The Language of Language Law

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Introduction

Language problems affect both law and society, but legal language problems are typically different from societal language problems. In connection with the law one thinks of terminological dissensus, unintelligible vocabulary, ambiguity, vagueness, stylistic élitism, and misleading rhetoric. The most salient language problems affecting societies are illiteracy, choices among languages of education, the needs and demands of language minorities, the issue of official languages, and linguistic barriers in international affairs. The language problems commonly associated with law concern *how* a single language is used. Those associated with society mostly concern *which* language is used. For clarity we can refer to these two kinds of language problems as "intralinguistic" and "interlinguistic" problems, respectively.

One place these two kinds of language problems meet is in "language law", or the law of languages. By "language law" we refer to provisions of constitutions, treaties, statutes, ordinances, regulations, and court decisions regarding languages, as well as scholarly authority on language rights and obligations. Language law can be understood as a body of authoritative rules delimiting the permitted solutions to interlinguistic problems.

In formulating these rules, the authors of language law use language. Like all other users of language they encounter or cause the other kind of "language problems", intralinguistic ones. We have a hunch about the relationship between the interlinguistic problems with which language law deals and the intralinguistic problems that this kind of law exhibits. We shall describe our hunch and then discuss some unsystematic evidence that bears on it.

Our hunch starts with the assumption that the authors of language law are trained in or knowledgeable about law. Their legal training and knowledge give them some expertise in intralinguistic problems but not in interlinguistic ones. Because the two senses of "language" are related and generally interchangeable without making utterances ungrammatical or nonsensical, the authors of language law (like most people) do not fully distinguish the two senses, so they have an exaggerated belief in their own expertise on "language" in its interlinguistic sense.

In seeking solutions to interlinguistic problems (our hunch continues), people pursue four main goals: equality, efficiency, freedom, and integration. It is, however, impossible to organize a linguistically diverse population so as to achieve equality, efficiency, freedom, and integration at the same time, so trade-offs among these goals are necessary. Not appreciating this fact, the authors of language law believe and claim that their proposed or commanded solutions are compatible with all four goals at once. To maintain their belief and claim, they need to obfuscate the impossibility of doing what they claim to do. Their writing on interlinguistic problems, being obfuscatory, exhibits language problems in the intralinguistic sense.

The Language of Language Instruments

Much language law formulates language rights. Referring to the United States, but arguably speaking for the world, Dworkin (1978, p. 184) says that "[t]he language of rights now dominates political debate". Dworkin implies that there is only one language used to talk about all rights, rather than a language of ethnic rights, a different language of political rights, still another language of economic rights, and so forth. We don't know whether this claim is true or even how we would prove or disprove it. But our impression of how rights are usually discussed fits Dworkin's

implication. It appears to us that most discussants of rights treat all rights as theoretically isomorphic: one theory of rights will account for all rights, including therefore language rights. The same vocabulary seems to be treated as suitable for discussing all rights. After all, how are language rights usually defined in legal instruments? They are defined, typically, by including the word "language" in a list of words each describing a right, embedded in a single right-conferring statement that applies in parallel to all elements of the list.

Here are some examples:

Ottoman Imperial Rescripts, 1856:

> Every distinction or designation tending to make any class whatever … inferior to another class, on account of their religion, language, or race, shall be forever effaced from administrative protocol (Laqueur & Rubin, 1979, pp. 127-133).

Polish Minority Treaty, 1919:

> Poland undertakes to assure full and complete protection of life and liberty to all inhabitants … without distinction of birth, nationality, language, race or religion. … All … nationals … shall enjoy the same civil and political rights without distinction as to race, language or religion (Laqueur & Rubin, 1979, pp. 152-154).

United Nations Charter, 1945:

> … the United Nations shall promote … universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion (Brownlie, 1981, p. 5).

Italian Peace Treaty, 1947:

> Italy shall take all measures necessary to secure to all persons … , without distinction as to race, sex, language or religion, the enjoyment of human rights and of the fundamental freedoms … (Laqueur & Rubin, 1979, pp. 156-157).

Universal Declaration of Human Rights, 1948:

> Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.(Brownlie, 1981, p. 22)

Declaration of the Rights of the Child, 1959:

> The child shall enjoy the rights set forth in this Declaration … without distinction or discrimination on account of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, whether of himself or of his family (Brownlie, 1981, p. 109).

Convention against Discrimination in Education, 1960:

> … the term 'discrimination' includes any distinction, exclusion, limitation or preference which, being based on race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, has the purpose or effect of nullifying or impairing equality of treatment in education … (Brownlie, 1981, p. 235).

International Covenant on Civil and Political Rights, 1966:

> Each State Party undertakes to respect and to ensure to all individuals … the rights recognized in the present Covenant, without distinction of any kind, such as race,

> colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status (Brownlie, 1981, p. 129).

Proclamation, International Conference on Human Rights, 1968:

> … the laws of every country should grant each individual, irrespective of race, language, religion or political belief, freedom of expression, of information, of conscience and of religion, as well as the right to participate in the political, economic, cultural and social life of his country (Laqueur & Rubin, 1979, p. 225).

American Convention on Human Rights, 1969:

> The States Parties … undertake to respect the rights and freedoms recognized herein and to ensure to all persons … the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.
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> …
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> Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar illegal action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law (Brownlie, 1981, p. 392, 397).

Final Act, Conference on Security and Co-operation in Europe, 1975:

> The participating States will respect human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief, for all without distinction as to race, sex, language or religion (Brownlie, 1981, p. 324).

U.S.S.R. Constitution, 1977:

> Citizens … shall be equal before the law, irrespective of origin, social and property status, nationality or race, sex, education, language, attitude to religion, type or character of occupation, domicile, or other particulars … (Laqueur & Rubin, 1979, p. 314).

Not all such lists include “language”. The 1948 Convention on the Prevention and Punishment of the Crime of Genocide defines “genocide” to include certain actions directed against “a national, ethnical, racial or religious group”, but not a language group (Brownlie, 1981, p. 31). The actions comprising genocide include physical harm, forced prevention of births, and the separation of children from their group, but not the forcible destruction of the group's language; proposals to broaden the definition to include such “cultural genocide” or “linguicide” were defeated under the leadership of the United States government (Lapenna, 1968, p. 174; Rudnyckyj, 1969). The 1961 European Social Charter declares that “the enjoyment of social rights should be secured without discrimination on grounds of race, colour, sex, religion, political opinion, national extraction or social origin” (Brownlie, 1981, p. 301), leaving language out.

Rights instruments from United States jurisdictions usually exclude language. The recognition of a right to be free from unequal treatment on the basis of language is nearly absent from the United States legal tradition, a fact which may help explain the United States government's energetic efforts to exclude language rights from the genocide convention and other international agreements (Kloss, 1977, p. 296). Examples of domestic instruments excluding “language” are:

Massachusetts Fair Employment Act, 1946:

> The right to work without discrimination because of race, color, religious creed, national origin or ancestry is hereby declared to be a right and privilege … (Mayhew, 1968, p. 101).

University of Washington Nondiscrimination Clause, 1984:

> The University of Washington … does not discriminate against individuals because of their race, color, religion, creed, age, sex, sexual orientation, national origin, handicap, or status as a disabled veteran or Vietnam era veteran (University of Washington, 1984, p. 4).

These formulations, some including "language" and some omitting it, give the impression that there is nothing special—e.g., specially complex, specially interesting, specially problematic, or specially important—about language rights. The list of categories can apparently be expanded or pruned at will without changing the rest of the sentence. The definition of a "right" and the criteria for determining who has what rights are unaffected.

The parallelism, however, is only apparent, because language rights are, in practice, not merely the same as all other rights except that they apply to language instead of race, religion, or some other category. The parallelism persists only in the formulation of "abstract rights" (Dworkin, 1978, p. 93), rights whose operational definitions and qualifications are left unstated. When "concrete rights" are formulated, the peculiar problems of language rights begin to emerge. Assertions of language rights begin to be accompanied by special justifications, attacked for special weaknesses, and hedged with special exceptions. Some advocates of equality, freedom, or protection cease to support linguistic equality, linguistic freedom, and linguistic protection, and some advocates of language rights appear who oppose other rights.

As a case in point, the Polish Minority Treaty, quoted above, provides abstractly for equal rights without regard to language. When it makes this equality concrete, however—by guaranteeing to linguistic minorities the right to education in their own language—the treaty qualifies this right in three ways. First, the right applies only in places where "a considerable proportion of Polish nationals of other than Polish speech are resident"; other members of linguistic minorities are permitted to use their own languages only in schools they themselves pay for. Second, the right does "not prevent the Polish Government from making the teaching of the Polish language obligatory" in minority-language schools. Third, the right does not apply to German speakers except in "that part of Poland which was German territory on August 1st, 1914" (Laqueur & Rubin, 1979, pp. 154-155).

Similarly, the American Convention on Human Rights prohibits discrimination on the basis of language, as noted above, but when the convention defines concrete rights of political participation it makes an exception (Brownlie, 1981, p. 400):

> 1. Every citizen shall enjoy the following rights and opportunities:
> (*a*) to take part in the conduct of public affairs, directly or through freely chosen representatives;
> (*b*) to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and
> (*c*) to have access, under general conditions of equality, to the public service of his country.
> 2. The law may regulate the exercise of the rights and opportunities referred to in the preceeding paragraph only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings.

Why do governments step back from blanket assurances of nondiscrimination when they make language rights concrete? The main consideration prompting the qualification of concrete language rights appears to be the desire to protect governments (and sometimes other entities) from linguistic obligations. This desire arises whenever one party's language right threatens to impose a corresponding obligation on another party. In the typical case, the right of one party to use a certain language may impose on another party the obligation to use that same language in dealings with the first party.

One way to avoid creating linguistic obligations is simply to avoid defining concrete linguistic rights. Sometimes, however, there is a consensus that certain rights to meaningful communication are so important as to necessitate concrete language rights. Two common such consensuses posit (1) a right to communicate meaningfully in the legal system as a criminal defendant and (2) a right to

communicate meaningfully in the education system as a student. Other rights to meaningful communication that have sometimes received legal sanction include a right to understand ballots and other electoral information and a "right to know" about certain health and safety hazards in workplaces. Given the costs imposed on powerful interests by the enforcement of such rights, governments define them narrowly, when at all.

Ottoman Sultan Abdul-Mejid agreed in 1856 to draw up a legal code and publish translations of it "in all the languages current in the empire" (Laqueur & Rubin, 1979, p. 134), but did not otherwise obligate the legal system to use minority languages. The 1919 Polish Minority Treaty (Laqueur & Rubin, 1979, pp. 154-155), conversely, requires that "adequate facilities shall be given to Polish nationals of non-Polish speech for the use of their language, either orally or in writing, before the courts" but permits the government to establish an official language and presumably publish its laws unilingually. The (European) Convention for the Protection of Human Rights and Fundamental Freedoms, signed in 1950, gives only criminal defendants concrete language rights (Brownlie, 1981, p. 242-245; Lillich & Newman, 1979, pp. 963):

> 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.
>
> …
>
> Everyone charged with a criminal offense has the … right … to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him [and] to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

The United Nations International Covenant on Civil and Political Rights (Brownlie, 1981, p. 133) copies these two courtroom rights almost verbatim but is silent on language rights during arrest. And the American Convention on Human Rights (Brownlie, 1981, p. 395) confines itself to guaranteeing the right to a translator or interpreter.

Language rights in education are also narrowly drawn. Some instruments provide for a right to education through the medium of the student's native language, but never without qualifications. The Convention against Discrimination in Education (Brownlie, 1981, p. 237) states:

> It is essential to recognize the right of members of national minorities to carry on their own educational activities, including the maintenance of schools and, depending on the educational policy of each State, the use or the teaching of their own language, provided however:
> (i) That this right is not exercised in a manner which prevents the members of these minorities from understanding the culture and language of the community as a whole and from participating in its activities, or which prejudices national sovereignty;
> (ii) That the standard of education is not lower than the general standard laid down or approved by the competent authorities; and
> (iii) That attendance at such schools is optional.

A narrowly drawn right is not necessarily, however, a precisely drawn right, as this provision illustrates. It is syntactically ambiguous. It can be interpreted to mean that governments *may* permit private minority schools to teach minority languages or teach in minority languages or both, or that governments *must* permit one of these. In addition, terms which would be critical in disputes over this provision, such as "national minority" and "the culture and language of the community as a whole", are undefined. A "national minority" might be any minority within a nation-state or only a minority that qualifies under some criterion of nationality. "The community as a whole" might be the jurisdiction of the government in question, a coherent region within or overlapping that jurisdiction, a locality, or a population to which the students in question believe they belong. Then there are cases to which it is unclear whether this provision applies, such as communities with several cultures and languages, minorities dispersed among several communities, and underprivileged numerical majority languages.

The Language of Language Decisions

By formulating abstract language rights in sweeping terms and concrete language rights in ambiguously circumscribed terms, governments invite legal challenges. The most thoroughly argued judicial opinions defining the meaning of the abstract right to be free from linguistic discrimination were handed down in the *Belgian Linguistic Case (No. 2)* (1968) and *Luedicke, Belkacem and Koç v. Federal Republic of Germany* (1978), both decided by the European Court of Human Rights.

In the 1930s and 1960s, the Belgian government implemented measures to fix permanent boundaries for linguistic territories. Residents of Flanders or Wallonia would be required to communicate with their local administration and undergo public schooling in Dutch or French, respectively, regardless of their native or preferred language. French-speaking parents in designated Brussels suburbs (located in Flanders) could have their children educated in French, provided at least a specified number of persons made such a request. Others could choose a divergent language of instruction only by using private schools or sending their children to public schools across a territorial border. Graduates of private schools not teaching in the territorial language would have to pass examinations to qualify for the privileges (such as professional licenses) that holders of regular diplomas could have without examination. This rigidly territorial language policy mainly offended French speakers living in Flanders (often in largely French-speaking communities near metropolitan Brussels) and also some Dutch-speakers in Flanders who preferred to have their children taught in French for socio-economic advancement (Lorwin, 1972).

Over four hundred such parents complained to the European Commission of Human Rights between 1962 and 1964 (*Belgian Linguistic Case [No. 2]*, 1968, p. 259). The complainants argued, among other things, that the Belgian government's statutes and practices violated Article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which confers "[t]he enjoyment of the rights and freedoms set forth in th[e] Convention … without discrimination on any ground such as … language … " (Brownlie, 1981, p. 247).

The Commission's majority opinion illustrates the nontriviality of making an abstract language right concrete. The Commission agreed that, since education was a right set forth in the Convention, the Belgian government might violate Article 14 by giving more of this right to members of one language group than to members of another language group. Although there was a formal parallelism between French and Dutch in the statutes in question, the Commission found that the statutes disadvantaged French speakers, since Dutch speakers in Wallonia were few and rarely wanted education in Dutch. But even without any over-all Dutch or French disadvantage, discrimination against one language group within a region would violate the subject right (*Belgian Linguistic Case [No. 2]*, 1968 [Eur. Comm'n], p. 324).

This holding would seem to doom the Belgian government's case. Instead, the Commission made a distinction between the right to education (guaranteed by the Convention) and the "favour or privilege" of *public* (i.e. publicly subsidized) education. The right to education was the right to organize and pay for one's own education. The government had no obligation to furnish education. If the government did so, it could give one group more or better education than another group without discrimination under Article 14, since Article 14 deals not with every benefit bestowed by governments, but only with rights which the Convention obligates governments to secure to their peoples. Further, even withholding rights differentially from one language group could escape condemnation under Article 14 if "the hardships, inequalities or disadvantages in question could be justified by administrative, financial or other needs" rather than being "imposed … deliberately in order to damage [one group's] interests or weaken its position in the community" (*Belgian Linguistic Case [No. 2]*, 1968 [Eur. Comm'n], p. 325).

Seven members of the twelve-person Commission dissented from one or more conclusions of the majority opinion regarding Article 14. Some dissenters argued that the Belgian government would have violated Article 14 only if it had completely denied someone the right to education. Other dissenters asserted that the right to education was a right to governmental assistance and that the desire to unilingualize a country's regions could not justify the discriminatory provision of this right.

The Commission majority found that the main feature of Belgian educational language policy, its establishment of territorially separate publicly funded school systems using a different language exclusively in each territory, did not violate the right to be free from linguistic discrimination guaranteed by the Convention. The Commission did find a violation of Article 14 in three subsidiary elements of the government's policy, but two of these findings were reversed in an

appellate opinion of the European Court of Human Rights, leaving only one minor element of the policy impermissibly discriminatory.

The Commission and the Court agreed that segregating a country into unilingual regions was a legitimate objective of public policy when adopted by a democratic government. In pursuit of that goal, a government could take any reasonable measure that did not arbitrarily or excessively treat different persons unequally. A question of discrimination would arise whenever the government unequally allocated a right, but an actual finding of discrimination would require that this differential allocation be unreasonable (*Belgian Linguistic Case [No. 2]*, 1968, p. 284). (The Court decided to rely on the English version of Article 14, forbidding "discrimination", rather than the French version, with its apparently more absolute phrase "*sans aucune distinction*".) As its definition of a "reasonable" distinction, the Court said (*Belgian Linguistic Case [No. 2]*, 1968, p. 293),

> Article 14 does not prohibit distinctions in treatment which are founded on an objective assessment of essentially different factual circumstances and which, being based on the public interest, strike a fair balance between the protection of the interests of the Community and respect for the rights and freedoms safeguarded by the Convention.

The Court majority implied that governments have the practically unlimited right to confer official statuses on and deny official statuses to languages of their choice, without committing linguistic discrimination. The fact that favoritism between languages inevitably creates inequalities between the native speakers of different languages does not make it impermissibly discriminatory. Once a government has conferred statuses on languages, however, the Court insisted that it treat *persons* equally regardless of their linguistic attributes, unless compelling reasons justified differentiation. Requiring all residents of Flanders to undergo their schooling (even private schooling) in Dutch would presumably have been permitted. In fact, the majority went so far as to assert that "the right to education would be meaningless if it did not imply … the right to be educated in the national language or in one of the national languages …" (*Belgian Linguistic Case [No. 2]*, 1968, p. 281). But admitted native speakers of Dutch to any school or program while excluding native speakers of French from the same school or program would apparently violate the linguistic nondiscrimination clause.

The majority's opinion implies that the Belgian complainants could have won a favorable ruling if they had been willing and able to show unequal access to educational services within the regular Dutch-language school system. If instead of saying "We want the government to teach us in French" they had said "We aren't succeeding in the Dutch-language schools because we don't yet know Dutch well enough to study in it", the complainants would have forced the Commission and the Court to deal with the question of whether identical treatment that neglects language differences is discriminatory.

Discrimination through identical treatment is the principal question that the United States Supreme Court dealt with in *Lau v. Nichols* (1974). There it was held that identical treatment which neglects language differences among students is discriminatory. Although the statute in question did not purport to prohibit linguistic discrimination, it did prohibit discrimination on the basis of national origin, and the regulations enforcing the statute required each school district receiving federal assistance to "take affirmative steps to rectify the language deficiency in order to open its instructional program to" students of a national-origin minority group who are excluded "from effective participation in the educational program" because of "inability to speak and understand the English language" (*Lau v. Nichols*, 1974, p. 568). The court noted that the petitioners were of "Chinese ancestry" and did not speak English. It found that the schools indirectly practiced national-origin discrimination by treating the petitioners the same as students who spoke English. By implication, if the inability to speak the school's instructional language cannot be traced to "national origin" (e.g., children of African or Northern European origin who speak little English because they are raised in Spanish-speaking households or neighborhoods), the students would be denied the same protection.

Cases involving the right to meaningful communication in the legal system have also come before the European Court of Human Rights. In 1972 a member of the British armed forces stationed in the Federal Republic of Germany (FRG) was tried for a traffic offense. Not fluent in German, the defendant was given access to an interpreter according to the FRG's Judicature Act, which provided (*Luedicke, Belkacem and Koç v. Federal Republic of Germany*, 1978 [record], p. 46):

> §184. The language used in court shall be German.
> §185(1) Where the hearing takes place under participation of persons who do not have command of the German language an interpreter shall be employed … .
> (2) The employment of an interpreter may be dispensed with if all the persons participating have command of the foreign language.

During the trial the defendant was not billed for the interpreter's services, but after his conviction he was. A statute authorized the collection from convicted defendants of the costs of government-provided attorneys, witnesses, experts, and interpreters. The defendant appealed the charge for interpretation costs on grounds that it violated Article 6§3(e) of the Convention for the Protection of Human Rights and Fundamental Freedoms, which provides (as quoted above) that "[e]veryone charged with a criminal offence has the … right … to have the free assistance of an interpreter if he cannot understand or speak the language used in court." The appeal was dismissed, whereupon the defendant filed a petition with the European Commission of Human Rights. The Commission and the Court consolidated this case with two similar cases involving an Algerian and a Turk.

Luedicke presented one significant language-rights issue and elicited mainly unanimous opinions. The question presented was whether the right to "free" interpretation was violated when the government demanded repayment from the defendant after his conviction. The government's argument was that this right lasted only until the end of the criminal proceeding and that the court costs, including the costs of interpretation, could therefore be collected after a final conviction was handed down. (The government's argument would seem to imply that even *acquitted* defendants could be charged for court costs after their acquittals, but the government, understandably, did not point out this implication.) The complainants argued that "free" meant free forever, not temporarily free.

The Commission and the Court agreed with the complainants that the Federal German government had violated the interpreter clause of the Convention. The Court relied in part on the definitions of "free" and "*gratuitement*" found in commonly used dictionaries of English and French. It also determined that the interpretation clause was "specifically designed to attenuate" the "disadvantages that an accused who does not understand or speak the language used in court suffers as compared with an accused who is familiar with that language" (*Luedicke, Belkacem and Koç v. Federal Republic of Germany*, 1978, pp. 161-162) and that a repayment requirement would thus defeat the purpose of the provision. In addition, the Court noted that some accused persons, fearful of having to pay for interpretation, would request that no interpreter be appointed even when they needed one.

To minimize its loss, the FRG government also argued that, if the Convention guaranteed forever-free services of an interpreter, it did so only in the oral hearing of the defendant's case. This claim was based on the French version of the Convention, which guarantees free interpretation to any defendant who does not know the language used "*à l'audience*" ("at the oral hearing"). The Court, in contrast, relied on the English version, which uses "in court". The Court further decided that "in court" did not qualify the location at which interpretation is guaranteed, but the location of the language whose foreignness to the defendant triggered the guarantee of interpretation. The Court thus ruled that free interpretation was obligatory for such defendants wherever it was required for a fair trial, including for the translation of documents.

The Court declined to address two issues that these cases came close to raising. The first was whether the post-conviction collection of other court costs could withstand scrutiny under the Convention. The complainants had not, however, objected to their bills for other court costs. The second issue was whether the linguistic nondiscrimination clause of the Convention had been violated. According to the Court, it was not necessary to examine that question because the attacked practice had been found to violate the interpreter clause. The murky relationship between the right of linguistic nondiscrimination and other rights remains far from settled in the case law of human rights.

The Language of Language Treatises

Legal instruments purporting to define language rights and judicial interpretations of these instruments leave some important questions unanswered or even unasked. When rights are guaranteed "without distinction as to language" (such rights have included due process of law, equal

protection of the law, political participation, the right of reply to criticism, education, equal access to public employment, equal pay for equal work, and equal opportunity for promotion in employment), does "language" refer to *native* language or *known* language? If only native languages are immune from discrimination, then governments can require knowledge of particular languages as a prerequisite to the enjoyment of rights, e.g. a literacy test in the official language as a prerequisite to the right to vote. Persons of different native languages, though in principle able to meet these requirements, will still suffer substantially differing costs in doing so. Do these differing costs constitute discrimination on the basis of native language? If, instead, rights are guaranteed equally to all regardless of language knowledge, must each government provide all services in every language that at least one person depends on for communication? If not, then must governments at their own expense teach their official languages to all persons who do not natively know those languages? If so, does that expenditure remove the linguistic discrimination that would otherwise exist, only mitigate it, or instead replace it with another kind of linguistic discrimination? It is, after all, a service restricted to speakers of certain languages.

Other questions concern the entities that have language rights. Instruments and court decisions have usually defined language rights as the property of individuals. Are there grounds, however, for attaching language rights to groups? If so, how would the memberships of the entitled groups be defined and how would such groups' choices among alternatives offered by their rights be ascertained? Organizations claiming to represent communities of native speakers of languages have often sought government action to protect a "right" of those communities to prevent their individual members from defecting, while the defecting individuals claim a "right" to decide which languages to learn and use. Some French-Canadian organizations in Quebec, for example, have lobbied for statutes prohibiting speakers of French from attending schools conducted in English. The idea of attributing rights to languages themselves is also imaginable and, though it may seem far-fetched, perhaps describes a number of existing practices and doctrines. When, for example, the Canadian federal government publishes all its statutes in English and French or the interpreters at sessions of the United Nations General Assembly translate all proceedings into Arabic, Chinese, English, French, German, Russian, and Spanish (regardless of whether anyone requests a particular item in a particular language), whose rights are thereby enforced? The most parsimonious interpretation may be that it is the language that has the right to be used.

Recent influential scholarship on language rights has followed the lead of legal practitioners in treating individuals (rather than groups or languages) as the owners of language rights and also in circumscribing the scope of those rights. Limits on language rights are grounded in the assumption that inequality in the treatment of languages is inevitable. If so, such inequality may not be interpreted as a violation of rights. The term "linguistic discrimination" is defined to refer not to all differences in the treatment of persons with different linguistic attributes, but only to those differences which are unwarranted. This position reflects a belief that languages, despite the parallelism we saw earlier in statements of abstract rights, are not parallel to demographic categories like races, religions, and sexes.

Kloss's work exhibits this willingness to find justifications for official preferences among languages. Kloss (1977, pp. 21-22) distinguishes "tolerance-oriented" and "promotion-oriented" rights. Tolerance-oriented rights permit linguistic minorities to cultivate their own languages. Promotion-oriented rights obligate "public institutions" to use and cultivate minority languages. Kloss also enumerates several rights which governments may grant to linguistic minorities, ranging from private use of their languages to permission for them to organize and operate autonomous governments (Kloss, 1977, p. 24-25).

Some such rights Kloss simply declares to be discretionary. For instance, he asserts (1977, p. 294) without further support that a government is justified in prohibiting the use of minority languages as media of instruction in public schools. Other rights are discretionary in certain factual situations and obligatory in others. One rule (Kloss, 1977, p. 289) is that the wishes of a language group must partly determine the treatment a government is obligated to give to the group's language. When

> ethnic groups . . . do not even wish the preservation of their language . . . [i]t would be sheer nonsense if the state should attempt to preserve these languages . . . .
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> On the other hand, wherever a minority may desire to cultivate its language, the state is by no means obligated to promote this language. . . . Is this only a rather spontaneous but fickle and short-lived sentiment . . . or a deep-rooted urge for self-preservation which is shared by the children and grandchildren . . . ? Only when the immigrant generation has succeeded in giving its native languages firm roots among

> the grandchildren . . . [and] has made the sacrifices for a private cultivation of the language . . . can they demand that the state come to their aid and promote their language. Such claim to promotion can be considered a natural right only beginning with about the third generation . . . .

Kloss's doctrine of language rights rests on unstated and undefended assumptions. These include the assumptions that durable desires entitle their desirers to government assistance, that only durable desires deserve respect, and that the behavior of the third generation distinguishes durable from fickle desires. Kloss also assumes that "ethnic groups" have desires, engage in purposive behavior, make claims, and have rights. If we deny the volitional capacity or rights-related status of groups, Kloss's criteria become uninterpretable.

Another serious attempt to define a doctrine of language rights is Van Dyke's. Van Dyke asserts that, despite differing interpretations of the requirement that rights be respected "without distinction as to language", "substantial agreement exists on the criteria of judgment" (Van Dyke, 1976, pp. 4-5). The chief criterion is a "rule of equal and nondiscriminatory treatment", which "requires that persons be treated alike in the absence of sufficient grounds for treating them differently." Differential treatment is sufficiently grounded, says Van Dyke, "as long as it is not unreasonable, arbitrary, capricious, unfair, unjust, or invidious." Differential treatment of persons, whatever the grounds, he calls "differentiation", and differentiation that violates the rule of equal and nondiscriminatory treatment he calls "discrimination".

Applying this distinction to the preferences that governments give to certain languages, Van Dyke (1976: 5-6) explains:

> Insofar as a principle is involved, it is that decisions concerning equal treatment can legitimately be affected by a balancing of costs and gains. Both gains and costs presumably increase with the number of languages used, but the universal judgment is that at some point the increased costs exceed the associated gains. . . . In any event, the general consensus is that differentiation as to language must occur; the desire to keep costs down makes this reasonable and therefore nondiscriminatory. Argument can and does occur over various questions (How many languages should be designated as "official" or "working"? Which ones? What should be the precise implications of the designation?), but that claims for equal treatment in terms of language need to be balanced off against costs is a principle that all accept.

Van Dyke interprets "costs" and "gains" to include effects on any political or other values that governments legitimately promote. Thus, if a government decides to promote the survival of a linguistic minority, a policy of forcing its members to be educated in their own language while allowing majority families to choose among languages of instruction would be "at least potentially justifiable, in which case it would be nondiscriminatory" (Van Dyke 1976: 7).

Van Dyke does not claim that the terms he uses have precise meanings. The "prohibition of distinction as to language should not be interpreted in an absolute and mechanical way" (Van Dyke 1976: 7). "Whether language requirements for service in legislatures should be condemned as discriminatory is a difficult question that requires a case-by-case answer" (Van Dyke 1976: 13).

This informality permits Van Dyke to enunciate several truths about language rights whose derivations are unclear. (1) Language groups may be treated differently on the basis of their sizes: language services "can be selected in the light of their costs and in the light of the number served" (Van Dyke 1976: 11). (2) The political segregation of language groups can be justified, especially since it often promotes rather than impedes equality (Van Dyke 1976: 21-22; cf. Kloss 1977: 19-20). (3) It is easier, at least in education programs, to justify differentiation as to language than differentiation as to race, religion, or sex (Van Dyke 1976: 22). (4) Governments may revoke previously granted linguistic concessions without practicing discrimination and may adopt more generous policies toward linguistic minorities without implying that discrimination was previously being practiced.

An example of the leeway Van Dyke gives to governments is that the United States government has "in effect given three different answers to the question of what constitutes equality and what constitutes discrimination with respect to the language of instruction" (Van Dyke 1976: 30). The government has sometimes regarded the teaching of all children via English to be equality. It has at other times regarded such use of English to be equality if non-English-speaking children

are taught English. It has at still other times held the position that the language of a minority must enjoy the same instructional status as the majority language in order to justify a finding of equality (Van Dyke 1976: 30-31). Van Dyke does not choose one of these three views as correct and reject the others as mistaken. He regards them all as legitimate and asserts that governments may rightfully choose among these doctrines.

To the extent that Van Dyke purports to describe the law of language rights as it has evolved in some countries, he fairly presents some commonly invoked principles. For example, legislatures and judges have often taken into account the size of a language group when deciding what language rights the members of that group shall be entitled to enjoy. In 1897 the Manitoba legislature adopted a statute requiring any public school to conduct instruction not only in English but also in any other language spoken by at least ten pupils in the same school (Canada, 1968, pp. 46-47). In *Lau v. Nichols* (1974), decided by the United States Supreme Court, the concurring opinion of Justices Blackmun and Burger stated that the number of persons affected by a government language policy was "at the heart" of interpreting whether the policy violated a statutory and regulatory right to equal education.

Van Dyke's admission of costs and gains as legitimate considerations in the denial of equal treatment to the speakers of different languages places critical importance on the meaning of "costs and gains". Van Dyke recognizes costs and gains accruing to all affected parties and intangible as well as tangible costs and gains. But in advocating case-by-case discretion he in effect proposes that the costs and gains be estimated impressionistically by governmental authorities. Representatives of governments tend to focus on their governments' costs and gains. When the United Nations staff examined the "costs" of alternative numbers of official U.N. languages, for example (King, 1977), it studied and reported only on the United Nations' own costs. The report did not even pretend to take into account the costs to member states' delegations and did not hint at any concern for the costs to the member states' home governments or populations. One can also speculate that the use of the terms "costs and gains", as opposed to such a pair as "pain and pleasure", would bias adjudicators toward monetizable effects and thereby give greater weight to the expenditures of governments in effectuating language rights than to the shame, anxiety, or ignorance suffered by some persons who experience inferior treatment on the basis of language.

A prominent antidote to adjudicator biases is the use of codification and precedent to limit discretion. But Van Dyke's use of the epithets "absolute and mechanical" to describe nondiscretionary rules for the application of language rights disparages codification and precedent. Had Van Dyke wanted to produce the opposite preference, he might have described precisely formulated rights as "stable", "reliable", "predictable", or "uniform" and rights interpreted by discretion-wielding judges as "arbitrary", "whimsical", or "personalistic".

Finally, the legitimate constraints on the right to be treated equally irrespective of language depend on how this right is conceptualized. Equal linguistic treatment might most likely be understood (cf. Kelman, 1971, p. 46; Rae, 1981, p. 11) as (1) the identical treatment of languages, (2) the equal treatment of languages, or (3) the equal treatment of speakers. The identical treatment of languages would require that whatever the authorities do to one language they do to the others. The equal treatment of languages would require that every language be treated as well as, but not necessarily the same as, all other relevant languages. Any inferior treatment of a language would have to be offset with some other, superior treatment of that language, so that on the whole it is treated no better and no worse than any other language. Equal treatment of speakers would require that no person be treated better or worse than he or she would be treated if he or she spoke a different language. Languages could be treated unequally, but anyone whose language is given inferior treatment would have to be compensated by being treated better in some nonlinguistic way.

Assumptions of the obvious impracticality of giving equal treatment to the speakers of all languages rely on a confusion between equal treatment and identical treatment, and a confusion between the treatment of languages and the treatment of speakers. Paradoxically, these confusions obstruct the hypothesized purpose of making incompatible goals (in this case equality and efficiency) compatible. These confusions make the equality-efficiency dilemma seem so intractable that the writers of language law are tempted to redefine one goal (here equality) until the dilemma disappears. In effect, they are saying, "Any discrimination that saves a government a substantial amount of money is not discrimination." If the equal treatment of speakers were understood as one of the reasonable senses of "equal rights without distinction as to language", additional methods for discovering language policies that are both egalitarian and efficient would come into view. The

conflicts between these two goals (and among equality, efficiency, freedom, and integration) would by no means disappear, but non-obfuscatory solutions to certain conflicts would be revealed.

One way to uncover intralinguistic problems in the corpus of language law is to engage in terminological experimentation. Is being raised as a native speaker of a language that only a small minority of the members of the society speak, and that is not used officially, a "mental handicap"? Does this condition entitle its victim to "special education" or "public assistance"? Or can competence in one's native language be regarded as a kind of "intellectual property"? Can exclusion of a person's native language from use in official communications be regarded as a "taking" of part of the value the person could reasonably expect to derive from that "property"? Does such exclusion then entitle any "owner" of the excluded language to compensation for the "fair market value" of the taken property, under the principles of "eminent domain"? Or do language rights instead belong to a class for which a new term is needed, such as "contextual rights"—rights to which an individual is entitled only if that individual and also some minimum number of other similarly situated individuals claim that right? If so, perhaps "language" should not appear in lists of attributes like "race", "sex", and "religion" in declarations of individual rights, but rather in those chapters of legal codes that provide for collective bargaining between employers and employees, public financing of electoral campaigns, and local improvement districts in cities.

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