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INTRODUCTION TO VOLUME I

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Overview

Volume I has an approximately equal number of texts written by lawyers and by sociolinguists, merged with multidisciplinary contributions by anthropologists and economists. Input from a variety of disciplines, and the impressive creative thinking that they embody, is needed for tracking the articulation of language rights in international human rights law and in national political and cultural realities as these have evolved over the past three centuries.

We begin with two substantial historical surveys, one of language rights in general (*Skutnabb-Kangas* and *Phillipson*, Ch. 1), taken from the first multidisciplinary anthology devoted to linguistic human rights in 1994. It is followed by a history of the protection of language rights in international human rights law (*Gromacki*, Ch. 2) and glimpses (Ch. 3) of efforts to strengthen respect for minority language rights in treaties that the League of Nations monitored between the two World Wars. Since Gromacki summarises the seminal *Study of the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, produced by Francesco *Capotorti* for the UN in 1979, we have only cited one appendix from this important pioneer study (Ch. 4).

Philosophical, ethical, moral, political and linguistic aspects of human rights and language rights are addressed by *Sen* (Ch. 5), a Nobel economics laureate; *Chen* (Ch. 6), a Hong Kong lawyer; and *Pattanayak* (Ch. 7), the first director of the Central Institute of Indian Languages.[1] They trace some of the complexity of the human condition in its diversity worldwide and ways that languages can be understood. This complexity is explored further by *Stavenhagen* (Ch. 11), who was the UN Special Rapporteur on the Situation of the Human Rights and Fundamental Freedoms of Indigenous People 2001–2008. He contrasts the differences between understandings of collective and individual rights in different cultures and the role of ethnic and political mobilisation in achieving rights. The analysis of the language rights of immigrants is by a sociolinguist whose thinking has been inspirational for the discipline of language planning (*Kloss*, Ch. 8). This expanded considerably in the 1960s and is now a significant constituent of language policy studies worldwide. *Geertz* (Ch. 9) and *Khubchandani* (Ch. 10) clarify some of the challenges faced

by postcolonial countries with competing demands (tradition/modernity) and fluid identities (fluctuating and multiple cultural and linguistic forms and functions). The extracts from *Stavenhagen* (Ch. 11), *Phillips* (Ch. 12) and *Alfredsson* (Ch. 13), all of whom have been at the forefront of efforts at the highest international level to strengthen minority rights in law and in practice, present sober assessments of the difficulties of ensuring political support for the rights of the disadvantaged. Even if considerable progress has been made, it is more in the acceptance of principles rather than in effective implementation. These chapters are essentially concerned with principles of language rights and their enactment.

Several key interfaces, tensions and challenges are explored by lawyers in the next set of papers: between languages and socio-economic participation (*Dunbar*, Ch. 14); between law and political theory and the principles that underlie them (*Rubio-Marín*, Ch. 15); between ethnic minority groups and state formation experience in Europe historically (de Witte, Ch. 16) and in the tension between national and European pressures in the current phase of European Union integration (*de Witte*, Ch. 17); between language rights and the administration of justice (*Henrard*, Ch. 18); and the role of translation in criminal court cases (*Vogler*, Ch. 19). A concluding paper draws many of the key factors in language rights policy together in an exposé of how a clearly differentiated and crafted territorial principle in language policy can meet the needs of both immigrant and autochthonous groups and lead to harmonious multilingual cohabitation (*Grin*, Ch. 20). These chapters are essentially concerned with the enactment of language rights and their application.

Texts of international instruments, covenants, charters and declarations dealing with language rights are presented in the second part of Volume III. Principles in language rights instruments are analysed further in Volume II (Ch. 21).

Recognising language rights

'Linguistic human rights, past and present' (Ch. 1) presents a provisional definition of linguistic human rights[2] and surveys the coverage of language rights in five historical periods. This is followed by classifying some national constitutions and international covenants on two continua in a figure: as overt or covert in relation to language rights on a vertical axis and, on the horizontal axis, from languages being prohibited at one end – via toleration, non-discrimination prescription and permission – to active promotion at the other. This approach to determining the degree of support for language rights has affinities with *Gromacki*'s starting point (Ch. 2), namely that language rights may be positive and absolute – which creates obligations for the state – or negative – which entails little beyond protection from discrimination. *Negative rights* have been defined by Max van der Stoel (1999: 8) as

> the right to non-discrimination in the enjoyment of human rights [… They] ensure that minorities receive all of the other protections without regard to their ethnic, national, or religious status; they thus enjoy a number of

> linguistic rights that all persons in the state enjoy, such as freedom of expression and the right in criminal proceedings to be informed of the charge against them in a language they understand (i.e. not necessarily the mother tongue), if necessary through an interpreter provided free of charge.

Positive rights have to do with

> the right to the maintenance and development of identity through the freedom to practise or use those special and unique aspects of their minority life – typically culture, religion, and language. Positive rights are those encompassing affirmative obligations beyond non-discrimination […] include a number of rights pertinent to minorities simply by virtue of their minority status, such as the right to use their language. This pillar is necessary because a pure non-discrimination norm could have the effect of forcing people belonging to minorities to adhere to a majority language, effectively denying them their rights to identity.
>
> (van der Stoel, 1999: 8–9)

Ongoing international efforts in several contexts to codify language rights for minorities are also described in Chapter 1. A key socio-political distinction is made between *necessary* and *enrichment-oriented* language rights. Only the necessary rights are fundamental, inalienable human rights; these rights can be considered linguistic *human* rights. They include the right to learn mother tongues and a dominant language in the country where one lives (see Appendix to the General Introduction). By contrast, *enrichment-oriented* rights include the right to learn a foreign language. The worldwide focus on learning English has led British promotion of English to label it as a 'basic skill', which is misleading since it implies that English is intrinsically of greater educational importance than any other language and lends itself to an overemphasis on English. This is now a problem in many countries.[3] Many of the basic concepts that are needed in the study of language rights are elucidated in more depth in the Endnotes following the text of Chapter 1.

Work over many years towards producing a draft *Universal Declaration of Linguistic Rights* (summarised in both Ch. 1 and Ch. 2) culminated in 1996 at a World Conference on Linguistic Rights in Barcelona, where the text was formally entrusted to UNESCO as a working draft for further elaboration (Vol. III, Ch. 68). This is a comprehensive document that makes bold claims for linguistic minorities that many governments are bound to consider unrealistic and unacceptable. UNESCO has in fact not taken up the challenge of attempting to reach consensus on a revised text that could obviate some of the politically sensitive and conceptually weak sociolinguistic and legal features of this draft. It is unfortunate that some of the marketing of this document creates the impression that the Declaration has already been approved or ratified by states, a misunderstanding that one can see in many academic references to it.

Skutnabb-Kangas and *Phillipson* conclude their general survey of language rights in 1994 (Ch. 1) with a presentation of the concept *linguicism*, which functions in a comparable way to racism and sexism, but with language as the key element. The concept, coined by Skutnabb-Kangas, was defined as 'ideologies, structures and practices which are used to legitimate, effectuate, regulate and reproduce an unequal division of power and resources (both material and immaterial) between groups which are defined on the basis of language' (Skutnabb-Kangas 1988: 13).[4] Linguicist policies that reproduce inequality and serve to marginalise speakers/users of Indigenous/Tribal, minority and minoritised languages (ITMs) are in force in most countries worldwide. Members of the dominant linguistic group by contrast enjoy full linguistic human rights throughout education and in public services. It is therefore of existential importance for language rights to be seen as basic human rights and for them to be strengthened in international and national law.

Gromacki (Ch. 2), writing in 1992, notes that while language figures in over twenty multilateral treaties, there is no general agreement on what precisely universal language rights are. His coverage of language rights is a meticulous description of the negotiation processes involved in the production of UN instruments and the coverage of language rights in them. He begins with the Covenant of the League of Nations and the minority protection treaties that it was commissioned to monitor and a case at the Permanent Court of International Justice. He describes the preparatory steps that led up to the UN Charter and the Universal Declaration of Human Rights, in which no collective rights were acknowledged. This limitation was the case until the ratification of the International Covenant on Civil and Political Rights and its key Article 27. The chapter by Barten (Ch. 78) in Volume IV is a 2015 update on this Article.

Gromacki describes the build-up towards the Capotorti report on minority rights in 1979 and reports its coverage of language rights. He analyses the complex process of the elaboration of the UN Declaration on the Rights of Indigenous Peoples. He also covers the first part of the twenty-year process leading to the passing in 1998 of the Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities. Gromacki refers to international instruments that exclude language rights, including their explicit omission from the Convention on the Prevention and Punishment of the Crime of Genocide. On this see text Vol. II, Ch. 21 for a more recent analysis and interpretation. Gromacki also summarises language rights in European and African instruments and the first international declaration on universal language rights in Recife in 1987 (for the International Working Group on Language Rights, leading to the Recife Declaration, see our General Introduction).

More historical detail on the position of language rights is provided in several chapters. *Robert Dunbar* describes the economic factors that have contributed to language attrition and depopulation over two centuries in the Celtic language 'heartlands' of Great Britain and Ireland before assessing how far language rights are being strengthened currently (Ch. 14). The legal status of minority language groups in European countries between 1850 and 1940 is analysed by

Bruno de Witte (Ch. 16). Post-1945, developments in the codification of minority language rights and the political build-up to the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities are surveyed by *Alan Phillips*, former director of the Minority Rights Group in London (Ch. 12). He assesses the importance of this Declaration and the influence of Council of Europe instruments. This text is one chapter of an entire book devoted to analysing and interpreting the Declaration (Caruso and Hofmann 2015). The article by *Gudmundur Alfredsson* (Ch. 13) surveys minority rights activities within the UN system, the instruments agreed on and their monitoring, the promotion of universally valid norms and the shortcomings in what has been achieved.

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Human rights principles and some language rights applications

Amartya Sen's text is a vivid analysis of the origin of rights, the power of words in articulating rights and 'natural rights (including what we now call human rights) as "parents of law"'. He cites a range of differing approaches by justices in the United States in their role of interpreting the law. He clarifies the distinction between human rights and legal rights and the limitations of the legal system as compared with other ways of influencing social change. It is important to distinguish between rights as proclaimed – the actual choice of words – and the motivation for legislating them into being and the intention of the drafters. Sen warns that legal systems should not be restricted to asserting what authors of a Constitution written centuries ago understood or intended in what was written. Likewise, narrowly national and parochial reasoning should be avoided in promoting the cause of greater justice. Foreign influence of various types (from the thoughts of Jesus Christ to Gandhi and Mandela) can be important in public reasoning that legal systems should be responsive to.

Albert Chen (Ch. 6) draws on several influential moral philosophers and political scientists in an analysis of how our world is understood through language and how states operate principles of language rights. He presents practical examples of rights being accorded differentially, some more liberal than others, and articulates the case for a well-functioning democratic public sphere. His approach has similarities with a seminal article by Juan Cobarrubias in 1983. He traces the origins of rights in the modern world to Hobbes, Rousseau and Locke, showing how far they agree on whether rights derive from natural law or a state's laws or a combination of them. Rousseau focuses on inequality within states, so a dependence on natural law is inadequate. The Hobbesian focus on society as a free-for-all between individuals is also inadequate for rights within a state, but correct when it comes to international relations: 'although the state of nature does not exist within nations, it does at the international level between nations' (1983, 69). International relations have been decisively influenced by empires, past and present, by the way trading relations impact on countries and hegemonic 'soft' power.

Cobarrubias presents a five-point taxonomy of official attitudes towards minority languages. He makes two generalisations about linguistic inequalities: 'no state,

or nation, is empowered to control all language functions, since captive communities retain at least natural language rights; second, that every state, or nation, is empowered to control some language functions. The first generalisation supports the idea that some language rights are inalienable or natural human rights, the second that obviously not all rights are natural. If these two generalizations are true, the distinction of two kinds of language rights makes sense' (1983, 74–75). These correspond partially to the earlier distinction in Ch. 1 between necessary and enrichment-oriented rights.

Robert Dunbar (Ch. 14) argues that the prospects for language maintenance of regional minority languages in Europe, in part under the influence of adherence to international and European instruments, needs to be integrated with the role of socio-economic factors in law and in practice and the potential synergy between both elements. He cites the conclusions of a considerable number of relevant court cases as well as interpretations of whether instruments like the UN International Covenant on Economic, Social and Cultural Rights, the Framework Convention for the Protection of National Minorities, and the European Charter for Regional or Minority Languages are being respected. Expert groups have frequently argued for more attention to be paid to the relative vitality of minority languages when economic policies are formed: economic investment should take sociolinguistic and language policy goals into consideration. There is a need for more information on economic, demographic and linguistic variables.

Ruth Rubio-Marín (Ch. 15) analyses language rights and language duties as a means for the promotion of other rights – in education, courts of law and political participation – in societies that aim at social justice and the rule of law. Her theoretical approach is related mostly to legislation and litigation in Canada and the United States. One point of departure is a distinction between instrumental and non-instrumental rights, but the analysis shows that this binary opposition, like related ones such as *toleration* and *promotion*, is not clear-cut.

This distinction in work on minority language rights is generally attributed to *Heinz Kloss* with reference to his 1971 article (Ch. 8) on the language rights of immigrant groups. In fact, Kloss first used the terms in a book written twenty years earlier in German on language policy in the United States, a settler country.[5] His concepts – 'fördernd' = *promotion*, 'duldend' = *toleration* – are, in grammatical terms, not nominalisations but adjectives derived from dynamic verbs.

Rubio-Marín at no point relates the principles that govern her analysis to international human rights law, possibly because she selects as examples of language rights the right to bilingual ballots and the right to learn the dominant language of a country, which are important issues in settler countries like the United States. Nor does she use the concept normative, unlike political philosophers.

Kloss (Ch. 8) drew on the work of Kant, Bernstein, utilitarianism, morality and rationality in devising the categories in language planning covering the status of a language in a polity (high or low, etc.) and its corpus (existing or planned vocabulary, grammar, discourse functions). His conclusion, on the basis of evidence in the United States, was that 'Support of language functions and eventual officialization

of minority languages, at least commensurable to their contribution to the state, is just, and it is also the best alternative to a harmonious coexistence of linguistic groups. Contractual pluralism is better than natural pluralism, natural pluralism is better than assimilationism. Language-status planning will continue to be contingent upon drifting ideologies' (p. 81).

Kristin Henrard (Ch. 18) assesses language rights in the administration of justice: in court proceedings (both criminal and civil), in communications with the police and in prison. Non-discrimination needs to be achieved on a sliding scale that takes several factors into consideration when ensuring substantive equality (as advocated earlier by Fernand de Varennes). Language rights are assessed in the provisions of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR); in minority instruments, including the Oslo Recommendations (see Vol. III, Ch. 67); and in international rules and recommendations for prisons, which are quite detailed but tend to be vague. Henrard has supplemented the 2001 article with an extensive update for this volume in 2015. This covers developments in the theoretical framework, in particular as regards indirect discrimination, differential treatment and reasonable accommodation. Court cases might serve to strengthen language rights. There is at present no robust protection for linguistic diversity. On the other hand, her review of developments in court cases, new rules and expert analysis in the three areas covered reveals that there is now more awareness of language discrimination being unacceptable.

Richard Vogler (Ch. 19) analyses the language rights of defendants in criminal proceedings in Europe. He cites a considerable number of cases at the European Court of Human Rights on the right to interpretation prior to and during court hearings and the right to translation of key documents. He also describes the difficulties of the European Commission to reach agreement with member states on a 'robust and universal' Directive for application throughout Europe, but is confident that significant progress on this increasingly important issue has been made.

Here is an example of how different professional specialisations affect language rights. An ITM person's right to use the mother tongue in court depends in most cases on declaring oneself to be linguistically deficient or being assessed as deficient by the court. Henrard (note 6 in Ch. 18) shows how the Human Rights Committee sees the issue:

> Nor does the requirement of a fair hearing mandate state parties to make available to a citizen whose mother tongue differs from the official court language, the services of an interpreter, if this citizen is capable of expressing himself adequately in the official language. Only if the accused or the defence witnesses have difficulties in understanding, or in expressing themselves in the court language, must the services of an interpreter be made available.

One can ask who decides whether a person is 'capable of expressing himself (sic) adequately in the official language'? If lawyers, who are often monolingual,

do this, how reliable is their judgement from a linguistic or sociological point of view? Many lawyers also refer to 'simultaneous translation' and seem to be unaware of the distinction between a right to 'translation' or to 'interpretation'. Covering the cost of interpretation is often resented.

A concrete example of resistance to being declared deficient or costing too much comes from a Saami friend in Norway. She and her Saami colleagues were members of the local health board in a Saami-dominant municipality. The medical doctor who had lived there for several years was the only native Norwegian speaker. The language at meetings was invariably Norwegian. Finally, frustrated Saami members informed the doctor that they were going to use Saami from the next meeting on. The doctor readily agreed, but said that they would incur a considerable expense if they chose to use their right to speak Saami. The Saami replied: '*You* are the one who causes the costs – we Saami are all bilingual'. Who was deficient?

François Grin's paper (Ch. 20) brings together many of the key issues addressed in this volume in a reflective, theoretically oriented paper that also has rich historical anchoring, with examples mainly from Switzerland and Canada. His aim is to specify how the allocation of language rights to a mix of language groups can be optimised. He argues for speakers of both immigrant and autochthonous minority languages to be entitled to language rights and that this should be seen as to the advantage of the entire society. He indicates why some decisions need to be made nationally, others decentrally. He demonstrates that there is a strong case for variety-enhancing and tolerability-enhancing asymmetries in any administration of the territoriality principle. This can combat emotionalism in the allocation of language rights and increase social cohesion. Grin has provided an update to his 1994 text which takes stock of many current pressures due to increased immigration in Europe which his criteria for granting language rights can address.

In conclusion, we note that some of the topics covered in this volume are elaborated in more depth in the remaining three volumes, especially education in Volume II; and language endangerment, violations and revitalistion in Volume III. This also includes a large collection of declarations in international law on language rights and of proposals that are intended to push language rights needs into a distinctly stronger position than they are at present. Volume IV covers a wide range of issues, some of a more theoretical kind, including the position of language rights in sociolinguistics and in political theory; some assess the current position of language rights in a wide range of countries; others address the state of the international human rights system and how far it is succeeding in delivering what it proclaims. Volume I provides a foundation for addressing these issues.

Notes

1. There is a comprehensive reprint of his brilliant writings on language and cultural diversity, including language rights, in Pattanayak 2014, two volumes.
2. See Skutnabb-Kangas 2012, section 16.2, 'Language rights versus linguistic human rights', for a discussion of definitions.

3. For cases studies of education systems in many countries with an inappropriate focus on English, see Rapatahana and Bunce (eds) 2012. For false claims for English as a basic skill by a British Council expert, see Phillipson (in press).
4. See Skutnabb-Kangas' 2015 article 'Linguicism'.
5. The tendency to see English as the sole language of research publication is misguided and uninformed.

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