NEW VOICES: HUMAN RIGHTS

This panel was convened at 9:00 am, Saturday, April 6, by its moderator, Dinah Shelton of the George Washington University Law School, who introduced the panelists: Chelsea Purvis of Minority Rights Group International; Moria Paz of Stanford University; Andy Spalding of the University of Richmond School of Law; and Katharine Young of Boston College Law School.

Introductory Remarks by Dinah Shelton*

The international lawmaking process has long been a topic of scholarly interest and divergent views, from highly state-centric and positivist approaches to decentralized and expansionist concepts that blur or erase any line between legally binding norms and non-binding political commitments. The attention given to lawmaking processes is particularly pronounced in the field of human rights, where concerns over ''devaluing the currency'' through too great an expansion of the catalogue of rights is countered by concerns for addressing critical new issues through a rights-based lens. In this debate, the role of international and domestic tribunals is a central focus, especially given the proliferation of international human rights bodies and the increasing number of complaint mechanisms that exist in global and regional organizations.

Each of the four young scholars on this panel is concerned with the development of new rights, enforcement of existing rights, and the role of international and domestic tribunals in respect to such development and enforcement. While the topics they address appear quite diverse, the lawmaking theme and role of tribunals is central to each of them. Moria Paz states that global and regional bodies ''create rights,'' and do not just enforce them. If indeed this is what international tribunals do, then she may rightly criticize their approach to language rights. Others might argue, however, that the role of tribunals is not legislative in nature, but is limited to enforcing the applicable legal instruments in a dynamic manner that stops short of creating rights that were omitted from the texts when they were drafted.

Chelsea Purvis and Katharine Young also look at the interpretation and enforcement of human rights. Chelsea points to a lack of awareness of the innovative normative framework and jurisprudence of the African human rights system. The lawmaking process in Africa has resulted in progressive treaties to guarantee new rights, while the African Commission has given broad readings to the rights thus included in the African legal instruments. By building on the texts and the jurisprudence of other regional and global institutions, the African Commission has made unique contributions to human rights law that are worthy of study and are in turn influencing other tribunals and lawmakers. Katharine Young reveals that similar innovations are occurring in domestic courts that address the implementation and enforcement of economic and social rights. In these instances, as well, the line between interpretation and creation of new rights is a sensitive issue for tribunals.

In contrast to the focus on interpretation and enforcement of existing rights, Andy Spalding suggests the emergence of a new right—freedom from corruption—and examines how tribunals and regulatory agencies may recognize and give effect to this new right. His focus is domestic courts and the issue of corporate liability for overseas human rights violations. He proposes an expanded reading of the Foreign Corrupt Practices Act instead of the recent

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intense focus on the Alien Tort Statute. He sees the possibility of regulatory enforcement of the FCPA to address the same kinds of abuses that have been the subject of ATS litigation.

These four papers, which can only be summarized in the *Proceedings*, deserve publication in full. They raise important issues and broad questions about the development of human rights law and the role of international and domestic tribunals in that development.

The Tower of Babel: Human Rights and the Paradox of Language

By Moria Paz[*]

Underlying human rights advocacy and litigation on the right of minorities to maintain their language is a serious conflict that, remarkably, has gone undiagnosed.

Major human rights instruments and leading scholars suggest two key functions of language: first, at an individual level, language is constitutive of a person's cultural identity (we are what we speak). Second, at a collective level, linguistic pluralism increases diversity. Here heterogeneity in languages has a positive value. It enhances cultural diversity, which, in turn, ''enriches the world.''[1] Given the relative weakness of minorities, if their language remains unprotected they are at a greater risk of losing their distinct identity. In this approach, the injury is born by both the minority and the entire society. Because diversity is good, treaties and scholars argue that the international human rights regime ought to enforce the right of minorities to maintain a fairly high level of linguistic separatism.[2]

There is, however, another way of viewing the function of language. This function could be called communicative as opposed to identity-constitutive. Seen from this perspective, language is above all a social tool that facilitates market operations and supports political unification. Here, value is assigned to the smooth operation of the state and civil society. Linguistic diversity is now presumed to be a cost rather than a benefit to society. The preferred solution to linguistic multiplicity is the speedy assimilation of minority speakers into the majority language of the public sphere on fair terms.

In contrast to the treaty regime and the writing of scholars, this second approach is the one that is actually advanced in practice by major human rights courts and quasi-judicial institutions. In practice, they are not prepared to force states to swallow the dramatic costs entailed by a true diversity-protecting regime.

To demonstrate my claim, I systematically examine the way in which the United Nations Human Rights Committee (UNHRC), and the European Court of Human Rights (ECtHR) dispose of cases bearing on language. I selected these two institutions because they both create *rights* that are judicially enforceable by individual submission and that lead to generally applicable decisions. The rights approach provides the linguistic interests of minorities with a prima facie presumptive inviolability.[3]

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[1] Henry Steiner, *Ideals and Counter-Ideals in the Struggle Over Autonomy Regimes for Minorities*, 66 Notre Dame L. Rev. 1539, 1550 (1990–1991). The value placed on diversity and the idea of equal respect for differences in human rights law is also legalized in the principle of equal protection. *See, e.g.*, International Covenant on Civil and Political Rights (ICCPR) arts. 21, 22; UN Charter art. 55(c); Universal Declaration of Human Rights (UDHR) art. 2; European Convention on Human Rights (ECHR) art. 14; American Convention on Human Rights (ACHR) art. 1.

[2] *E.g.*, ICCPR art. 27; UN Declaration on the Rights of Persons Belonging to National or Ethnic or Religious Minorities art. 2; European Charter for Regional or Minorities Languages, preamble; Framework Convention for the Protection of National Minorities art. 10; Universal Declaration on Linguistic Rights art. 7(1).

[3] Louis Henkin, The Age of Rights 4 (1970); Philip Alston, *Making Space for New Human Rights: The Case of the Right to Development*, 1 Harv. Hum. Rts. Y.B. 3, 3 (1988).