16 Article 27 of the International Covenant on Civil and Political Rights

The Wording and Its Implications

György Andrássy[*]

16.1 Introduction

Fifty years ago, on 16 December 1966 the General Assembly of the United Nations adopted the International Covenant on Civil and Political Rights (hereinafter: ICCPR) together with the International Covenant on Economic, Social and Cultural Rights (hereinafter: ICESCR), whereby an unprecedented legislative work directing to the international codification of human rights was completed. The first great achievement of the codification was the adoption of the Universal Declaration of Human Rights (hereinafter: UDHR) in 1948, but then the drafting and the adoption of an international convention of human rights, which in the meantime, divided into two covenants, took another 18 years. In the end, the General Assembly adopted these two international covenants as well, and by these three major human rights instruments the goal of the codification was reached: the International Bill of Human Rights came into existence.

The rights recognized in Article 27 of the ICCPR are not yet recognized in the UDHR but this does not mean that such rights were not on the agenda when the UDHR was drafted. On the contrary! The archetype of Article 27 of the ICCPR was already included in the first draft of the UDHR as its Article 46.[1] However, this article, the so-called minority article was later, after some modifications and a heavy debate, deleted from the draft. To substitute this minority article new proposals were made, which also triggered a

* Professor at the Department of Philosophy of Law and Social Theory, Faculty of Law, University of Pécs, andrassy.gyorgy@ajk.pte.hu.
With the permission of the editors concerned this paper is, in fact a translation from Hungarian of certain parts of the content of the author's following papers: 'Gondolatszabadság, szólásszabadság, nyelvszabadság', in: A. Koltay & B. Török (Eds.), *Sajtószabadság és médiajog a 21. század elején*, Vol. 2, Complex Wolters Kluwers, Budapest 2015, pp. 11-52; 'Gondolatszabadság, szólásszabadság, nyelvszabadság', *Iustum Aequum Salutare* 11, 3, 2015, pp. 5-25; 'A nyelvszabadság és a hivatalos nyelvek' in: A. Koltay & B. Török (Eds.), Sajtószabadság és médiajog a 21. század elején Vol. 3, Complex Wolters Kluwers, Budapest 2016, pp. 11-52; 'A magyar nyelv jogállása, a kultúraszabadság és egyes emberi jogok területhez kötöttsége' (*JURA*, 1, 2016 – pp. 5-24).

1 UN Doc. E/CN.4/AC.1/3, p. 16.

big debate. At last, the drafters did not vote on the merits of these proposals; instead, they made a procedural decision whereby the proposals and the whole issue were sent back for further study to certain United Nations organs.[2] Then the Sub-Commission on Prevention of Discrimination and Protection of Minorities prepared a new proposal from which the text of Article 27 of the ICCPR developed.[3]

The adoption of Article 27 of the ICCPR was a remarkable progress not only because the drafters were able to reconcile very diverse views but also because through the adoption of this Article the United Nations renewed, in a sense, the international protection of ethnic, religious and linguistic minorities. The text of the Article reads as follows:

> In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.[4]

The ICCPR came into force in 1976. By that time the implementation of Article 27 became an important issue and this gave new stimulus to the interpretation of the Article. Two major views appeared: one considered the rights recognized in the Article as other civil and political rights which require the State mainly to refrain from certain types of action against individuals.[5] The other interpretation, which was initiated and represented primarily by Special Rapporteur Francesco Capotorti, stated that the implementation of the rights in Article 27 requires, in addition to toleration, active support from the State.

Capotorti devoted special attention to the subjects of the rights ensured in Article 27 and his definition on the concept of 'minority' is quite known even today. However, he also provided a careful analysis on the *meaning* of the rights in his study. In this latter context he investigated, *inter alia*, the relationship between the rights in Article 27 and the rights in other Articles of the ICCPR and he made the following statement about the relationship between the rights in Article 18 and Article 27:

> There is indubitably a particularly close relationship between article 18 of the International Covenant on Civil and Political Rights, regarding freedom of thought, conscience and religion, and article 27 in so far as it concerns religious

2 Cf. UN Doc. A/RES/3/217 C.

3 For more details see P. Thornberry, *International Law and the Rights of Minorities*, Clarendon Press, Oxford 1991, pp. 121-153, and M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, Engel, Kehl am. Rhein 2005, pp. 635-642.

4 International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171.

5 Cf. Thornberry 1991, pp. 180-181.

> minorities; there is even reason to wonder whether, viewed in this light, it may not duplicate what is stated in article 18.[6]

Patrick Thornberry accepted Capotorti's interpretation of Article 27 and made an even more extensive statement on the relationship between Article 27 and some other Articles of the ICCPR:

> The point here is that unless Article 27 is given a more forceful content, it adds nothing to the Covenant. Freedom of thought, conscience and religion is already protected by Article 18, and there is also, for example, as far as language and culture are concerned, the provision on freedom of expression in Article 19.[7]

Accordingly, Thornberry held that just as freedom of religion recognized in Article 18 includes the minority right concerning religion in Article 27, freedom of expression recognized in Article 19 also includes the minority rights concerning culture and language in Article 27 and because of these overlaps 'Article 27 adds nothing to the Covenant' unless the Article is given 'a more forceful content'. And Thornberry concluded that the correct interpretation of the Article is to attribute a more forceful content or meaning to it and he expressed this view, for example, in this way: "Article 27 must oblige the State to provide something more than is provided by Article 18; otherwise Article 27 is redundant."[8] In a wider context Thornberry drew the conclusion as follows:

> Whether or not one accepts the Capotorti interpretation, the meaning of the right of members of minorities 'to enjoy their own culture', to 'profess and practise' their own religion, and 'to use their own language', may call for elucidation in specific contexts. These are not phrases of the utmost precision, and would appear to open up wide areas of discretion even among States accepting a positive obligation to support minority rights. This is, of course, a problem with the article as a whole which has a 'generic' or 'framework' character deriving from its attempt, however limited, to deal with a question which manifests itself in different ways in different continents and nations. Supporters of a 'positive' view of the article concede that its letter is in some senses 'ambiguous'.[9]

---

6 F. Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, United Nations, New York 1979, para. 227.
7 Thornberry 1991, p. 180.
8 Id., p. 193.
9 Id., p. 185.

Capotorti and Thornberry have explored, to some extent, the more forceful content of the rights recognized in Article 27 of the ICCPR but they have not completed this work.[10] Meanwhile, the Capotorti/Thornberry interpretation of Article 27 proved to be influential in academic circles and it affected even the UN Human Rights Committee. In its General Comment 23 on Article 27 of the ICCPR the Committee observed, for example, that

> […] this article establishes and recognizes a right which is conferred on individuals belonging to minority groups and which is *distinct from, and additional to, all the other rights* which, as individuals in common with everyone else, they are already entitled to enjoy under the Covenant.[11]

It must be stressed however, that the Human Rights Committee did not provide a detailed description about the 'more forceful' or 'additional' content of the rights in question, either. Nevertheless, the Committee explored a linguistic element of *another* Article of the ICCPR in 1993, by stating that freedom of expression recognized in Article 19 of the ICCPR includes everyone's freedom to "express oneself in a language of one's choice."[12]

This view of the Committee, which in fact recognizes freedom of language, gave new impetus to theoretical investigation of language rights[13] and these efforts were further stimulated by the new Article 18 of the Swiss Constitution adopted in 1999 in so far as this set forth: "Freedom of language is guaranteed."[14] Having been supported by such developments, a commentator in 2007 already discussed freedom of language as a recognized fundamental right. Nevertheless, this commentator did not link this freedom to Article 27 of the ICCPR at all, and otherwise he took it for granted that freedom of language need not to be recognized explicitly.[15]

This paper relies on the Capotorti/Thornberry interpretation of Article 27 and the growing theoretical and legal recognition of freedom of language as a universal human right; however, the paper takes a few steps forward. First, it deduces freedom of language

---

10 The greatest result they reached may have been the adoption of the UN's minority declaration in 1992 and the establishment of its soft implementation mechanism. Cf. U. Caruso and R. Hofmann (Eds.), *The United Nations Declaration on Minorities*, Brill – Nijhoff, Leiden, Boston, 2015.

11 UN Human Rights Committee, General Comment No. 23, 26 April 1994, available online at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11, para. 1. Last visited 5 March 2016.

12 *Ballantyne, Davidson, McIntyre v. Canada* case, UN Human Rights Committee, 5 May 1993, UN Doc. CCCPR/C/47/D/359/1989 and 385/1989/Rev.1, paras 12 and 11.3.

13 Cf. e.g. F. de Varennes, *Language, Minorities and Human Rights*, Martinus Nijhoff Publishers, The Hague 1996, pp. 33-53.

14 Constitution fédéral de la Confédération du suisse. https://www.admin.ch/opc/fr/classified-compilation/19995395/index.html. Last visited: 18 February 2016.

15 Cf. X. Arzoz, 'The Nature of Language Rights', *JEMIE*, Vol. 6, No. 2, 2007 (by European Centre for Minority Issues). www.ecmi.de/fileadmin/downloads/publications/JEMIE/2007/2-2007-Arzoz.pdf, pp. 25-28.

as a private life freedom from Article 27 and other legal and philosophical sources. Second, it derives official language rights from certain human rights recognized by the UDHR and the ICCPR and points out that official language rights are also human rights. Third, it provides a solution to the official language problem; this solution is based on the assertion that official language rights are, just as political rights, limited territorially.

16.2 A Philosophical Argument

The reason to begin with a philosophical argument is that I discovered or realized freedom of language in a philosophical context. Inspiration was given by an invitation to a conference in 1991 and, in regard to this by re-reading some parts of John Rawls' *A Theory of Justice*. This theory of justice, which is on the principles of a well-ordered or just society, "[…] generalizes and carries to a higher level of abstraction the familiar theory of the social contract as found, say, in Locke, Rousseau, and Kant".[16]

A key component of the theory is the 'original position' which "corresponds to the state of nature in the traditional theory of the social contract".[17] The original position is 'a purely hypothetical situation' within which the contracting parties choose the fundamental principles of justice for a well-ordered society 'behind the veil of ignorance'.[18]

In this position the contracting parties know for example that they have various religious and moral convictions but they do not know 'what their religious or moral convictions are' and that 'how their religious or moral view fares in their society, whether, for example, it is in the majority or the minority'.[19] "The question they are to decide is which principle they should adopt to regulate the liberties of citizens in regard to their fundamental religious, moral, and philosophical interests."[20] Now, Rawls held that under such conditions

> […] equal liberty of conscience is the only principle that the persons in the original position can acknowledge. They cannot take chances with their liberty by permitting the dominant religious or moral doctrine to persecute or to suppress others if it wishes. Even granting (what may be questioned) that it is more probable than not that one will turn out to belong to the majority (if a majority exists), to gamble in this way would show that one did not take one's religious or moral convictions seriously, or highly value the liberty to examine one's beliefs. Nor on the other hand, could the parties consent to the principle

16 J. Rawls, *A Theory of Justice*, The Belknap Press of Harvard University Press, Cambridge, Massachusetts 1971, p. 11.
17 Id., p. 12.
18 Cf. Id. pp. 11-12.
19 Id., p. 206.
20 Id., p. 206.

> of utility. In this case their freedom would be subject to the calculus of social interests and they would be authorizing its restriction if this would lead to a greater net balance of satisfaction.[21]

However, we can imagine in the same way that the contracting parties know that they speak different languages but they do not know what their language is and that how their language fares in their society, whether, for example, it is in the majority or the minority. Moreover, it is evident that they have fundamental linguistic interests as, for example, many of them can use only one language, theirs own. Therefore, the question they are to decide extends to the principle they should adopt to regulate the liberties of citizens in regard to their fundamental linguistic interests.

Now, it seems that the only principle the parties can acknowledge in the original position is *equal liberty of language*. They cannot take chances with their liberty by permitting the dominant language to persecute or to suppress others if it wishes. Even granting (what may be questioned) that it is more probable than not that one will turn out to belong to the majority (if a majority exists), to gamble in this way would show that one did not take the value of one's language seriously, or highly value the liberty to use one's own language. Nor on the other hand, could the parties consent to the principle of utility. In this case their freedom would be subject to the calculus of social interests and they would be authorizing its restriction if this would lead to a greater net balance of satisfaction.

This was more or less my first argument for freedom of language: what I did was in fact an application of Rawls' reasoning to the language question.[22] It is worth noting that Rawls himself also referred to the possibility of such applications; he wrote that his reasoning 'can be generalized to apply to other freedoms, although not always with the same force.'[23]

16.3 Article 27: A Great Achievement of Which the Wording Is Problematic

Above I recalled that according to Capotorti, Thornberry, their academic followers and the UN Human Rights Committee Article 27 of the ICCPR has a 'more forceful' content than it may suggest; however, I added that this implicit or tacit content of the Article has not yet been completely explored. Below I will provide a critical interpretation of the drafting of Article 27. The result of this analysis will be, in fact an elucidation of the more forceful or additional content of the Article in relation to the language right recognized in it. Let us see first and foremost the text of the Article again; it reads as follows:

21 Id., p. 207.
22 Cf. Gy. Andrássy, 'Etnikai kisebbségek és emberi jogok', 2, *Regio*, 1993, pp. 74-79.
23 Rawls 1971, p. 206.

> In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

The Article recognizes three rights: the right of persons belonging to ethnic minorities to enjoy their own culture, the right of persons belonging to religious minorities to profess and practise their own religion, and the right of persons belonging to linguistic minorities to use their own language.[24] The wording of the latter right is the following:

> In those states in which… linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to… use their own language.

Apparently the text is correct, for it seems evident that persons belonging to linguistic minorities shall not be denied the right, in community with the other members of their group, to use their own language. Then what is the problem? I think there are two basic problems and these are not as much in the text as in its implications.

The first problem concerns with the definition of the right-holders. Namely, the definition implies that in those states in which linguistic minorities exist and in which states persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to use their own language, persons belonging to the linguistic *majority* can already be denied the same right. In other words, from that in such states persons belonging to linguistic minorities shall not be denied the said right follows that in the same states persons belonging to the linguistic majorities can be denied this right.[25] However, this is nonsense or it is a pure injustice for it is as clear as day that persons belonging to linguistic majority should not be denied the right to use their own language, either.

Now, in connection with the right-holders this is the problem that has not yet been raised sharply so far and this is the problem in light of which it is obvious that the drafters of the ICCPR made, from a theoretical or logical point of view, a mistake: they conceived a *universal* issue as a *minority* one. For it is evident that all human beings are language users and have their own language and thus not only persons belonging to linguistic minorities, but all human beings do have the right to use their own language. The mistake the drafters made is serious if we take into consideration that they intended to recognize

24 Cf. Capotorti 1979, para. 590.

25 I note that although there is no generally agreed definition of the term 'minority' in relation to Art. 27, it is certain, for conceptual reasons that no single definition of the term can include persons belonging to cultural, religious or linguistic majority. Therefore, the objection I made cannot be ignored in any case.

universal human rights and not *particular* rights, such as e.g. minority rights. Therefore, it is not surprising that the definition given by the drafters is wrong in light of fundamental principles of the ICCPR, too.

Firstly, the definition of the right-holders in Article 27 is inconsistent with the principle of *universality* of human rights i.e. with the principle which permeates the whole ICCPR in such terms as 'every human being', 'everyone', 'no one', 'all' etc.[26] So while human rights are *universal* rights, i.e. rights for all, the language right recognized in Article 27 is a *particular* right, i.e. a right for some: for persons belonging to linguistic minorities.

Secondly, the definition in question is inconsistent with the principle of non-discrimination. The ICCPR lays down this principle in Article 2 and 26 and these Articles forbid, among other things, linguistic discrimination. However, according to Article 27 in those states in which linguistic minorities exist, persons belonging to such minorities, i.e. persons whose language is in minority, shall not be denied the right to use their own language; from which it follows that in the same states persons belonging to the linguistic majorities, i.e. persons whose language is in majority can be denied the right to use their own language. This is, however, linguistic discrimination.

Thirdly, the definition is inconsistent with the right to equal protection of the law, which is recognized in Article 26. The inconsistency lies in that while Article 27 protects persons belonging to linguistic minorities by stating that these persons shall not be denied the right to use their own language, Article 27 permits that persons belonging to linguistic majorities shall be denied the same right.

Thus, the definition of the right-holders of the language right in Article 27 is badly drafted not only because it is irrational, unjust and illogical, but also because, not independently of these, it is inconsistent with three fundamental principles of international human rights law. It is also evident that the mistake is serious as the drafters came up against their own human rights convictions, i.e. those convictions which permeate the ICCPR and the whole doctrine. On top of all this it is sure that the last thing the drafters wanted was to make possible the denial of the right of persons belonging to linguistic majorities to use their own language. Consequently, from a theoretical point of view, the error ought to be corrected.

The solution would actually be simple: it should be stated that nobody shall be denied the right to use their own language or that everyone shall have the right to use their own language. The correction could be reached through legislation and legal practice alike. The basis of the first way is Article 51 of the ICCPR, which sets out that "Any State Party to the present Covenant may propose an amendment and file it with the Secretary-General of the United Nations." However, it is possible to correct the error within the process of the application of the ICCPR, too; the more so as it is evident that the drafters did not want

26 Cf. The Main Types and Causes of Discrimination, 7 June 1949, UN Doc. E/CN.4/Sub.2/40/Rev.1, p. 4.

to deny the right of persons belonging to the linguistic majorities to use their own languages. Therefore, the UN Human Rights Committee could state that persons belonging to linguistic majorities cannot be denied the language right recognized in Article 27, either. The Committee could have already done so but it did not exercise the option: it refused the complaint made concerning Article 27 in the *Ballantyne, Davidson, McIntyre* case, where the applicants were English-speaking Canadian citizens who ran their businesses in Québec. The reasoning of the Committee was the following:

> As to article 27, the Committee observes that this provision refers to minorities in States; this refers, as do all references to the 'State' or to 'States' in the provisions of the Covenant, to ratifying States. Further, article 50 of the Covenant provides that its provisions extend to all parts of Federal States without any limitations or exceptions. Accordingly, the minorities referred to in article 27 are minorities within such a State, and not minorities within any province. A group may constitute a majority in a province but still be a minority in a State and thus be entitled to the benefits of article 27. English speaking citizens of Canada cannot be considered a linguistic minority. The authors therefore have no claim under article 27 of the Covenant.[27]

This reasoning is logical, nevertheless, it obscures that the thesis, according to which "the authors have no claim under article 27 of the Covenant" is, in its content, desperately controversial. It is because it means that the authors, who felt that the authorities of their country violated their right to use their own language, did not have claim under Article 27, i.e. under the very Article which recognizes the right to use the own language. But under which Article would they have claim rather than Article 27 when only Article 27 recognizes the right to use the own language and they felt that the authorities violated exactly this right?

As we have seen, the Committee held that the authors did not have claim under Article 27 as Article 27 recognizes the right to use one's own language only for persons belonging to linguistic minorities, while the authors, according to the Committee, belonged to the linguistic majority in their country. But how can it be that persons belonging to the linguistic majority in a country do not have the right to use their own language? This is nonsense! Therefore, I think, the Committee could have stated, on the basis of a more comprehensive reading of the ICCPR and of the international human rights law at all that the language right recognized in Article 27 cannot be denied to persons belonging to linguistic majorities either.

---

27 *Ballantyne, Davidson, McIntyre v. Canada*, UN Human Rights Committee, 5 May 1993, UN Doc. CCCPR/C/47/D/359/1989 and 385/1989/Rev.1, para. 11.2.

It seems that Article 27 of the ICCPR defines badly the *content* of the language right in question, too. I agree with what the text states, i.e. that the right-holders shall not be denied the right to use their own language. But why could not they learn and use other languages as well, if they so wish? Why can they be denied this right? Such a denial would obviously contradict to all rationality and to the intent of the General Assembly of the UN, too.

If we correct the drafting of the content of the language right recognized in Article 27, we get that the right-holders cannot be denied either the right to use their own language or the right to use any other language. In this case however, they cannot be denied the right to choose the language they wish to use in a given situation either. This in turn means that the right-holders cannot be denied the right to the choice of the language to be used or, in short, to freedom of language. Accordingly, the drafters of the ICCPR ought to have defined the content of the language right included into Article 27 so that the right-holders shall not be denied the right to freedom of language.

Even at this point one could say that the fault may not be in that the drafters ill-defined the language right recognized in Article 27: it maybe that they ought not to have recognized this right at all.[28] Therefore, let us proceed as if the drafters had left the place of the language right recognized in Article 27 empty.

16.4 Article 27 Is Not the Only Source of the Claim for Freedom of Language

The ICCPR recognizes certain rights which are closely related to language. The most important one among them is probably freedom of thought in Article 18. Freedom of thought recalls that human thinking is deeply embedded into language: human beings cannot even think or at least think propositionally without or outside language.[29] Therefore, practically nobody can enjoy freedom of thought without using at least one language.

Freedom of conscience and freedom of religion are also closely related to language. Pursuant to Article 18 these freedoms include everyone's freedom "to have or to adopt a religion or belief of his choice". However, 'choice' involves propositional thinking and as human beings cannot think propositionally without language, practically nobody can enjoy freedom of conscience and freedom of religion without using at least one language.

All this falls into the sphere of *internal* freedom, and therefore the language use entailing it is also internal speech. On the other hand however, freedom of thought, conscience and religion also includes, according to Article 18 of the ICCPR, *external* freedom,

28 I note that certain versions of this argument played an important role in the drafting of the UDHR. Cf. Andrássy 2013, pp. 336-338 and 365-379.

29 D. Crystal, *A nyelv enciklopédiája*, Osiris Kiadó, Budapest, 1998, p. 25.

i.e. everyone's "freedom to manifest his religion or belief" "either individually, or in community with others and in public or private […] in worship, observance, practice and teaching". Well, worship, observance, practice and teaching can have moments which take place without external language use but they almost always have moments which entail such language use, too. Thus, freedom of thought, conscience and religion as external freedoms frequently entail external language use. All these apply *mutatis mutandis* to freedom of opinion and expression recognized in Article 19 of the ICCPR.

Hereupon I must put the question: in which language or languages do all human beings have the right to these freedoms? The ICCPR does not say anything about this: it is silent. However, I think this silence is a weakness: the ICCPR ought to answer the question. Below I will provide some supporting arguments.

Human beings use approx. seven thousand languages as mother tongues today;[30] on the other hand, no one is able to use language *as such* or language *in general*. Consequently, everyone can be language user only in one or more than one of the above-mentioned seven thousand languages, i.e. in Greek, Hungarian, Bengali etc., or maybe in a dead language or an artificial language such as the Esperanto. And taking into consideration that the enjoyment of freedom of thought, conscience and religion, as well as of freedom of opinion and expression entails language use necessarily or generally, the question I raised is not only appropriate but unavoidable. Therefore, the ICCPR ought to provide an answer.

But what should the answer be or what is missing from the ICCPR? Well, it seems evident that everyone has the right to freedom of thought, conscience, religion, opinion and expression primarily in their own language. This has to be so, also because a lot of persons cannot speak any language besides their own. Therefore, if they do have the right to the said freedoms (and they do), they have to have the right to these freedoms in their own language. Furthermore, it also seems evident that everyone has the right to learn and use not only their own language but other languages as well and if they have the right to use other languages it would be nonsense if they would not also have the right to express their opinions and religious or non-religious convictions in these languages.

At this point someone may make the objection that if it is evident that everyone has the right to freedom of thought, conviction and religion, as well as to freedom of opinion and expression in their own language and in any other language, why should these statements be included into the ICCPR? Such an inclusion, he may say, would be redundant.

I would disagree and would refer to the famous lines of the American Declaration of Independence. These reads that "We hold these truths to be *self-evident*, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that

30 Cf. Ethnologue, 2016, available online at https://www.ethnologue.com/world. Last visited 14 July 2016.

among these are Life, Liberty and the pursuit of Happiness".[31] Accordingly, declarations and conventions on human rights can be considered even collections of evidences and accordingly, language evidences should also be included into such documents. Thus, the ICCPR also ought to specify the language or languages in which persons have the right to freedom of thought, conscience, religion, opinion and expression. But how should the ICCPR express this?

As having pointed out, basically two rights define the answer: one is that everyone has the right to the said freedoms primarily in their own language and the other is that everyone has the right to these freedoms in any other language, too. However, if everyone has the right to these freedoms both in their own and any other language, then it is evident that everyone has the right to decide which language to be used in certain cases as well. This in turn means that everyone has the right, within the scope of these freedoms, to choose the language to be used, or in short, to freedom of language. All in all it is this right, the right to freedom of language within the scope of freedom of thought, conscience, religion, opinion and expression which the ICCPR ought to recognize.

Naturally, this is exactly the same conclusion, as the result of our analysis of Article 27 of the ICCPR was above. In other words, not only the analysis of the minority language right recognized in Article 27 but also the analysis of certain fundamental freedoms recognized in Articles 18 and 19 of the ICCPR led to the claim for the recognition of a universal freedom, freedom of language. Therefore, it is not possible to say any more that the mistake the drafters of the ICCPR made may not have been in that they ill-defined the language right recognized in Article 27, but in that they recognized this right at all. Even if they had decided to omit this minority language right from Article 27, freedom of language would still be missed from the ICCPR.

More importantly is the fact that the Human Rights Committee also drew this or a very similar conclusion relating Article 19 of the ICCPR in *Ballantyne, Davidson, McIntyre*. The opinion of the Committee reads as follows:

> The Committee believes that it is not necessary, in order to protect the vulnerable position in Canada of the francophone group, to prohibit commercial advertising in English. This protection may be achieved in other ways that do not preclude the freedom of expression, in a language of their choice, of those engaged in such fields as trade. For example, the law could have required that advertising be in both French and English. A State may choose one or more official languages, but it may not exclude, outside the spheres of public life, the

31 The unanimous Declaration of thirteen united States of America, 4 July 1776 (emphasis added), available online at www.archives.gov/exhibits/charters/declaration_transcript.html. Last visited 4 March 2016.

> freedom to express oneself in a language of one's choice. The Committee accordingly concludes that there has been a violation of article 19, paragraph 2.[32]

This opinion seems to be surprising at first sight as Article 19, as opposed to Article 27 does not say a word about the right to use one's own language or about language at all.[33] How could then the Committee draw this opinion? The explanation is likely to be that the Committee was confronted with two claims of the authors (first, that commercial advertisements and signs fall into the scope of freedom of expression and second, that freedom of expression includes freedom of expression in one's own language) and that the Committee accepted both claims. What is more, the Committee went beyond, insofar as it took the position that freedom of expression includes not only freedom of expression in one's own language but in *any* language. Thus, the Committee was of the opinion that there is an unwritten, tacit or implicit component of the content of freedom of expression; consequently, when the Committee stated that Article 19 (2) includes "freedom to express oneself in a language of one's choice", it made this only visible.

Finally, it must be noted that while deducing freedom of language from freedom of thought, conscience and religion, or from freedom of opinion and expression, both the Committee and I myself hardly utilized the definitions of these freedoms given in the ICCPR. Therefore, not only the ICCPR ought to recognize freedom of language but all those instruments, too which have listed human rights and have put freedom of thought, conscience and religion or freedom of opinion and expression on the list.

16.5 Does Freedom of Language Fit in with the Development of National and International Law?

As we have seen, freedom of language can be derived from both the language right recognized in Article 27 of the ICCPR and practically all those national and international instruments which recognize freedom of thought, conscience, religion, opinion and expression. However, if this is true, then it is rather surprising that except *Ballantyne, Davidson, McIntyre* there has been hardly any sign of the recognition of freedom of language in positive law. Well, there have been.

32 *Ballantyne, Davidson, McIntyre*, para. 11.3.

33 Art. 19(2) reads as follows: "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."

Article 30 (originally Art. 23) of the Constitution of Belgium has contained the following provision since 1831: "The use of languages spoken in Belgium is optional; only the law can rule on this matter, and only for acts of the public authorities and for judicial affairs."[34]

What else is this if not a recognition of freedom of language? For, pursuant to this provision everyone is entitled to choose the language they wants to use from among the languages spoken in the country.

Belgium was not the only state which recognized freedom of language in the 19th century: within the Austro-Hungarian Monarchy Hungary and in a sense Austria also recognized this freedom.[35] In Hungary Act XLIV of 1868 ruled on the *official* use of languages exclusively; moreover, the Preamble of the Act laid down that the use of 'the languages spoken in the country' may be regulated by 'special provisions' 'solely in official use of these languages'.[36] All these mean that private use of languages was optional or free: due to a deliberate non-regulation of private language use persons were, in this sphere, entitled to choose the language they wished from among the languages spoken in the country.[37]

As for the official use of languages, originally the Belgian legislator made the French language official solely but in 1878 an Act was adopted which required the official use of the Flemish language for public authorities in four provinces and since 1898 Acts were to be promulgated in both languages.[38]

Pursuant to Act XLIV of 1868 Hungary also had only one official or state language: Hungarian. However, this Act required the use of languages of all other nationalities in many spheres of official matters, too. For example, Article 1 laid down that "Acts must be adopted in Hungarian, but their authentic translation to the languages of all other nationalities shall also be promulgated". Article 2 stated that records of regional authorities had to be written in Hungarian but they also had to be written in all those languages in

34 Constitution de la belgique 7 February 1831, available online at http://mjp.univ-perp.fr/constit/be1831.htm. Last visited 4 March 2016. Constitution de la belgique, 6 January 2014, available online at www.senate.be/doc/const_fr.html. Last visited 4 March 2016.

35 It seems that the Austrian approach was influenced by the idea of collective rights; nevertheless, I think freedom of language can be deduced from Art. 19 of the Constitution of Austria adopted in 1867.

36 Cf. Act XLIV of 1868 On the Subject of National Equality, 7 December 1868, available online at http://dtt.ogyk.hu/hu/gyujtemenyismertetok/jogforrasok/torvenytar/item/406-corpus-juris-hungarici. Last visited 4 March 2016.

37 Minister for Religious Affairs and Public Education Baron Eötvös, József stated during the parliamentary debate of the Act: "The age which proclaimed the complete equality of civil rights, which declared equal freedom of religions without any denominational distinction, that age claims similar freedom of citizens concerning the use of their language." Cf. G. Kemény, *Iratok a nemzetiségi kérdés történetéhez Magyarországon a dualizmus korában.* Tankönyvkiadó, Budapest, 1952, p. 140, and N. Nagy, *A hatalom nyelve, a nyelv hatalma: Nyelvi jog és nyelvpolitika Európa történetében*, Doctoral Thesis, 2015, p. 148, available online at http://ajk.pte.hu/files/file/doktori-iskola/nagy-noemi/nagy-noemi-vedes-ertekezes.pdf. Last visited 15 July 2016.

38 Capotorti 1979, paras. 18.

which one fifth of the representatives wished. Courts of first instance judged in the language or languages of the records of the town and they had to issue the judgements of the courts of appeal in Hungarian and in the language the parties may have demanded provided that this language was identical with one of the languages of the records of the court of first instance. Public servants of regional authorities were required to use, as far as possible, the language of the villages, ecclesiastical organs, private organizations and persons in official communications. Compulsory public education had to be provided, as far as possible, in mother tongue for everyone, and even Hungarian banknotes were issued with subtitles in ten languages.

Accordingly, in Hungary not only Hungarian was in official use, but Romanian, Slovak, German etc. as well.[39] Therefore, in my view it would have been more correct if Act XLIV had declared that Hungarian was the first official or state language, but languages of all other nationalities were also official languages according to the provisions of the law.

To sum up, in the 19th century both the Belgian and the Hungarian legislators recognized freedom of language, they recognized this freedom within the spheres of private life, they regulated official language use by special rules and these special rules were very similar to each other insofar as they made practically all historically spoken languages, in one way or another, official. It must be added however that neither the Belgian nor the Hungarian legislators called freedom of language freedom of language and this probably played a role in that neither the Belgian nor the Hungarian recognition of this freedom affected the development of national and international law significantly.

Recognition of freedom of language was not limited to national legislation; international law also recognized this freedom, viz. within the international minority protection system established after World War I. This system, which was placed under the control of the League of Nations and the Permanent Court of International Justice, was complicated but its general law incorporated in treaties of peace, minority treaties and minority declarations, was almost uniform. This uniformity emerged from the fact that the Polish Minorities Treaty, which was drafted first, became, concerning protection of minorities, a model for the drafting of the other documents. For us the most important provision of the Polish Treaty is Article 7(3) which reads as follows:

> No restriction shall be imposed on the free use by any Polish national of any language in private intercourse, in commerce, in religion, in the press or in publications of any kind, or at public meetings.[40]

39 Cf. N. Nagy, 'Linguistic Legislation in Hungary during the Era of Dualism', in: M. Wakounig and F. Kühnel (Eds.), *Central Europe (Re)visited – A Multi-Perspective Approach to a Region*, LIT Verlag Berlin-Wien, 2015, p. 239.

40 Polish Minorities Treaty, 28 June 1919, in: Thornberry 1991: pp. 399-403 (as Appendix 1).

There is no doubt that this provision recognized freedom of language use, or, in short, freedom of language. Nevertheless, commentators usually present this provision as if it would have recognized the right of persons belonging to linguistic minorities to use their own language in certain spheres of life.[41] This interpretation is doubly flawed: on the one hand, the right-holders were not persons belonging to linguistic minorities but all Polish citizens; on the other hand, the provision recognized not only the right to use one's own, but any language.

The system regulated official language use and language use in public education by special rules. It authorized the governments of the obligated states to make the majority language official but it required, according to Article 7 (4) of the Polish model treaty 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". As for public education, Article 9(1) of the Polish treaty set forth:

> Poland will provide in the public educational system in towns and districts in which a considerable proportion of Polish nationals of other than Polish speech are residents adequate facilities for ensuring that in the primary schools the instruction shall be given to the children of such Polish nationals through the medium of their own language. This provision shall not prevent the government from making the teaching of the Polish language obligatory in the said schools.

In light of all these it is clear that, just like the national legal systems discussed above the general law of the international minority protection system did recognize freedom of language also in the private spheres of life and that it regulated official language use, including language use in public education, by special rules. The main difference between the national and the international legislation was that the international system did not require from the states bound to make their minority languages, in one way or another, official.

The states bound by the general law of the system were Albania, Austria, Bulgaria, Czechoslovakia, Estonia, Greece, Hungary, Iraq, Yugoslavia, Poland, Latvia, Lithuania, Romania and Turkey. Accordingly, in these states freedom of language became a recognized right of all citizens. Thus, after World War I already 15 states – Belgium and the 14 states listed above – recognized freedom of language as a constitutional right, true, without calling it freedom of language.

Prospects were also encouraging. In 1922 the Assembly of the League of Nations adopted a voeu "[…] that states not bound by the minorities treaties should observe the same

41 Cf. I. Cloude, *National Minorities: An International Problem*, Greenwood Press Publishers, New York 1955, pp. 18-19; Capotorti 1979, para. 99(e); Thornberry 1991, pp. 42-43; de Varennes 1996, pp. 26-27; Szalayné, Sándor Erzsébet, *A kisebbségvédelem nemzetközi jogi intézményrendszere a 20. században.* MTA Kisebbségkutató Intézet – Gondolat Kiadói Kör, Budapest 2003, pp. 89-90 and 92.

standards as those bound by such treaties" and this wish "[…] was reiterated by the Assembly of the League in 1933".[42] This means that international law once already recognized the right of all citizens to freedom of language worldwide, true, in a form of wish only.

It is also worth noting that the Institute of International Law declared, in Article 3 of a declaration on the international rights of man in 1929, the following: "All states shall have to recognize the right of all individuals to the free use of the language of his choice and of its teaching."[43]

No doubt that through this article the Institute called upon all states in the world to recognize freedom of language as a universal human right. This indicates that freedom of language, although it was not called freedom of language this time either, became an accepted idea in the highest academic circles.

By the time World War II had broken out the international minority protection system collapsed and its functioning was not restored after the war. Instead, a new world organization, the UN was established which with its member states pledged itself to respect human rights. This opened a new and promising opportunity for international recognition of freedom of language, since this time preparation of the list and definitions of human rights were on the agenda.

Therefore, it is difficult to understand that whilst adopting the Universal Declaration of Human Rights, the UN did not put freedom of language on the list of human rights. It is even more difficult to understand however, that the UN later recognized a minority language right in Article 27 of the ICCPR. How could it happen that while the international minority protection system recognized freedom of language for all citizens, the international human rights protection system recognizes only the right of persons belonging to linguistic minorities to use their own language?

Legal practice often maintains legislative errors but sometimes it corrects them. As we have seen, the UN Human Rights Committee in *Ballantyne, Davidson, McIntyre* maintained the errors the legislators made in the drafting of Article 27 of the ICCPR, but it corrected these errors in a sense when stating that freedom of expression recognized in Article 19 includes everyone's freedom 'to express oneself in a language of one's choice'. In other words, while interpreting Article 19 of the ICCPR, the Committee recognized the right to freedom of language for all and by this it made up for, to a certain extent, the recognition of freedom of language in the ICCPR.

Now, let us turn back to national legislation. As having seen, the Constitution of Belgium has recognized freedom of language since 1831. It is worth noting however, that recognition

42 Cf. J.B. Schechtman, 'Decline of the International Protection of Minority Rights', 4 *The Western Political Quarterly*, 1951, p. 1.

43 Déclaration des droit internatiaux de l'homme, 12 October 1929, available online at www.idi-iil.org/idiF/resolutionsF/1929_nyork_03_fr.pdf. Last visited 4 March 2016.

of freedom of language within the international minority protection system established after World War I has also survived, to a certain extent, as the provision on this freedom included into the Treaty of Saint German with Austria in 1919 is in effect according to Article 149(1) of the Constitution of Austria.[44] Furthermore, Article 30 of the Constitution of South Africa and Article 18 of the Constitution of Switzerland have also recognized this freedom.[45]

Regarding the Swiss recognition of freedom of language two facts deserve special attention. One is that the Federal Supreme Court has recognized freedom of language use as an 'unwritten constitutional right' since 1965,[46] the other is that since 1999 Article 18 of the Federal Constitution reads as follows: "Freedom of language is guaranteed."[47]

This provision is crystal clear: it recognizes freedom of language calling this freedom freedom of language. As for the content of this freedom the Article does not provide any specification; nevertheless, a co-reading of Article 18 with other articles, especially with Article 70, defines the most important elements. Article 70(1) set forth that "The official languages of the Confederation are German, French and Italian. Romansh is also an official language of the Confederation when communicating with persons who speak Romansh". Paragraph (2) adds that "The Cantons shall decide on their official languages" and that "in order to preserve harmony between linguistic communities, the Cantons shall respect the traditional territorial distribution of languages and take account of indigenous linguistic minorities".

Pursuant to the provisions quoted everyone has the right to freedom of language within the spheres of private life. This in turn means that the Swiss regulation fits in with the trend initiated by the Belgian Constitution in 1831 and followed by the Hungarian and the Austrian legislators in the 19th century, as well as the international minority protection system after World War I and the UN Human Rights Committee in the 1990s.

After all, freedom of language is not new indeed in national and international law: its recognition has been traceable in national law since 1831 and in international law since 1919.

---

44 Cf. Treaty of Peace between the Allied and Associated Powers and Austria (St Germain-en Laye, 10 September, 1919), Australian Treaty Series, 1920, No. 3. available online at www.austlii.edu.au/au/other/dfat/treaties/1920/3.html. Last visited 4 March 2016, and X. Arzoz, 2007, p. 26.

45 Cf. Art. 30 of the Constitution of the Republic of South Africa, available online at www.gov.za/sites/www.gov.za/files/images/a108-96.pdf. Last visited 4 March 2016.

46 Cf. Flügel, 'Nyelvi politika és nyelvi kisebbségek Svájcban', in: O. András and S.E. Szalayné (Eds.), *A többnyelvűség svájci modellje*, Osiris Kiadó, Budapest 1998, p. 74, at pp. 76-77.

47 Federal Constitution of the Swiss Confederation, 18 April 1999, available online at https://www.admin.ch/opc/fr/classified-compilation/19995395/index.html. Last visited 4 March 2016. It must be noted that the unofficial English translation of the article in the governmental portal cited had to be corrected in light of the official language versions of the text in the same portal.

16.6 Freedom of Language as a Private Life Freedom

So far I have deduced freedom of language from human rights law; now I intend to deduce a satisfactory definition of it therefrom. Above I deduced freedom of language from Article 27 of the ICCPR first; the result might as well be summarized as a definition of this freedom: "Everyone has the right to freedom of language; this right includes freedom for all to use their own and any other language."

This is indeed a definition but very short: it consists of twenty words only. For comparison, the definition of freedom of opinion and expression in Article 19 of the ICCPR consists of 126 words. Consequently, the definition of freedom of language must be supplemented.

Formerly I deducted freedom of language from Article 19 of the ICCPR, too and I pointed out that the UN Human Rights Committee also did so when stating that freedom of expression recognized in this Article includes everyone's freedom 'to express oneself in a language of one's choice'. If this is so however, then 'freedom of expression' in the text of Article 19 can be exchanged for 'freedom of language' and a reference to the core meaning of this freedom and, as a result, a new definition of freedom of language appears:

> Everyone shall have the right to freedom of language; this right shall include freedom to choose any language for practising his freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

I deducted freedom of language from Article 18, too. This Article recognizes freedom of thought, conscience and religion and I demonstrated that everyone has the right to these freedoms in her own and any other language, i.e. that everyone has freedom of language within the scope of these freedoms. Accordingly, 'freedom of thought, conscience and religion' can be exchanged for 'freedom of language', etc. in the text of Article 18, especially in Paragraph 1. The result is the following:

> Everyone shall have the right to freedom of language. This right shall include freedom to have or to adopt a language of his choice, and freedom, either individually or in community with others and in public or private, to use his language in worship, observance, practice and teaching.

In this definition it sounds strange that everyone has the freedom 'to have or to adopt a language of his choice' as no one chooses her mother tongue. However, the appropriate words can be borrowed from the American Convention on Human Rights, which set forth

that everyone has freedom 'to maintain or to change one's religion or belief'. After substituting the words, the definition is as follows:

> Everyone shall have the right to freedom of language. This right shall include freedom to maintain or to change one's language and freedom, either individually or in community with others and in public or private, to use his language in worship, observance, practice and teaching.

But does this definition prepared by logical deduction stand the test of a substantive examination? Doubts may arise primarily concerning the right to changing one's own language: does anyone have the right to change her language, i.e. to freedom of language as *internal* freedom? My answer is affirmative for the following reasoning. If everyone has the right to use any language while expressing their opinions, practising their religion etc., then everyone has the right to use constantly a language different from their mother tongue. However, if it is so, then everyone must have the right to identify with this language, too, or, to consider this language their own instead of their mother tongue. And if someone reaches this point, she has changed in fact her language. It is worth noting that such language change takes place frequently, especially among immigrants and the receiving states do not make objections but support this process.

The results we have reached so far can be put together; the outcome, after some small changes is as follows:

> Everyone shall have the right to freedom of language. This right shall include freedom to maintain or to change her language and freedom to learn and teach her own and any other language, as well as to use her or any other language either individually or in community with others in public or private, in practising religion and in seeking, receiving and imparting information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print or through any other media of her choice.

16.7 The Official Language Problem

Language use is not limited to private life: state organs also need to use at least one language for it is impossible to legislate, administer, judge etc. without language use. The one or more than one language which state organs use in fulfilling their functions is usually called official language, state language or national language. Accordingly, all states have at least one official, state or national language, independently of whether this one or more than

one language is declared official, state or national language in the legal system of a given state. For simplicity I will call such languages official languages hereinafter.

Modern states maintain extensive public educational systems which also need to use at least one language as language of instruction. Therefore, all states that maintain such a system have at least one public educational language, independently of whether the legal system of these states declares this language to be public educational language or not. Below I include public educational language into the concept of official language, except where I specify both.

Modern states almost always choose their one or more than one official language from the living languages spoken in their territory and the number of the languages chosen is almost always less than the number of these languages. And it is this point at which the official language problem arises. Jonathan Pool formulated this problem as follows:

> Although the intrinsic inelegance of the official language problem is variously described, most theorists appear to have concluded that the choice of official languages involves an inevitable compromise between efficiency and fairness. It is usually claimed that an efficient language policy officializes fewer than all languages and is therefore unfair, while a fair policy officializes everyone's language or an entirely alien language and is therefore inefficient. Efficient neutrality, exemplified in church-state separation and racial non-discrimination, is held inapplicable to language groups, because governments can simply *ignore* races and religions, but must *use*, and thus *choose*, languages.[48]

Fernand de Varennes described the problem in a similar way:

> Whilst a state can completely disregard differences in colour of skin, and can in most cases ignore differences in religion, language provides with an even greater level of challenge and difficulty to the state, because it cannot be language "neutral" when it interacts with its inhabitants or in its day to day operations. The state machinery must function in a language, or at most in a few languages, for most of its communication, work and service activities, making it impossible not to make any distinction as to language. This creates a distinction: by limiting itself to a single language, the state is involved in a difference or distinction of treatment … Any state preference invariably favours some and disadvantages others. It must again be emphasised that this is an unavoidable situation, since no state has the resources to provide all of its services in every language spoken

48 J. Pool, 'The Official Language Problem', 2 *American Political Science Review*, 1991, p. 496.

> within its jurisdiction. However, the linguistic policy actually adopted in a given state must be reasonable.[49]

De Varennes based this standpoint, to a considerable extent, on international human rights law and its interpretation given by the UN Human Rights Committee. I think this is a step forward, as the official language problem can primarily be solved, in my opinion, as a human right issue. In this respect a relevant provision of international human rights law is Article 26 of the ICCPR:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The UN Human Rights Committee interpreted this article as follows:

> In the view of the Committee article 26 does not merely duplicate the guarantee already provided for in article 2 but provides in itself an autonomous right. It prohibits discrimination in law or in fact in any field regulated and protected by public authorities. Article 26 is therefore concerned with the obligations imposed on State parties in regard to their legislation and the application thereof. Thus, when legislation is adopted by a State party, it must comply with the requirement of article 26 that its content should not be discriminatory. In other words, the application of the principle of non-discrimination contained in article 26 is not limited to those rights which are provided for in the Covenant.[50]

Accordingly, pursuant to Article 26 regulations on official languages in the State parties must not be discriminatory on the ground of language either. However, we have seen that in reality regulations on official languages treat speakers of the various languages differently in most State parties. The question is therefore whether this kind of differential treatment counts as discrimination. Well, not necessarily, as the Committee observes:

---

49 de Varennes 1996, pp. 80 and 88.

50 UN Human Rights Committee, General Comment No. 18, 10 November 1989, available online at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11, para. 12. Last visited 4 March 2016.

> […] not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.[51]

But what does this mean in relation to the choice and the number of official languages? The Committee has not yet investigated these issues in detail. Nevertheless, the Committee's opinion in *Ballantyne, Davidson, McIntyre* has a relevant element in this respect:

> A State may choose one or more official languages, but it may not exclude, outside the spheres of public life, the freedom to express oneself in a language of one's choice.[52]

This suggests that the Committee holds, the states are relatively free to decide about how many languages and which one(s) to make official. De Varennes is of a similar opinion and it seems that the prevailing view is that international human rights law allows states large margin when deciding about their official language or languages.

I think this view is too soft and it does not provide a real solution to the official language problem. Below I make an attempt to present the solution or an outline of it.

16.8 An Outline of the Solution to the Official Language Problem

Article 10 of the Universal Declaration of Human Rights recognizes everyone's right to an independent and impartial tribunal, Article 11 recognizes the rights of persons charged with penal offence and Article 26 recognizes everyone's right to education. But in which language can these rights be practised? All the three articles are silent on this issue although it is impossible, in normal circumstances, to hold a public hearing before a court, to accuse someone with a penal offence and to receive elementary, technical, professional and higher education without using at least one language. In other words, as the question arises necessarily, it is *ab ovo* a human right question; and if it is so, then the answer will also be necessarily a human right answer. But what is the answer?

In my opinion it is that everyone has the right to an independent and impartial tribunal primarily in her own language, that persons charged with a penal offence have the right to be informed about the charge primarily in their own language and that everyone has the right to education, especially to public education primarily in her own language. The argument for this is that a lot of human beings do not speak any language other than their own and that if they have the right to an independent and impartial tribunal etc., then they

51 Id., para. 13.

52 *Ballantyne, Davidson, McIntyre*, para. 11.4.

have to have the right to enjoy these rights in their own language. Further, I think that those who speak more than one language must also have the right to be heard by an independent and impartial tribunal in their own language etc. since if it were not so, this would mean that in the moment someone acquires a language other than her own, she should automatically lose her right to be heard by an independent and impartial tribunal in her own language etc. However, this would be nonsense.

After all, it must be concluded that everyone has the rights declared in Article 10, 11 and 26 of the Universal Declaration primarily in her own language. However, this seems to imply that all the languages spoken as mother tongues have to be made official in all states in the world, which in turn would be unreasonable as the number of such languages is around 7000 today.

At this point we face not only the official language problem or a version of it but also a human rights problem. Namely, given that human rights are conceived as self-evident or at least reasonable rights, how can it be that recognition of a human right would be irrational?

In order to find the solution we must return to the argument which led to the official language problem. The argument was that if everyone has the right to use her own language as official language, then all languages spoken as mother tongues have to be made official in all states in the world. Well, it must be realized that there is a tacit, hidden, implicit presupposition in this argument; it is that everyone is entitled to the human right to use her own language as official language *everywhere* or that everyone is entitled to *all* human rights *everywhere*.

However, there are human rights to which everyone is entitled but not everywhere. Political rights are the best examples. Article 21(1) of the Universal Declaration set forth: Everyone has the right to take part in the government of *his country*, directly or through freely chosen representatives.[53]

Pursuant to this provision everyone is entitled to these rights but not everywhere. It seems therefore that human rights divide into two groups in this respect: there are human rights to which everyone is entitled *everywhere* and there are human rights to which everyone is entitled only *somewhere*. And we have seen that if the right of everyone to use their own language as official language would belong to the first group, this would imply that approx. seven thousand languages should be made official in all states in the world, which would be unreasonable. Therefore, the right of everyone to use her own language as official language has to be a right to which everyone is entitled only somewhere. Conceiving the right in question in this way means that states naturally do not have to make

53 Universal Declaration of Human Rights, 10 December 1948 (emphasis added), available online at www.ohchr.org/EN/UDHR/Pages/Language.aspx?LangID=eng. Last visited 4 March 2016.

seven thousand languages official in their territory. And I think it is this perception that comprises the key of the solution to the official language problem.

But where, in which state is everyone entitled to the right to use their own language as official language? Is anyone entitled to this right for example in those states in which their language is not spoken or it is spoken only occasionally? I think they are not, since if everyone has the right to use their own language as official language but not everywhere in the world, then it seems to be evident that everyone has this right in a country in which their language is spoken at all.

The next question is whether anyone is entitled to use her own language as official language in those countries in which this language has been spoken only recently. My answer is negative again as in such countries the language is spoken mainly by immigrants or descendants of immigrants and if these persons would have the right to use their own language as official language in these countries, then sooner or later everyone would have this right everywhere in the world; however, as we have seen, this would be unreasonable. Therefore, immigrants and descendants of immigrants do not have the right to use their own language as official language in the receiving states.[54] Nevertheless, this does not mean that these people do not have this right at all; naturally, they also have it, but not in their new home country.[55]

Accordingly, it seems that everyone has the right to use their own language as official language in a state in which their language has been spoken traditionally. The fact that most states choose their official languages from their historically spoken languages strengthens this conclusion.

However, are human beings entitled to the right to use their own language as official language in *all* such states? I cannot answer this question in this paper; however, it is sure that there has to be *one* state for each human being in which her language has been spoken traditionally and in which she is certainly entitled to the right to use her own language as official language. But which state is that? Well, this depends on the situation of the right-holders. Let us see the main cases.

Most human beings live in a state in which their language has been spoken traditionally and they belong to the language community that has spoken this language traditionally

54 Kymlicka and Patten also drew this conclusion. Cf. W. Kymlicka, *Multicultural Citizenship*, Clarendon Press, Oxford 1995, pp. 95-101; A. Patten, 'Who Should Have Official Language Rights?', *Supreme Court Law Review*, 2006, p. 103, available online at www.princeton.edu/~apatten/whoshouldhave.pdf. Last visited 3 March 2016, and A. Patten, *Equal Recognition. The Moral Foundations of Minority Rights*, Princeton University Press, Princeton 2014, pp. 285-297.

55 Thus, immigrants do not waive their official language rights, as Kymilcka holds, nor they ought to be treated unequally for good reasons in this respect by the receiving society, as Patten argues. The reason is simple: according to my argument there is no need for such deviations from the underlying principles, i.e. from the inalienable character of human or moral rights in the case of Kymlicka, or from the requirements of the principle of equal treatment in the case of Patten. Cf. Kymlicka 1995, pp. 95-101 and Patten 2014, pp. 281-297.

there. These persons have to have the right to use their own language as official language in this state. The argument is that if they would not have this right there, then no one could have this right there, since without these persons this state cannot be a state in which the language in question has been spoken traditionally.

There are also many, who live or stay in a state in which their own language has not been spoken traditionally. These persons are mostly immigrants, descendants of immigrants or tourists and other foreigners. We have seen that these persons have the right to use their own language as official language not in this state; but then where? Obviously in that state to which the territory they originate from belongs. For example, if a person immigrate to Canada from Vietnam, she does not have the right as human right to use her own Vietnamese language as an official language in Canada, but she will continue to have this right in Vietnam.

Most descendants of immigrants change their own language at one point, and practically all of them change their inherited language to a language which has been traditionally spoken in the host state. Thus, after this language shift these persons and their descendants live already in a state in which their own language has been traditionally spoken, but they do not originate from the language community which has spoken this language traditionally there. The question is where, in which state do these persons have the right to use their language as official language? Well, it seems evident that they have this right in this state, i.e. in the state of language shift. For example, if a person immigrate to Canada from Vietnam and her third generation descendants change their own Vietnamese language to English, they will have the right as human right to use English, their new own language as official language in Canada.

Finally, let us consider those persons who live or stay as immigrants, descendants of immigrants or tourists or other foreigners in a state in which their own language has been spoken traditionally, but they do not originate from the language community which has spoken their language there traditionally, and they or their ancestors have not changed their own language either. These persons are from such a territory of another state in which their own language has been spoken traditionally and they originate from the language community which has spoken traditionally their language in this territory. It seems to be evident that these persons have the right to use their own language in the state to which the territory they originate from belongs. For example, if a native Italian speaker has immigrated to Switzerland from Italy recently or travel to Switzerland as a worker or tourist, she has the right as a human right to use her own Italian language as official language not in Switzerland but in Italy. The same applies to recent native German speaker immigrants, workers and tourists from Germany and Austria in Switzerland, Italy or Belgium, to recent native French speaker immigrants, workers or tourists from France in Switzerland

or Belgium and vice versa, or to recent native Swedish speaker immigrants, workers and tourists from Sweden in Finland etc.[56]

Naturally, other types of issues also arise. For instance, there are many languages which do not have script and these languages can hardly be official in modern states. What follows is not, in my opinion, that native speakers of these languages do not have any official language rights. I think, these persons have at least the right to use their own language in official affairs and to learn and study their own language in the institutions of public education: naturally in the territory where they otherwise would have the right to use their own language as official language and to receive public education in this language.

I must also note that there are certain overlaps between private and public spheres of life and this may also cause difficulties, e.g. in the field of education. The issue deserves special attention but this paper cannot discuss it due to lack of space. Nevertheless, the guiding principle is clear from the logic I follow here. Accordingly, those who have official language rights in a given state have the right to an adequate respect and protection for their own language in the overlapping areas between private and public spheres of life.

All in all, the main elements of the results we reached above are as follows. First, everyone has the right to freedom of language as a private life freedom everywhere in the world. Second, everyone has the right to use her own language as official language and to receive public education in her own language somewhere in the world. Third, everyone is entitled to the said official and public educational language rights in a single state in which her language has been traditionally spoken. Hereupon a definition of freedom of language can be drafted as follows:

> (1) Everyone shall have the right to freedom of language. This right shall include freedom to maintain or to change her language and freedom to learn and teach her own and any other language, as well as to use her or any other language either individually or in community with others in public or private, in practising religion and in seeking, receiving and imparting information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print or through any other media of his choice.
> (2) Everyone shall have the right to use her language as official language, to receive education in her language in the institutions of public education and, in addition, to enjoy an adequate respect and protection for her language in a

56 It is another (but related) issue whether or not these persons have a legal right to use their own language as official language in the host country. The European Court of Justice has already dealt with such issues e.g. in the judgment of 11 July 1985 in Case 137/84, *Ministere Public v. Robert Heinrich Maria Mutsch* [1985] ECR 02681 and the judgment of 24 November 1998 in Case C-274/96, *Hans Otto Bickel and Ulrich Franz* [1998] ECR I-07637.

state in which her own language has been traditionally spoken. The states in which persons shall have these rights are the following:
a) Persons who live in a state in which their language has been spoken traditionally and they belong to the language community that has spoken this language traditionally there, shall have these rights in this state (historical language territory).
b) Immigrants, descendants of immigrants, as well as tourists and other foreigners who live or stay in a state in which their own language has not been spoken traditionally, shall have these rights in the state to which the territory they originate from belongs (language territory of origin).
c) Persons who or whose ancestors changed their own language and as a result, their language became identical with a language which has been spoken traditionally in the territory in which the language change took place, shall have these rights in the state to which this territory belongs, independently of whether the persons concerned live in this or another state (language territory of language change).
d) Immigrants, descendants of immigrants, as well as tourists and other foreigners who live or stay in a state in which their own language has been spoken traditionally, but they do not originate from the language community which has spoken their language traditionally there and they or their ancestors did not change their language either, shall have these rights in the state to which the territory they originate from belongs (language territory of origin)
(3) Persons whose own language cannot be official language and language of public education because of a compelling reason (as is e.g. that the language does not have a script), shall have at least the right to use their own language in official affairs, to learn and study their language in the institutions of public education, and to enjoy an adequate respect and protection for their language in that state in which they otherwise would have the rights recognized in paragraph (2) of this Article.
(4) Provisions of the preceding paragraphs must also be applied, *mutatis mutandis*, to persons whose own language is a sign language.
(5) States are not obliged to create conditions which enable any language to be made an official and public educational language; however, if a state contributed to the removal of the official and public educational language status of a language of which the native speakers otherwise would have had the right to, the state in question shall have to restore the former status of the said language as soon as possible.

16.9 Conclusion

The main conclusion of this paper is that international and national legislators ought to recognize freedom of language or, in other words, they ought to expand the list of human rights with freedom of language. Another conclusion is that what Capotorti and Thornberry called as 'the more forceful content' of Article 27 is likely to be freedom of language, at least with regard to the language right recognized in that Article.

To expand the list of human rights in human rights law is not an easy issue. In the case of freedom of language this would e.g. require to supersede the traditional minority approach to language rights, of which the prevailing position seems originating not only from its theoretical characteristics and their embeddedness, but from certain fears, too. This is traceable from the preparatory work of Article 27 of the ICCPR. For example, the Annotation on the text of the draft International Covenants on Human Rights prepared by the Secretary-General of the UN stated: "It was thought that *disruptive tendencies* might result if 'every person' were to claim the benefit of the rights of minorities."[57]

It is more than probable that the Secretary-General referred, first and foremost, to the worries expressed by the so-called immigrant countries which were rather unwilling to recognize even minority rights for fear of the slowdown or termination of the assimilation of immigrants.[58] Now, if minority rights had been extended to everyone, then immigrants would certainly have had these rights. However, states may also have feared the danger that the extension of minority rights to everyone would result in claims for *official* language rights for all. In other words, the fears were likely to include what this paper calls, following Pool, the official language problem. This, as we have seen consists in that justice would require states to make everyone's language official, but this would be irrational.

Well, considering that human rights are understood as manifestations of justice, the fear of claims for official language rights for all appeared to be grounded. However, in this paper I think I was able to demonstrate that though everyone has the right to use her own language as official language, everyone is entitled to this right in a single state only. In addition, immigrants and their descendants do not have official language rights in the host states, unless they have changed their own language whereby their language has become identical with an official language of the host state. Consequently, if we understand official language rights in this way, the 'destructive tendencies' which states feared while drafting the ICCPR, disappear and the remaining difficulties may also prove to be solvable.

In any case, a discourse concerning freedom of language in the academic community is needed and it seems that the 50th anniversary of the adoption of the ICCPR and its Article 27 provides a good opportunity for a start.

57 UN Doc. GA Official Records, A/2929, para. 186.

58 Cf. Thornberry 1991, pp. 133-137 and 149-158; Nowak 2005, pp. 638-642.