrument requires immediate realisation on the part of the state parties³⁸. Article 9 of the UN Declaration is closely related to Article 10 which guarantees the right to a fair trial by stipulating that “everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations of any criminal charge against him³⁹”. Again, the right was incorporated into Article 14 ICCPR. Specifically, language aspects are referred to in Article 14 (3)f ICCPR which guarantees the free assistance of an interpreter if a person charged cannot understand or speak the language used in court. Both Article 9 and Article 10 of the Declaration, reaffirmed in Articles 11 and 14 ICCPR, grant the right of equality, fairness, and lack of arbitrariness at the stage of detention and the legal process itself, which also implies the right to understand the language in which the charges, rights, and obligations are pronounced, and this confers the right to interpretation and translation. The fact that language rights are included in the ICCPR as components of the right to liberty and security and the right to a fair trial makes the rights legally enforceable. The enforcement of the rights enshrined in the ICCPR is supervised by the UN Human Rights Committee (UNHRC) which is authorised to consider inter-state complaints and, under the First Optional Protocol, has the competence to examine individual

³⁸ U.N. *International Covenant on Civil and Political Rights*, 23 March 1976.

³⁹ *The Universal Declaration of Human Rights*, 10 December 1948, available at: <http://www.un.org/en/universal-declaration-human-rights/> [last accessed 19 April 2018].

complaints with regard to the alleged violations of the Covenant by state parties⁴⁰.

The provisions of the UN Declaration exerted an impact on the European Convention on Human Rights and Fundamental Freedoms (the Convention, ECHR) of 1950, also in respect of the linguistic aspects of the right to liberty and security and the right to a fair trial. The rights are enshrined in Articles 5 and 6 of the Convention respectively. They provide the right of an arrested or accused person to a translator and/or interpreter at different stages of criminal proceedings, including arrest, police custody, investigation, and trial. Firstly, Article 5(2) ECHR stipulates that “everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him”. Next, Article 6(3) a) and e) ECHR makes clear reference to languages by stating that “everyone charged with a criminal offence has to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him”, and by guaranteeing for those charged with a criminal offence “the free assistance of an interpreter if he or she cannot understand or speak the language used in court”. In this context, the ECtHR often refers to section 1 of Article 6 which includes a general statement that “everyone is entitled to a fair trial and public hearing within a reasonable time by an independent and impartial tribunal⁴¹”.

The ECtHR case-law on the right to language assistance in criminal proceedings, understood as a right resulting from the right to liberty and security and the right to a fair trial, is pretty extensive. The overview of the ECtHR case-law proves that establishing the existence of the right itself is not a problem as the protection against arbitrary deprivation of liberty (Article 5 ECHR) is an elementary safeguard of any arrested person. The arrested person should know in a language he or she understands why he or she is deprived of his or her liberty. Such an approach was approved in

⁴⁰ Information available at: <http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIntro.aspx> [last accessed 17 September 2017].

⁴¹ *European Convention on Human Rights and Fundamental Freedoms*, 4 November 1950, available at: https://www.echr.coe.int/Documents/Convention_ENG.pdf [last accessed 19 April 2018].

*Delcourt v. Belgium*⁴² where the Court ruled that when a person deprived of liberty does not understand an official language of the state, the explanation must be provided to the person concerned in a language that the person understands, including Braille or sign language, and the explanation needs to be given, at the initial moment of apprehension, by a person who can speak the language of the detained. The protection of the right to free assistance of an interpreter exercised under the right to a fair trial was extended by the ECtHR in its case law. Over time, the ECtHR extended the right beyond procedures that are qualified as criminal to a procedure aimed at finding a regulatory offence and stated that such an offence should also be covered by Article 6(3)e ECHR. In *Öztürk v. Germany*⁴³, the Court ruled that what mattered was the criminal nature of the sanction. As a consequence, the right to receive the free assistance of an interpreter was vested in anyone who could not speak or understand the language used in court either in criminal proceedings or in proceedings relating to petty offences⁴⁴.

The challenge related to the right to language assistance lies in various aspects of the practical implementation of the right. There are three main categories of legal problems considered by the ECtHR in this respect: 1. When may language assistance be refused? (*Bozicek v. Italy*), 2. Should such assistance be free of charge? (*Luedicke, Belkacem & Koç v. Germany, Isyar v. Bulgaria*) and 3. What is the extent of the authorities' duty in respect of language assistance? (*Kamasinski v. Austria, Hermi v. Italy*). Moreover, the ECtHR has also dealt with an issue of the translator/interpreter choice (*Cuscani v. the United Kingdom*), translation/interpretation quality control (*Panasenko v. Portugal*) and the impartiality and independence of a translator/an interpreter (*Ucak v. the United Kingdom*).

First, the refusal of language assistance was examined by the ECtHR in *Brozicek v. Italy*⁴⁵ where the applicant, who was not Italian and did not speak Italian, was not informed of the charges in a language he understood. The letter sent to him by the Public Prosecutor's office was prepared in

⁴² *Delcourt v. Belgium*, (application no. 2689/65), judgment of 17 January 1970.

⁴³ *Öztürk v. Germany* (application no 8544/79) judgment of 21 February 1984.

⁴⁴ *Studies on translation and multilingualism. Language and Translation in International Law and EU Law*. DGT/2011/MLM2. 6/2012, 30 July 2012, p. 72.

⁴⁵ *Brozicek v. Italy* (application No. 10964/84), judgment of 19 December 1989.

Italian and then the applicant was convicted *in absentia* despite the fact that he responded indicating that he did not speak Italian. He claimed that he had not been given the possibility of participating in the trial in order to defend himself against the charges brought against him. The ECtHR ruled that the trial was not fair within the meaning of Article 6(1) and (3) a) ECHR as the lack of written translation of the indictment might put an accused in a disadvantaged position and prevented him from defence.

Secondly, the coverage of costs for language support is another key linguistic aspect of the right to a fair trial which was exposed in *Luedicke, Belkacem, and Koc v. Germany*⁴⁶. In the case, the ECtHR ruled that the state had an obligation to act in order to comply with the language rights of an individual. The Court examined the possible violation of Article 6(3) e) which guaranteed for an accused not understanding or speaking the language used in court the right to the free assistance of an interpreter for the translation or interpretation of all those documents and statements in the proceedings instigated against him which it was necessary to understand in order to have the benefit of a fair trial. In the case three applicants who were charged before the German courts and were not sufficiently familiar with the language of the country were assisted by an interpreter, as guaranteed under the right to a fair trial. The ECtHR ruled that charging the applicants with the costs of interpreting by the German court would result in disadvantages for the party who did not understand or speak the language used in court when compared with an applicant who was familiar with that language. Notably, the competent court rested on the supposition that the free assistance of an interpreter covered only the costs resulting from the interpretation at the trial hearing. Yet the court did not determine whether the right stated in Article 6(3)e) extended to the costs that the German court awarded against applicants. The court held unanimously that Article 6(3)e) ECHR was breached and that the Federal Republic of Germany should reimburse the interpretation costs at the trial hearing to Mr Luedicke, who incurred the costs for the oral hearing.

Thirdly, the extent of the authorities' duty in respect of language assistance is yet another important linguistic dimension of the right to

⁴⁶ *Luedicke, Belkacem and Koc v. Germany* (application No. 6210/73, 6877/75, 7132/75), judgment of 28 November 1978.

a fair trial examined by the ECtHR. The Strasbourg case-law proves that the authorities have a duty to ensure that an accused be provided with language support if requested, unless it is evidenced that the request is not justified. In the case of refusal, it is the government which bears the burden of proof in proceedings in front of the court to demonstrate that language services are not essential. The same occurs when the accused is provided with language assistance, but complains about its quality or the impartiality of a translator/interpreter. In such a case, the accused will have to show in front of the court that he/she was adversely affected by the low quality or partiality of a translator/an interpreter⁴⁷.

The issues of the free assistance of an interpreter and the scope of the authorities' support occurred in the *Kamasinski v. Austria*⁴⁸ case when the ECtHR decided that the right to language assistance applies not only to oral statements made at the hearing, but also to documentary material and the pre-trial proceedings. In this case, the applicant's principal grievance derived from his inability to understand or speak the language used in the criminal proceedings brought against him in Austria. He complained of inadequate interpretation of oral statements and the lack of written translation of official documents in criminal proceedings, as a result of which the defendant did not have enough evidence to allow him to defend himself and protect his interests during an adjudication. Mr Kamasinski maintained discrimination in the enjoyment of the fundamental rights protected by Article 6. The ECtHR decided unanimously that Article 6(1) ECHR was violated. Similar approach was confirmed in the case *Shamayev and 12 Others v. Georgia and Russia*⁴⁹, where the ECtHR held the violation of Article 5(2) ECHR and ruled that the applicants had not received sufficient information in a language understandable to them about their detention. In the light of that finding, the Court stated that well qualified translators should be used for the purpose of translating the warrant of arrest and for interrogation of the applicant and it was incumbent on the

⁴⁷ J. Brannan, *European Court of Human Rights case-law on the right to language assistance in criminal proceedings*, available at: http://eulita.eu/sites/default/files/European%20Court%20of%20Human%20Rights%20case-law_abstract.pdf [last accessed 29 June 2017].

⁴⁸ *Kamasinski v. Austria* (application no. 9783/82), judgment of 9 December 1989.

⁴⁹ *Shamayev and 12 Others v. Georgia and Russia*, (application No. 36378/02), judgment of 12 April 2005.

authorities to ensure that requests for translation are formulated with precision⁵⁰. It is worth mentioning that in *Kamasinski v. Austria* the ECtHR expressed the opinion that the requirements of Article 6(3)e are not met in a case when the accused only roughly understands the language of the criminal proceedings. In such circumstances, the accused is not vested with the right to a free interpretation/translation service, as according to the Court they are able to understand the language of the proceedings. This approach was confirmed in the case of *Cuscani v. Italy*⁵¹.

As noticed by Paz, the approach of the UNHRC and the ECtHR towards the linguistic aspects of procedural rights is similar. Both the decisions of the UNHRC and the ECtHR support treating language rights as part of a right to liberty and security and the right to a fair trial (due process guarantee). Both the UNHRC and the ECtHR focus on individual-based procedural fairness. Both the UNHRC and the ECtHR have developed a utilitarian test for what constitutes a sufficient level of language knowledge. According to the test, the accused should be able “to have knowledge of the case against him and to defend himself”. In this respect both institutions have been criticised for being unfair. The point is that, on the one hand, a person charged in a criminal trial who belongs to a non-dominant linguistic group, but who has assimilated enough into the state to possess “sufficient knowledge” in the dominant language is forced to speak the language of the Court, even if he feels that his knowledge of that language is not “sufficient for a successful pursuit of his claim”. On the other hand, if the same accused had never learned the state language (again either by choice, by necessity, or otherwise), he would be allowed to use the language of his choice in court sessions, and would have the costs of an interpreter covered by the state. Procedurally, this means that those who do not participate in the state activities are more privileged by the international legal regime than those who do. In fact, it seems that the international regulations protect claimants who are completely ignorant of the Court’s language and thus cannot respond to the charges against them, but fail to provide protection to

⁵⁰ *Guide on Article 5 of the Convention. Right to Liberty and Security*, available at: http://www.echr.coe.int/Documents/Guide_Art_5_ENG.pdf [last accessed 17 July 2017] at p. 23.

⁵¹ *Cuscani v. Italy* (application no. 32771/96), judgment of 24 September 2002.

those who made an effort to assimilate themselves and are engaged into social life⁵².

2. FREEDOM OF EXPRESSION

Freedom of expression, also known as freedom of speech, is internationally recognised as an individual right protected under Article 19 of the Universal Declaration of Human Rights, under Article 19(2) of the International Covenant on Civil and political Rights as well as under Article 10 of the European Convention of Human Rights. The right includes freedom to seek, receive, and impart information and ideas of all kinds and through the media of one's choice⁵³. The right to freedom of expression protects the use of any language in private or in public. Notably, no international law instrument guarantees the right to use a given language in official proceedings or in education, as it protects only the expression of oneself, but not communication with the entities that have connection with the holder of the right. In this sense, freedom of expression has a very limited reach in view of language rights, insofar as it can protect only communications between persons using the same language or unilateral usages of a certain language in an environment which is hostile to that language⁵⁴.

The linguistic aspects of the freedom of expression were described by Arzoz as the freedom of language, which is not territorially circumscribed and granted to everyone. According to Arzoz's theory, freedom of language includes the right to use one's mother tongue or any other language, both in speech and writing. Any linguistic intolerance and repression of non-dominant languages is regarded to be inconsistent with the fundamental rights of an individual. Arzoz stresses that freedom of language guarantees the right to freely determine one's linguistic behaviour⁵⁵. The linguistic

⁵² Paz, *supra* note 33 at pp. 192–193.

⁵³ Available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx> [last accessed 3 July 2017].

⁵⁴ *Studies on translation and multilingualism. Language and Translation in International Law and EU Law*. DGT/2011/MLM2. 6/2012, 30 July 2012, p. 72.

⁵⁵ Arzoz, *supra* note 9 at p. 26.

aspects of freedom of expression were also analysed by Leslie Green, a leading scholar in the analytic philosophy of law. He studied whether the freedom of expression protects the choice of language on the territory of Canada, whose federal system requires the use of French and English for certain purposes. He claims that language is protected indirectly through the principles of rationality, non-discrimination, and personal liberty. In the judgment in *Devine v. Quebec*, a leading ruling on the constitutional protection of minority language rights in Canada, the Supreme Court of Canada unanimously held that the Language Charter as a valid provincial law violated freedom of expression under section 2(b) of the Canadian Charter as it prohibited the use of English in commercial signs, i.e. in the public sphere. Moreover, the right to use a language in a private domain under the right to freedom of expression was acknowledged in the case of *Ballantyne v. Canada* despite the fact that the ruling was contrary to the official language policy of the Government of Quebec⁵⁶.

The most common case of breach of freedom of expression in relation to language occurs when the public authority bans the use of a minority language in public areas. Such a decision of the authorities would constitute a form of discrimination based on language, which would be contrary to Article 27 of the International Covenant on Civil and Political Rights. This interpretation proves that a direct link between the freedom of expression and non-discrimination places language matters closer to the right of non-discrimination as there should be no discrimination between speakers of a language that dominates on a territory and speakers of other languages who should be granted the right to express themselves in their languages⁵⁷.

3. PROHIBITION OF DISCRIMINATION ON THE GROUNDS OF LANGUAGE

The prohibition of discrimination on the grounds of language is regarded as protecting a universal human right which may be exercised in the

⁵⁶ L. Green, *Freedom of Expression and Choice of Language*, Osgoode Digital Commons, 1994, p. 147.

⁵⁷ De Varennes, *supra* note 20 at pp. 15–25.

case of an unjustified disadvantage suffered due to the use of a certain language. Fernand de Varennes claims that non-discrimination on the grounds of language may be the most powerful right for individuals who seek more just and responsive conduct from public authorities in language matters⁵⁸. International law instruments include numerous references to the prohibition of discrimination on the grounds of language, including the Universal Declaration of Human Rights (Article 2), the International Covenant on Civil and Political Rights (Article 2, Article 27), the International Covenant on Economic, Social and Cultural Rights⁵⁹ (Article 2), the European Convention on Human Rights (Article 14) or the Convention on the Rights of the Child⁶⁰ (Article 2) and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families⁶¹ (Article 7). The scope of the instruments listed above illustrates various areas where the discrimination on the grounds of language may occur, including civil, political, economic, social, and cultural rights as well as the right to education and employment. The legal force of the listed international instruments regulating the right of non-discrimination on the grounds of language differ. Only some provisions are legally binding. The paper focusses on the rights enshrined in the ICCPR and the ECHR as well as the European Charter for Regional or Minority Languages and the Framework Convention for the Protection of National Minorities, which are complementary to the ECHR in respect of linguistic and minority rights.

To start with, Article 2 ICCPR includes only a general stipulation that the rights recognized in the ICCPR be respected without distinction of any kind, including language, and that the rights be available to everyone within the territory of those states who have ratified the Covenant (State

⁵⁸ Ibid.

⁵⁹ *International Covenant on Economic, Social and Cultural Rights*, available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx> [last accessed 19 April 2018].

⁶⁰ *Convention on the Rights of the Child*, 2 September 1990, available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx> [last accessed 19 April 2018].

⁶¹ *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, adopted by the General Assembly on 18 December 1990, available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CMW.aspx> [last accessed 19 April 2018].

Party). Article 2 is too general in nature to constitute the legal grounds for the enforcement of language rights. In respect of language matters it has to be read in conjunction with Article 27 ICCPR which regulates the language rights of persons belonging to minorities. Under the ICCPR, the right of non-discrimination on the grounds of language actually relates to the protection of minority languages. Such interpretation of the ICCPR causes the right of non-discrimination on the grounds of language to be associated with the linguistic rights of minorities under international law and as such will be analysed in this paper.

In view of the above, before the analysis is started, the question should be asked if the right of non-discrimination based on language with respect to linguistic minorities is a universal human right. On the one hand, the rights of minorities are regulated separately in a number of international instruments such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic or Religious Minorities⁶², the European Convention of Human Rights, the Framework Convention for the Protection of National Minorities⁶³, the European Charter for Regional or Minorities Languages⁶⁴. They all promote the language rights of minorities as universal, minority-specific human rights, which should be combined with the prohibition of discrimination⁶⁵. On the other hand, the right to use a minority language in the public sphere seems not to be an absolute right as in many cases, as shown below, it depends on numbers.

The right of non-discrimination on the grounds of language constitutes the basis for the entire catalogue of language rights of minority members. Such rights may be divided into two broader categories, i.e. the right to use a minority language in private life and public life. Scholars often stress that

⁶² *United Nations Declaration on the Rights of Persons Belonging to National or Ethnic or Religious Minorities*, adopted by the General Assembly on 18 December 1992, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/Minorities.aspx> [last accessed 19 April 2018].

⁶³ *Framework Convention for the Protection of National Minorities*, February 1995, <https://rm.coe.int/16800c10cf> [last accessed 19 April 2018].

⁶⁴ *European Charter for Regional or Minorities Languages*, 5 November 1992 available at: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/148> [last accessed 19 April 2018].

⁶⁵ Paz, *supra* note 33 at p. 171.

a distinction between the private use of language by persons belonging to a minority and the use of a minority language in contact with public authorities result in different types of rights. The main distinctive feature of the private use of language is that such rights cannot be arbitrarily or unlawfully interfered with by public authorities and such rights manifest fundamental individual rights which are unconditional. The catalogue of language rights in the private sphere includes the rights to private and family life, freedom of expression, non-discrimination, and the right of minority members to use their language with other members of their group. The language rights in the private sphere may imply other rights, an example being the right to a private life which entails the right to have one's name and surname recognised in one's own language, as names and surnames are a means of identifying persons within their families and the community⁶⁶. The right to the public use of a minority language is not regarded as fundamental and absolute as it depends on how the state organises its communication with minorities. Language rights in the public sphere may include the right to speak and write, correspond and communicate, in a minority language, the right to cultural and musical expression in a minority language, to designate localities and topography, the right to linguistic expression such as posters, commercial signs.

As for the right to use a minority language within the public domain, under international law the state must apply a principle of non-discrimination in all areas of state involvement and conduct. If there are certain services to which all individuals are entitled, there is a legal obligation on the state to ensure that there is no discrimination based on language. In fact, the use of a minority language by public authorities refers to language rights in relation to fairness of judicial proceedings and the general use of minority languages by public officials. Public authorities are legally obliged to use a minority language to communicate information to an individual facing criminal charges in a language he or she understands. International law recognises a number of rights in the area of justice with reference to the members of a minority, such as the right to an interpreter in criminal proceedings, the right to be informed promptly in a language one understands, or the right to use a minority

⁶⁶ De Varennes, *supra* note 20 at pp. 17-18.

language during civil ceremonies. Both the right to an interpreter in criminal proceedings and the right to be informed promptly in a language one understands are absolute rights and do not depend on the number of speakers of a minority language. The rights are directly linked to the right to a fair trial. They are entrenched in most treaties dealing with human rights and are granted not only to the members of minorities, but also to any non-national. Specifically, the language rights of minority members are also mentioned in the European Charter for Regional or Minority Languages in Article 9 which recognises the need to use regional or minority languages in criminal, civil, and administrative proceedings where “the number of residents justifies the measures”⁶⁷.

In the area of the general use of minority languages by public officials, the state authorities have a positive obligation to provide public services, benefits, and privileges in a language of a specific minority in appropriate circumstances. The issue is that this is the state which decides what appropriate circumstances stand for. If circumstances are defined by the states as appropriate, then the state *must* respond to the needs of a minority in respect of language rights⁶⁸. In principle, appropriate circumstances for the state authorities are defined as in particular a minimum number and geographic concentration of the speakers of a minority language which make it reasonable or justified for the state to use their language in the public sphere. A need to use a minority language essentially appears when there is – in the state’s opinion – a sufficient number of language speakers who demand a certain type of public service in their language. This may imply that when a number of speakers is too low and it is too onerous to use a minority language in a certain type of public service, the right to use a minority language is not violated. In the case when the number of minority language speakers constitutes a very high percentage, there would have to be a sufficient number of public officials able to respond in a minority language, as all activities pertaining to administrative and public authorities and all areas of state involvement, including the judiciary, state education, state-provided health services,

⁶⁷ F. de Varennes, *The Existing Rights of Minorities in International Law*, [in:] “Language: A Right and a Resource. Approaching Linguistic Human Rights”, Hungary 1999, p. 130.

⁶⁸ *Ibid.*, at p. 127.

or public broadcasting will also be provided in the minority language⁶⁹. An example of the right dependent on the concentration of minority language users is the right of persons belonging to minorities to use a minority language during civil ceremonies which may be claimed by an individual only in the event that a minority is territorially concentrated and sufficiently numerous to make it reasonable to respond to their preference.

V. INTERNATIONAL LAW ON MINORITY RIGHTS

Article 27 ICCPR is championed by legal scholars as a crown jewel in the protection of linguistic minorities and as the most widely accepted legally binding provision on minorities. It includes an express right of persons belonging to linguistic minorities, i.e. the right to enjoy the minority's own culture and to use its own language. The Article reads that the "states in which ethnic, religious, or linguistic minorities exist, persons belonging to such minorities shall not be denied the right in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language". On the one hand, Article 27 imposes obligations on the state to positively support minority language maintenance and to specify the measures necessary to comply with broad commitments with respect to cultural and linguistic preservation. On the other hand, Article 27 gives the state leeway to provide the rules and procedures used to determine who can become a citizen and a member of a national minority as regards some minority languages.

Article 14 ECHR provides the right to non-discrimination on the grounds of language, and in theory it may be invoked by any non-national, but in fact it is mostly adduced by linguistic minority members. The problem with Article 14 ECHR is that it is ambivalent in nature and it remains unclear whether the anti-discrimination clause provided in the Article covers the linguistic and cultural preservation of the collective rights, or protects only individual members of the minority group. Scholars unanimously claim that the ECHR shows deficiencies as it lacks

⁶⁹ Ibid., at p. 21.

a direct language privilege⁷⁰. As opposed to Article 27 ICCPR, Article 14 ECHR offers no rights to the use of minority languages when interacting with the state. Since the right to use one's language in dealing with public authorities is not protected by any provision of the Convention, Article 14 cannot be used to challenge the unequal application of state regulations of public language use. Under the ECHR, linguistic minority members have no direct way to claim language rights before the ECtHR. Thus, the ECtHR quickly dismisses applications that raise this violation⁷¹. In *Mentzen v. Latvia*, the ECtHR stated that "[l]inguistic freedom as such is one of the rights and freedoms governed by the Convention [...] [but] the fact remains that with the exception of the specific rights stated in Articles 5(2) and 6(3) and (e) the Convention *per se* does not guarantee the right to use a particular language in communications with public authorities or the right to receive information in a language of one's choice⁷²". The above ruling confirms that the ECHR lacks a direct language privilege and furthermore includes no substantive right for communication with the government that would enable a claim of non-discrimination under Article 14. As a result, Article 14 ECHR has only an accessory character in that the prohibition of discrimination must be invoked in combination with other rights enshrined in the Convention. Moreover, as opposed to the ICCPR, the ECHR provides only functional guarantees, which in practice result in the right to understand the proceedings in court⁷³.

The limited reach of the prohibition of discrimination on the grounds of language under the ECHR was demonstrated in the judgment of the ECtHR in the *Belgian Linguistic Case*⁷⁴. The case proves that the ECtHR was reluctant to derive rights from the prohibition of discrimination which would create a positive obligation on the state to create and finance education facilities in respect of education in minority languages in order to avoid the claim of discrimination. The applicant in the case claimed that the Belgian legislation which stated that the language of education

⁷⁰ Paz, *supra* note at 33 at p. 197.

⁷¹ Paz, *supra* note at 33 at p. 196.

⁷² *Mentzen v. Latvia* (application no. 71074/01), decision of 7 December 2004.

⁷³ Paz, *supra* note at 33 at p. 191.

⁷⁴ *Belgian Linguistic Case*, (application no. 1474/62, 1677/62, 1769/63, 1994/63, 2126/64), judgment of 23 July 1968.

shall be Dutch in the Dutch-speaking region, French in the French-speaking region and German in the German-speaking region, infringing the prohibition of discrimination set out in Article 14 of the European Convention of Human Rights. Moreover, the applicant claimed that there was an infringement of the right to state education in a minority language under Article 2 of Protocol 1 to the Convention. The Belgian government argued that the right to education in one's own language was not included in the Convention and the Protocol, and the applicants did not belong to a national minority within the meaning of Article 14. The ECtHR found that Article 14 of the Convention and Article 2 of the Protocol read in conjunction were not breached, as the right to education was to be secured by each contracting party to everyone within its jurisdiction in the national language, excluding the provision that parents' linguistic preferences be respected. As to the infringement of the right to education, the ECtHR added that the Convention lays down no specific obligations concerning the extent of the means and manner of the organisation or subsidisation of an official educational system of the state. The right to education enshrined in Article 2 of the Protocol guarantees access to educational establishments existing in a given state and by its nature calls for the regulation by the state, which implies that the regulations in this respect may vary depending on needs and resources. Further, Article 2 of the Protocol does not include any linguistic requirement and does not specify the language in which education must be conducted in order that the right to education be respected and satisfied. However, the Court found it discriminatory that some children were prevented solely on the basis of their parents' place of residence from having access to the French-language schools existing in the six communes on the periphery of Brussels.⁷⁵

Despite the gaps in Article 14 ECHR, and the limited application of the right of non-discrimination on the grounds of language, for long Europe has been perceived to be at the forefront of developments in the area of language or minority rights mainly owing to the European Charter for Regional or Minority Languages of 1992 (ECMRL, the Charter) and the Framework Convention for the Protection of National Minorities of 1995 (the Framework Convention) prepared under the auspices of the

⁷⁵ *Final Report for the Study on translation in international law and EU law*. European Commission, DGT/2011/MLM2, 30 July 2012, p. 72.

Council of Europe, which as claimed by some jurists represent the most advanced notion of international minority protection available in the world⁷⁶. Actually, their genesis lies in the observed shortcomings within the ECHR system with regard to safeguarding the rights of minorities to enjoy their own culture, and to use their own language. The Charter, which expressly protects the languages of national minorities, accommodates minority languages through an “a la carte” system, under which state parties undertake to implement a minimum number of measures to promote minority or regional languages in different fields. The Charter sets out to protect and promote regional or minority languages, not linguistic minorities, but it does not establish any individual or collective rights for the speakers of regional or minority languages. For this reason, emphasis is placed on the cultural dimension and the use of a regional or minority language in all the aspects of the life of its speakers. The ECRML is also reported as having egregious deficiencies with regard to the rights of persons belonging to minorities. Firstly, it does not guarantee enforceable rights, either individual or collective, but it only encourages states to take measures to protect regional or minority languages. As indicated, the aim of the ECRML is not to guarantee human rights *per se*, but to protect regional and minority languages as an integral part of the European cultural heritage. Secondly, it allows each state that ratifies the ECRML to specify which minority or regional languages it wants to incorporate into the scope of the ECRML. Thirdly, states can choose which paragraphs or subparagraphs they want to apply. They are obliged to choose a minimum number of 35 paragraphs or subparagraphs out of 97 options to be complied with by them. Moreover, the ECRML does not aspire beyond defining the rights of linguistic minorities, but rather limits itself to providing the rudiments for developing context-based standards of protection of regional or minority languages. The context-based varying standards established by the ECRML should be adjusted by the states to the needs of each particular language.

As opposed to the ECRML, the Framework Convention attempts to extend the language privileges of national minorities. It aims to make the signatory states respect the rights of national minorities by undertaking actions to combat discrimination, promote equality, preserve and develop

⁷⁶ Arzoz, *supra* note 9 at p. 15.

the culture and identity of national minorities, and guarantee freedoms in relation to access to the media, minority languages, and education. Critics have noticed that actually the effects of both the Charter and the Convention are not satisfactory as only a small number of states signed and ratified both the European Charter for Regional or Minority Languages (signed by 33 member states and ratified by 25) and the Framework Convention on the Rights of National Minorities (ratified by 39 Council of Europe member states). As a result, in the light of the above documents, the rights of language minorities are not legally binding rights in the states which did not ratify them. They often constitute moral and political principles which are not part of international law, and as a consequence are desired, but not legally required.

Regardless of the lack of binding legal force of the ECRML and the Framework Convention, it is worth noting that both instruments recognise a gradation that must be respected as to the degree to which public authorities must use a minority language. The states tend to refer to a model based on the state's resources and an ability to respond in a reasonable way (a sliding-scale model) which accounts for disadvantages affecting minority individuals⁷⁷. In fact, Sue Wright (2001) claims that it difficult to provide an example of a society that has managed total equality in terms of language rights for all its members in every domain of public life. The states that are commonly cited as models for linguistic equality (e.g. Switzerland and Belgium) are usually operating the territoriality principle which means that although the states may be officially multi- or bilingual the individual regions are monolingual, as are many of their citizens⁷⁸.

1. ENFORCEMENT OF LANGUAGE RIGHTS OF MINORITY MEMBERS

The United Nations Human Rights Committee (UNHRC) and the European Court on Human Rights (ECtHR) play a key role in the interpre-

⁷⁷ De Varennes, *supra* note 62 at p. 130.

⁷⁸ S. Wright, *Language and Power: Background to the Debate on Linguistic Rights*, [in:] "IJMS: International Journal on Multicultural Societies" 2001, vol. 3, no. 1, pp. 15–25. UNESCO. www.unesco.org/shs/ijms/vol3/issue1/art2, p. 48.

tation of international legal provisions on the language rights of persons belonging to minorities. Although the UNHRC and the ECtHR represent two separate legal regimes, they are very closely aligned regarding minority language use. Legal entitlements in relation to linguistic minorities enshrined in particular in Article 27 ICCPR and Article 14 ECHR prove that in principle there is convergence between the UNHRC and the ECtHR regimes in handling claims bearing on language use in the public sphere. The two supranational bodies accommodate non-majority language speakers in the public realm only insofar as is needed to prevent irreparable harm from discrimination based on linguistic status, and merely until these speakers complete their transition into the linguistic mainstream of society and its dominant cultural practice.

Both the UNHRC and the ECtHR demonstrate the limited pragmatic model of language protection. The first includes situations in which a non-dominant language becomes a barrier to realising certain *other* universally accepted human rights that are not specific to culture. In this case, the UNHRC and the ECtHR interpretation of language rights claims tends to emphasize procedural issues. The second category includes cases where some minimal protection is needed in order to prevent irreparable harm to the individual from discrimination based on linguistic status⁷⁹. In practice, case law has consistently favoured linguistic assimilation rather than the protection of linguistic diversity. Instead of strong language guarantees, only transitional accommodations are offered in the public realm for those individuals or groups as yet unable to speak the majority language. The legal decisions take a narrowly utilitarian approach to language, forcing the state to accept the use of minority languages only insofar as they facilitate communication with the majority and with the official bodies of the state.

As regards the protection of one of the main linguistic minority interest i.e. the interest in learning the majority language, the UNHRC and the ECtHR have defended the use of a single designated national language. Outside the national language, the UNHRC or the ECtHR protects only a thin layer of non-majority languages that is focused on fairness and the needs of the individual, and that demands the most

⁷⁹ Paz, *supra* note at 33 at p. 163.

minimal redistribution of resources, including interpreters in criminal procedures only for those defendants who are completely unfamiliar with the language used by the court. At the same time, in the private sphere, the UNHRC and the ECtHR support a thick layer of cultural and linguistic preservation, and guarantee the complete freedom of linguistic minorities to defend and to develop their distinct linguistic identity and cultural practices⁸⁰.

Legal scholars have subjected the decisions of the members of the UNHRC and the judges of the ECtHR in the area of language rights protection to criticism claiming that they are politically driven in the sense that they defer back to sovereign authority. They maintain that the UNHRC and the ECtHR are likely to prioritise state interests and provide only nominal accommodation of language rights claims over the demands for maximal interpretation of the rights. Their final decisions are a far cry from adopting a human rights approach to the conflict. Decisions of the UNHRC and the ECtHR in the field of language right claims prove that they are demands for new distributions of power.

VI. CONCLUSIONS

- Lack of a transparent definition of language rights under international law poses the question of whether international law is the right tool to regulate legal language matters.
- The purposes of language rights protection under international law, i.e. preservation of peace and security, fair treatment of individuals, and preservation of linguistic diversity imply the division of language rights into individual rights and collective rights.
- The analysis of the nature of language rights leads to the conclusion that language rights are first and foremost the rights of individuals.
- Language rights may be regarded as collective rights within the meaning of the rights granted to individuals belonging to a linguistic minority (collective conception).

⁸⁰ Paz, *supra* note at 33 at pp. 191–195.

- There is still an unresolved issue as to whether language rights should be categorised under international law as universal human rights. The scientific debate in this respect is in progress. The proponents of language rights as human rights claim that this is the only way to duly protect them (May, Philipson, Skutnabb-Kangas, De Varennes). The opponents (Paz, Arzoz) maintain that international law cannot deliver universal solutions for language rights as human rights. They propose regional and state regulations which would define whether a given right is of fundamental nature.
- The present study proves that international law distinguishes three universal human rights comprising linguistic aspects, such as procedural linguistic human rights, freedom of expression, and prohibition of discrimination on the grounds of language. They are regulated in the legal instruments of the United Nations and the Council of Europe.
- Firstly, procedural linguistic human rights are universal human rights as they are derivatives from the right to liberty and security and the right to a fair trial. Procedural linguistic human rights prohibit arbitrary detention and guarantee a fair and certain legal process for individuals. This in fact stands for the right of the detained or the accused to language assistance in criminal proceedings. The practical realisation of the right triggered severe criticism as international law fails to protect equally those who have assimilated themselves into the state to possess “sufficient knowledge” in the dominant language and those who have never made an effort to learn the state language. The former are forced to speak the language in court proceedings even if they feel that their knowledge of that language is not sufficient to successfully pursue the claim, and the latter would be allowed to use the language of their choice in court sessions, with the costs of an interpreter being covered by the state.
- Secondly, the study showed that the linguistic aspects of the right to freedom of expression are strictly related to the right of non-discrimination on the grounds of language, and the violation of the linguistic dimension of freedom of expression should be examined as a form of discrimination.

- Thirdly, the analysis indicated that the right of non-discrimination on the grounds of language should be understood as a universal human right, as it constitutes a component of the prohibition of discrimination. The right of non-discrimination on the grounds of language first of all relates to the language rights of persons belonging to minorities in the private and public sphere of language use. The former are regarded as inalienable human rights and the latter are not granted such status as they are conditional upon 'appropriate circumstances' specified by a state.
- The United Nations Human Rights Committee and the European Court on Human Rights represent a pragmatic model of the protection of language rights relying upon a minimalistic protection of non-majority languages. The decisions of the UNHRC and the ECtHR prove that they do not represent a human rights approach to language rights.
- Finally, language rights which are universal human rights include the linguistic aspects of the right to a fair trial, the right to liberty and security, and the right to non-discrimination on the grounds of language use in private sphere. The language rights protected otherwise do not fall within the category of human rights and their protection is not universal.