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LINGUISTIC RIGHTS OF INDIGENOUS PEOPLES IN THE STATES OF LATIN AMERICA

JOSÉ MANUEL PÉREZ FERNÁNDEZ*

ABSTRACT¹

The protection of language rights of speakers of indigenous languages has experienced important developments in the Latin American sphere, which has served as a framework for the whole process of recognition of cultural and ethnical identity of Indigenous Peoples. This reflects a rejection of assimilation, and an assertion of multicultural and multilingual aspects in Latin American societies. On the one hand, the author focuses on the role that international law instruments related to human rights, those for the general protection of minorities and those specific for the indigenous peoples, may perform in the recognition of linguistic rights when granting legal protection of minimum standards and, at the same time, insisting on changes in internal law. On the other hand, the author analyzes the treatment of indigenous languages by the new Latin American constitutions and their legal developments. This treatment fluctuates between providing the language with an official status or with articles to safeguard the language as an integral part of the state's cultural heritage, by including some positive linguistic rights.

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1. Introduction: Latin America as a Multicultural and Multilingual Society

Linguistic diversity in America is not always a well-known reality that originated from methods of social organization and from physical restrictions of the land, which made communication and contact very difficult among different groups, with the exception of important civilizations emerging from Central Mexico and Peru, whose languages reached a wider expansion. The beginning of the European colonial process, the phenomenon of racial mixing, and the decline of indigenous peoples² caused the indigenous languages to start diminishing in favor of Spanish,³ Portuguese, English, and to a lesser extent, French.⁴ Therefore, they were displaced from the world of culture, political usage, and teaching, which, in many cases, unavoidably results in disappearance. North America has moved from speaking 600-700 languages during the 16th century to only speaking 187 in 2000.⁵ In Mexico alone, 130 languages have been extinguished during the 20th century.⁶ In the case of South America, when the Europeans arrived, there were more than 1,500 languages, whereas nowadays there are about 350 left.⁷

In the beginning of the 21st century, and regardless of the continuous detriment suffered by the American linguistic heritage, it was believed that around 600 languages were still spoken in the

² See ANTONIO CARIDAD SALVADOR, *HISTORIA DE LAS LENGUAS DEL MUNDO* 20 (2006) (discussing how the decline of the indigenous people was mainly caused by slaughtering and epidemics, among other factors).

³ See e.g. Azucena PALACIOS ALCAINE, et al., *EL ESPAÑOL EN AMÉRICA. CONTACTOS LINGÜÍSTICOS EN HISPANOAMÉRICA* 384 (2008) (providing an overview about indigenous languages in America and their interaction with Spanish).

⁴ See JEAN SELLIER, *ATLAS DE LOS PUEBLOS DE AMÉRICA* 11 (2007) (explaining how these languages are spoken by 95 % of the American continent's population as a whole).

⁵ CARIDAD SALVADOR, *supra* note 2, at 21.

⁶ CARIDAD SALVADOR, *supra* note 2, at 21. See Klaus Zimmerman, *El contacto de las lenguas amerindias con el español en México*, 2 (4) REVISTA INTERNACIONAL DE LINGÜÍSTICA IBEROAMERICANA 19, 19-29 (2004), for a critical assessment of the mechanisms that were employed in the process.

⁷ CARIDAD SALVADOR, *supra* note 2, at 21.

whole continent. This was characterized by an extreme disparity in the distribution pattern of languages and speakers: bearing in mind that 80% of the American indigenous population is concentrated in two big areas, Andean region (Bolivia, Ecuador, Peru), and Mesoamerica (Mexico and Guatemala). We can state that there are few indigenous languages with more than one million speakers, given the fact that the majority of them are spoken by less than 10,000 people, in small and very diverse communities, becoming serious candidates for extinction, in a more or less short period of time.⁸ Nevertheless, this sad prospect, which is characterized by a real danger of extinction of a good part of the Native American linguistic heritage, coexists with a process of relative sociocultural vigor of many indigenous languages, whose number of speakers has increased in absolute terms, according to experts.⁹ Thus, some of the vernacular American languages represent the first language in 3.5 % of the continent's population and continue to be alive.¹⁰ Focusing on the Latin American sphere, the indigenous languages that currently have a larger number of speakers are:

Quechua: a language that originated from the Central Andes and is spoken approximately by nine to eleven million people.

Southern Quechua chinchay: a language approximately spoken by 5.4 million people in Bolivia (2.9 million,) Peru (2.4 million), and Argentina (150,000). In Ecuador, 1.5 million people speak *Northern quechua chinchay*, and 1.4 million people speak *quechua huáihuash* in the center of Peru.¹¹

⁸ See Luis Enrique López, *Pueblos, Culturas y Lenguas indígenas en América Latina*, in ATLAS SOCIOLINGÜÍSTICO DE PUEBLOS INDÍGENAS EN AMÉRICA LATINA 19, 85 (Inge Sichra ed., 2009); SELLIER, *supra* note 4, at 7.

⁹ SELLIER, *supra* note 4, at 10.

¹⁰ SELLIER, *supra* note 4, at 10.

¹¹ See CARIDAD SALVADOR, *supra* note 2, at 24-26; Marisa Censabella, *Chaco. Argentina en el Chaco*, in ATLAS SOCIOLINGÜÍSTICO DE PUEBLOS INDÍGENAS EN AMÉRICA LATINA, *supra* note 8, at 159, 169; Marleen Haboud, *Amazonía. Ecuador amazónico*, in ATLAS SOCIOLINGÜÍSTICO DE PUEBLOS INDÍGENAS EN AMÉRICA LATINA, *supra* note 8, at 333, 347, 349; Inge Sichra, *Andes. Aspectos generales*, in ATLAS SOCIOLINGÜÍSTICO DE PUEBLOS INDÍGENAS EN AMÉRICA LATINA, *supra* note 8, at 515, 525-30.

Guarani: the *tupi-guaraní* language is spoken by approximately four million people in Paraguay (3.6 million) and Argentina (350,000). It is also spoken in the south of Brazil and in the Bolivian region of Gran Chaco.¹²

Aimara or *aymar*: the *aru* language is spoken by 2.2 million people in Bolivia (1.8 million), Peru (350,000), and Chile.¹³

Náhuatl (*mexicano, azteca o nahua*): the *uto-azteca* language is spoken by 1.4 million people in the center of Mexico.

Furthermore, Zapotecan and Mixtecan languages in Mexico, like *otomí* (223,000) or *totonaco* (270,000), display good vitality.¹⁴

In the sphere of languages belonging to the Maya family, it is worth mentioning *Quiché*, spoken by more than one million people in Guatemala, and the *Yucateco* or *peninsular Maya* spoken in Mexico and Guatemala by approximately 713,000 people.¹⁵

Mapuche or *araucano*: the *araucana* language is spoken by approximately 440,000 people in Chile (400,000) and Argentina (40,000).¹⁶

¹² See CARIDAD SALVADOR, *supra* note 2, at 34; Censabella, *supra* note 11, at 164-65; Mily Crevels, *Amazonía. Bolivia amazónica*, in ATLAS SOCIOLINGÜÍSTICO DE PUEBLOS INDÍGENAS EN AMÉRICA LATINA, *supra* note 8, at 281, 290-300; Flávia de Castro Alves, *Amazonía: Brasil no amazónico*, in ATLAS SOCIOLINGÜÍSTICO DE PUEBLOS INDÍGENAS EN AMÉRICA LATINA, *supra* note 8, at 265, 266-277; Luis Enrique López & Marisa Censabella, *Chaco. Bolivia en el Chaco y el Oriente*, in ATLAS SOCIOLINGÜÍSTICO DE PUEBLOS INDÍGENAS EN AMÉRICA LATINA, *supra* note 8, at 196, 197-200; Bartomeu Melià, *Chaco. Paraguay*, in ATLAS SOCIOLINGÜÍSTICO DE PUEBLOS INDÍGENAS EN AMÉRICA LATINA, *supra* note 8, at 173, 179-83.

¹³ See CARIDAD SALVADOR, *supra* note 2, at 34; SELLIER, *supra* note 4, at 11; Sichra, *supra* note 11, at 531-33.

¹⁴ See CARIDAD SALVADOR, *supra* note 2, at 28-30; Ernesto Díaz Couder, *Mesoamérica*, in ATLAS SOCIOLINGÜÍSTICO DE PUEBLOS INDÍGENAS EN AMÉRICA LATINA, *supra* note 8, at 827, 840-44; José Luis Moctezuma Zamarrón, *Oasisamérica. Aspectos generales*, in ATLAS SOCIOLINGÜÍSTICO DE PUEBLOS INDÍGENAS EN AMÉRICA LATINA, *supra* note 8, at 931, 935-44.

¹⁵ See CARIDAD SALVADOR, *supra* note 2, at 27-28; Díaz Couder, *supra* note 14, at 837-39,

¹⁶ See CARIDAD SALVADOR, *supra* note 2, at 34; Arturo Hernández & Nallely Argüelles, *Patagonia. Chile patagónico*, in ATLAS SOCIOLINGÜÍSTICO DE PUEBLOS

This short description of the state-of-the-art indigenous languages in Latin America must be completed with a reference to the Brazilian state. In Brazil, around 180 indigenous languages are still being spoken and have been classified in twenty different families.¹⁷ The main languages are *tupí*, *arawak*, *macro-yê*, and Caribbean languages.¹⁸ The reality for the majority of these languages is that they are spoken by minorities, with an average number of speakers below 200 individuals.¹⁹

Once the multilingual reality of the Latin American society has been stated, one is faced with the issue addressed in this article: What has been the attitude towards cultural and linguistic diversity in the societies of the Latin American states that emerged from a process of emancipation or decolonization that took place during the first quarter of the 20th century? As an introduction, it is worth commenting when the need to regulate the use of those languages by law and the meaning of linguistic rights comes into being. First, one needs to take into account that language regulation by law has not always been considered. It emerges from the idea of the nation-state, with the linguistic element part of the hardcore factors (culture, religion, ethnic origin) that express national or community identity.²⁰

INDÍGENAS EN AMÉRICA LATINA, *supra* note 8, at 126, 127-30; Marisa Malvestitti, *Patagonia. Argentina patagónica*, in ATLAS SOCIOLINGÜÍSTICO DE PUEBLOS INDÍGENAS EN AMÉRICA LATINA, *supra* note 8, at 109, 113-22.

¹⁷ See López, *supra* note 8, at 80; Flávia de Castro Alves, *Amazonia: Brasil amazónico*, in ATLAS SOCIOLINGÜÍSTICO DE PUEBLOS INDÍGENAS EN AMÉRICA LATINA, *supra* note 8, at 245, 248-64; Francesc Queixalos, *Amazonia. Aspectos generales*, in ATLAS SOCIOLINGÜÍSTICO DE PUEBLOS INDÍGENAS EN AMÉRICA LATINA, *supra* note 8, at 231, 237-42.

¹⁸ See SELLIER, *supra* note 4, at 9-10; Inge Sichra, *Introducción*, in ATLAS SOCIOLINGÜÍSTICO DE PUEBLOS INDÍGENAS EN AMÉRICA LATINA, *supra* note 8, at 3, 14.

¹⁹ López, *supra* note 8, at 88. On the reality of indigenous languages in Brazil, see Aryon Dall'Igna Rodrigues, *Línguas indígenas: 500 anos de descobertas e perdas*, 9.1 DOCUMENTAÇÃO DE ESTUDOS EM LINGÜÍSTICA TEÓRICA E APLICADA (DELTA) 83, 83-103 (1993).

²⁰ See DRET LINGÜÍSTIC 19-20 (Jaume Vernet ed., 2003); Alessandro Pizzo/ russo, *Libertad de lengua y Derechos Lingüísticos: Un estudio comparado*, 16 REVISTA VASCA DE ADMINISTRACIÓN PÚBLICA 13, 14-15 (1987); Eduardo J. Ruiz Vieytez, *Lenguas y Constitución. Una visión del derecho lingüístico comparado en*

Furthermore, this concept of the nation-state is also identified with the idea of a civilized society, which presupposes a defense of homogeneity and the need to avoid differences at all costs.²¹ Secondly, even knowing it is not a peaceful issue, linguistic rights can be understood as the set of rules established by public institutions in connection with the use of a language in certain spheres of social life (education, justice, addressing public institutions, et cetera).²² On the other hand, it can also be understood to refer to the legal situation of speakers of a certain language (majority or minority) depending on the status the language enjoys (official recognition, promotion or just tolerance).²³

Going back to the question posed earlier, one can state, from a historical perspective and regarding the issue of linguistic diversity, that the prevailing attitude was characterized by an attempt to achieve integration – *assimilation* – of indigenous peoples in the process of construction of a homogenous national state.²⁴ This was carried out by the descendants of the colonizers whose attitude explains the omission or total silence in the legal and constitutional texts about the treatment of the indigenous linguistic issue, with the

Europa, 72 REVISTA VASCA DE ADMINISTRACIÓN PÚBLICA 231, 232 (2005).

²¹ WILL KYMLICKA, CIUDADANÍA MULTICULTURAL 14 (1996).

²² See José Manuel Pérez Fernández, et al., *Principios del régimen juridicolingüístico: en especial, el estatuto de oficialidad*, in ESTUDIOS SOBRE EL ESTATUTO JURÍDICO DE LAS LENGUAS EN ESPAÑA 23, 24-29 (Barcelona Atelier 2006). See Alan Patten & Will Kymlicka, *Introduction: Language Rights and Political Theory: Context, Issues, and Approaches*, in LANGUAGE RIGHTS AND POLITICAL THEORY 1, 16-25 (Will Kymlicka & Alan Patten eds., 2003), for a survey of different domains in which language policy choices get made (internal usage; public services; courts and legislatures; education; et cetera), from a political theory perspective.

²³ See Xabier Arzoz, *Language Rights as Legal Norms*, 15 EUR. PUB. L. 541, 544-48 (2009); Robert Dunbar, *Minority Language Rights in International Law*, 50 INT'L & COMP. L.Q. 90, 96-98 (2001).

²⁴ See Xavier Albó, *Del indio negado al permitido y al protagonista en América Latina*, in ATLAS SOCIOLINGÜÍSTICO DE PUEBLOS INDÍGENAS EN AMÉRICA LATINA, *supra* note 8, at 981, 986-88; Marco Aparicio Wilhelmi, *Los pueblos indígenas y la formación del estado-nación en América Latina*, in CAMINOS HACIA EL RECONOCIMIENTO. PUEBLOS INDÍGENAS, DERECHOS Y PLURALISMO 323, 324-40 (M. Aparicio Wilhelmi ed., 2005).

aim of contributing to the subordination of aboriginal languages to the dominating official language or state language, Spanish or Portuguese.²⁵

Actually, this linguistic issue is only a fundamental part of the treatment received by indigenous peoples on behalf of the Latin American states that developed after the end of colonial dominance. These states failed to recognize the indigenous peoples as such for a long time and they considered them as “differentiated minorities” but as citizens at a social and economic disadvantage.²⁶ On the other hand, from a sociolinguistic point of view, this subordination has generated a linguistic conflict that is characterized, following Enrique Hamel,²⁷ by a *replacement dysglosia*: that is, an asymmetric relation between the dominating language – Spanish or Portuguese – and the dominated language – indigenous, aboriginal, native or ancestral language, according to the terminology in legal texts.²⁸ This process of replacement, in the words of Miguel Siguan, is based on understanding:

... language as a sign of cultural and national identity and the situations of languages in contact as a conflict between these identities when they share a similar political space.

²⁵ See Bartolomé Clavero, *Derechos Indígenas y Constituciones Latinoamericanas*, in PUEBLOS INDÍGENAS Y DERECHOS HUMANOS 313, 313 (Mikel Berraondo ed., 2006).

²⁶ LELIA JIMÉNEZ BARTLETT, *DIVERSIDAD CULTURAL Y PUEBLOS INDÍGENAS* 35 (2009).

²⁷ See Enrique Hamel, *Derechos lingüísticos*, 44 *NUEVA ANTROPOLOGÍA* 71, 73-82 (1993) (analyzing the conflicting sociolinguistic reality of indigenous languages); Esteban Emilio Mosonyi, *Plurilingüismo indígena y políticas lingüísticas*, 153 *NUEVA SOCIEDAD* 82, 82-92 (1998); Constanza Roja-Primus, *Diversidad lingüística y alfabetización en América Latina y el Caribe*, 40-3 *REVISTA IBEROAMERICANA DE EDUCACIÓN* 1, 1-11 (2006).

²⁸ See CONSTITUCIÓN DE LA REPUBLICA BOLIVARIANA DE VENEZUELA art. 9 (using the term “indigenous languages”); REPUBLICA DE COSTA RICA, CONSTITUCIÓN DE 1949 art. 76 (using the term “indigenous languages”); REPUBLICA DE ECUADOR, CONSTITUCIONES art. 2 (using the term “ancestral languages”); REPUBLICA DE EL SALVADOR, CONSTITUCIONES art. 62 para. 2 (using the term “native languages”); REPUBLICA DE PANAMA, CONSTITUCIONES art. 88 (using the term “aboriginal languages”); REPUBLICA DEL PERÚ, CONSTITUCIÓN DE 1993, art. 48 (using the term “aboriginal languages”).

The language in the dominating group tends to expand as a consequence of a direct pressure, simply as a result of a bigger prestige in being the language in the most powerful group. The weak language suffers the influence of the strong one and the speakers become bilingual. Eventually, conscious of the inferiority of its language, they end up dropping it.²⁹

In short, during the long period of validity of the integration or assimilation policy, it is no use arguing about any type of linguistic right in favor of indigenous peoples. What is more, the indigenous people had to disappear as such, together with their special cultural and linguistic features.³⁰

Nevertheless, complex modern societies pay increasing special attention to the concept of cultural diversity and the need to find mechanisms safeguarding it, accommodating in a reasonable and stable way those cultural and ethnic differences that are at its core and highlighting the homogenous nation-state crisis.³¹ It is considered that guaranteeing cultural biodiversity means guaranteeing freedom of the people, the wealth of intangible heritage, the progress of world societies, and the correct understanding of other realities other than one's own.³² One can

²⁹ MIGUEL SIGUAN, BILINGÜISMO Y LENGUAS EN CONTACTO 258 (2001). See JOSÉ LUIS BLAS ARROYO, SOCIOLINGÜÍSTICA DEL ESPAÑOL. DESARROLLOS Y PERSPECTIVAS EN EL ESTUDIO DE LA LENGUA ESPAÑOLA EN CONTEXTO SOCIAL 400-04, 409-20 (2005)(discussing problems of dyglosia in the Hispanic word and its typology).

³⁰ Clavero, *supra* note 25, at 317-20; Kajkoj Ba Tiul, *Los pueblos indígenas: derecho a la educación y a la cultura*, in PUEBLOS INDÍGENAS Y DERECHOS HUMANOS, *supra* note 25, at 569-71.

³¹ See JÜRGEN HABERMAS, LA INCLUSIÓN DEL OTRO. ESTUDIOS DE TEORÍA POLÍTICA 94 (1999); LUIS VILLORIO, ESTADO PLURAL, PLURALIDAD DE CULTURAS 13-62 (1998).

³² UNESCO, *Universal Declaration on Cultural Diversity*, UNESCO Doc. 31C/Res 25, Annex 1 (Nov. 2, 2001) (stating "In our increasingly diverse societies, it is essential to ensure harmonious interaction among people and groups with plural, varied and dynamic cultural identities as well as their willingness to live together. Policies for the inclusion and participation of all citizens are guarantees of social cohesion, the vitality of civil society and peace. Thus defined, cultural pluralism gives policy expression to the reality of cultural diversity. Indissociable

state that nowadays the majority of societies are *multicultural*, independent of formal declarations gathered in some constitutional texts and of controversy generated by the term *multiculturalism*, given the fact that they accommodate groups with different cultural codes, similar cultural identities, and that they are challenged with integrating cultural diversity, respectfully, by protecting civil and political rights of individuals and groups.³³

Furthermore, the phenomenon of multiculturalism is not alien to Latin American societies where ethnic and cultural diversity represents an inherent native element.³⁴ Following this, after the 1970s, a radical change is caused by the organization of self-managed indigenous movements and by the new criteria of an important sector of anthropologists and other social scientists. Several events like the 1971 Declaration For the Liberation of the Indians, known as the Declaration of Barbados (approved in Symposium on Inter-Ethnic Conflict in South America, in Barbados, January 25-30, 1971), or the creation of the World Council of Indigenous Peoples in 1975 have helped the indigenous peoples increase and intensify their demands about the recognition and preservation of their cultures, demanding cultural, linguistic and educational rights that connect with the strongest claim of their ethnic identity.³⁵ This identity will only be fully developed with the recognition of their right to autonomy and self-determination; these demands will seek protection in international law instruments and have lastly brought about a radical change in the treatment of the

from a democratic framework, cultural pluralism is conducive to cultural exchange and to the flourishing of creative capacities that sustain public life”).

³³ See HABERMAS, *supra* note 31, at 189-227; JIMÉNEZ BARTLETT, *supra* note 26, at 11-20; Kymlicka, *supra* note 21, at 25-46 (explaining how a state is declared to be multicultural if several cultures live within it. Nevertheless, there is no common criterion about the meaning and usage of the term multicultural that is either a social descriptor or a normative model to follow).

³⁴ See WILL KYMLICKA, LAS ODISEAS MULTICULTURALES. LAS NUEVAS POLÍTICAS INTERNACIONALES DE LA DIVERSIDAD 263-64 (2009); MULTICULTURALISM IN LATIN AMERICA: INDIGENOUS RIGHTS, DIVERSITY AND DEMOCRACY 280 (Rachel Sieder ed., 2002).

³⁵ See Ba Tiul, *supra* note 30, at 574-79.

indigenous issue in Latin American constitutionalism.³⁶

II. Linguistic Rights of Indigenous Peoples from the Perspective of International Law

A. The Protection of Indigenous Peoples in International Law Instruments Related to Human Rights

In the process of demanding their rights and interests, the indigenous peoples have used international instruments related to human rights.³⁷ From the perspective of the protection of indigenous languages and their speakers, the international law instruments related to human rights more than establishing specific linguistic rights, they provide a basic pattern of linguistic tolerance, a protection against discrimination and against the most diverse ways of assimilation.³⁸ This way, through general human rights, one

³⁶ See Clavero, *supra* note 25, at 324 (discussing how the demand for linguistic rights arouses great interest, specifically in article 15 of the Declaration of Principles of World Council of Indigenous Peoples: "All indigenous peoples have the right to be educated in their own language and to establish their own education institutions. Indian people's languages shall be respected by nation-states in all dealings between them on the basis of equality and non-discrimination").

³⁷ See Universal Declaration of Human Rights, G.A. Res. 217(III), at 71, U.N. GAOR, 3d. Sess., 183rd plen. mtg., U.N. Doc. A/RES/217(III) (Dec. 10, 1948); International Covenant on Civil and Political Rights, G.A. Res. 2200(XXI), at 49, U.N. GAOR, 21st. Sess., 1496th plen. mtg., U.N. Doc. A/RES/2200(XXI) (Dec. 16, 1966); International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200(XXI), at 49, U.N. GAOR, 21st. Sess., 1496th plen. mtg., U.N. Doc. A/RES/2200(XXI) (Dec. 16, 1966); International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106(XX), at 47, U.N. GAOR, 20th Sess., 1406th plen. mtg., U.N. Doc. A/RES/2106(XX) (Dec. 21, 1965); Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, G.A. Res. 47/135, U.N. Doc. A/RES/47/135 (Feb. 3, 1993).

³⁸ For a relation with the protection of the rights of indigenous peoples in the international framework, see S. James Anaya, *Los derechos de los pueblos indígenas*, in PUEBLOS INDÍGENAS Y DERECHOS HUMANOS, *supra* note 25, at 29, 29-60; Magdalena Gómez, *El Convenio 169 de la Organización Internacional del Trabajo*, in PUEBLOS INDÍGENAS Y DERECHOS HUMANOS, *supra* note 25, at 133-51; Luis Rodríguez-Piñero Royo, *El sistema interamericano de derechos humanos y los pueblos indígenas*, in PUEBLOS INDÍGENAS Y DERECHOS HUMANOS, *supra* note

guarantees the right to the adoption of measures aimed at avoiding discrimination, favoring freedom of expression, of assembly and association, or rights to respect private and family life.³⁹ Furthermore, in some cases, the level of protection is increased exceeding the sphere of simple tolerance, in such a way that it is imposed on the states, not only the adoption of negative measures (protection against interference), but also positive measures in relation to the use and promotion of indigenous languages.⁴⁰

We will now focus on examining the most relevant instruments from a linguistic rights perspective and their recognition.⁴¹ Specifically, the article will focus on the instruments that make up general international law for minorities, those that protect them against discrimination and guarantee their cultural integrity in countries where the majority of people belong to a different culture.

The following issue needs to be addressed fully by this article: Is the right for minority protection applicable to indigenous peoples? Leaving aside the definition of *minority*⁴² and whether

25, at 153-203; Rodolfo Stavenhagen, *Los derechos de los pueblos indígenas en el ordenamiento internacional*, in AVANCES EN LA PROTECCIÓN DE LOS DERECHOS DE LOS PUEBLOS INDÍGENAS 1-24 (Fernando M. Mariño Menéndez & J. Daniel Oliva Martínez eds., 2004). See Eva Pons Parera, *Los derechos lingüísticos en el marco internacional y comunitario europeo*, in ESTUDIOS SOBRE EL ESTATUTO JURÍDICO DE LAS LENGUAS EN ESPAÑA, *supra* note 22, at 65-82, for an examination of these instruments of international law from the specific perspective of linguistic rights.

³⁹ See Xabier Arzoz, *Accommodating Linguistic Difference: Five Normative Models of Language Rights*, 6 EUR. CONST. L. REV. 102, 105 (2010); Theodor Schilling, *Language Rights in the European Union*, 9 GERMAN L. J. 1219, 1225 *et seq.* (2008).

⁴⁰ See Arzoz, *supra* note 23, at 548-51.

⁴¹ See Durban, *supra* note 23, at 93-95, for research on the theoretical underpinnings of language rights as human rights.

⁴² See Francesco Capotorti, *Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities*, U.N., Special Rapporteur of the Sub-Comm'n on Prevention of Discrimination & Prot. of Minorities, ¶ 568, U.N. Doc. E/CN.4/Sub.2/384/Rev.1, U.N. Sales No. E.91.XIV.2 (1991) (defining a minority as "[a] group numerically inferior to the rest of the population of the State, in a non-dominant position, whose members— being nationals of the State — possess ethnic, religious or linguistic characteristics differing from those of the rest of the

indigenous peoples are entitled to this status (ethnic minority, linguistic minority, or a combination of both),⁴³ the important thing is the applicability of international law for minorities. Along this line, one can observe that many areas of regulations for the protection of indigenous peoples agree with regulations for minority laws, such as education or language use. Accordingly, indigenous peoples usually demand these rights, which belong to them by virtue of such minority regulations. Even when some rights recognized in both systems may be different, the sphere of implementation is potentially similar.⁴⁴ Specifically, the sphere of implementation is

population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language”); Jules Deschênes, *Proposal concerning a Definition of the term “Minority”*, UE Doc. E/CN. 4/Sub. 2/1985/31, para. 181 (offering an alternative to Capotorti’s definition: “A group of citizens of a state, constituting a numerical minority and in a non-dominant position in that State, endowed with ethnic, religious or linguistic characteristics which differ from those of the majority of the population, having a sense of solidarity with one another, motivated, if only implicitly, by collective will to survive and whose aim is to achieve equality with the majority in fact and in law”)““.

⁴³ See Dieter Kugelmann, *The Protection of Minorities and Indigenous Peoples Respecting Cultural Diversity*, in MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 254-55 (Armin von Bogdandy & Rüdiger Wolfrum eds., 2007) (discussing how the recognition of Indigenous Peoples as *minorities* is rejected based on a double argument. On the one hand, the different historical circumstances surrounding both communities: *Indigenous Peoples* have been settled in their territories from time immemorial, before the consolidation of State realities that emerged from the colonization process; *national minorities* have normally been formed recently, linked to romantic movements at the end of 18th century and beginnings of 20th century. *Id.* On the other hand, accepting the term “*minority*” may imply accepting the legitimacy of the state that “*colonizes*” indigenous people. Furthermore, the existence of international instruments that specifically take on the protection of indigenous peoples (the 1989 ILO Convention and the 2007 Declaration), may support the idea that they enjoy certain rights different to the rest of minorities); JIMÉNEZ BARTLETT, *supra* note 26, at 36 (explaining that the dividing line between minority and indigenous people is not very clear: “estos conceptos no son excluyentes, es decir, [...] un pueblo indígena puede ser a la vez minoría y pueblo indígena y como tales reivindicar la posición más favorable” (English version: “these concepts are not mutually exclusive; that is, [...] an indigenous people can be minority and indigenous people at the same time and demand the most favorable position as such”).

⁴⁴ See KYMLICKA, *supra* note 34, at 278-304.

determined by compliance of practical, objective, and subjective criteria established to identify these groups; consequently, there is no legal burden to apply minority law also to groups designated as “*indigenous peoples*.”⁴⁵

Moreover, article 27 of the International Covenant on Civil and Political Rights (ICCPR) can be considered the fundamental pillar of general international law for minorities, and that is why the Human Rights Committee (HRC) has based itself on it very frequently to make statements about the rights of indigenous peoples.⁴⁶ Article 27 ICCPR states:

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 practice their own religion, or to use their own language.

Even though article 27 refers to the rights of minorities in States where they already exist, its applicability is not subject to official recognition of a minority by a given State.

Three characteristics define article 27 of the ICCPR: (1) it does not recognize an absolute individual right, (2) it does not explicitly incorporate a system of legitimate restrictions, and (3) it does not explicitly incorporate the need to balance general, individual and collective interests or interests of minority groups.⁴⁷ In its general report about article 27, the HRC declares that even though the rights protected by the rule mentioned above are individual rights, they depend on the capacity of the minority group to preserve their language, among other things (culture, religion); consequently, in some instances States should adopt positive measures to protect the identity of a minority and the linguistic rights

⁴⁵ See BJÖRN ARP, *LAS MINORÍAS NACIONALES Y SU PROTECCIÓN EN EUROPA* 136-39 (2008).

⁴⁶ See Anaya, *supra* note 38, at 44-45; AMELIA DÍAZ PÉREZ DE MADRID, *LA PROTECCIÓN DE LAS MINORÍAS EN DERECHO INTERNACIONAL* 212-223 (2004); KYMLICKA, *supra* note 34, at 48-49).

⁴⁷ DÍAZ PÉREZ DE MADRID, *supra* note 46, at 211.

of its members, such as teaching in the minority language or the use of it before public institutions.⁴⁸ Therefore, article 27 of the ICCPR represents recognition in the rights of the individuals belonging to an indigenous group, as an ethnic-linguistic minority, to express themselves and to use their own language, both individually and with the rest of the members of their community.⁴⁹

It is also worth mentioning sections *a* and *f* in article 14.3 of the ICCPR as they recognize the right of the accused to use their language, with the free assistance of an interpreter, in cases where they do not speak or understand the language used at court. Nevertheless, there is no doubt that these rules have more of a procedural than a linguistic content, since they are aimed at guaranteeing the right of defense.⁵⁰

⁴⁸ See U.N. Hum. Rts. Comm., General Comment 23, Art. 27 (50th Sess. 1994), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, p. 38, para. 6.2, U.N. Doc. HR1/GEN/1/Rev.1 (1994); ARP, *supra* note 45, at 114-18; Stavenhagen, *supra* note 38, at 8-9.

⁴⁹ Xabier Deop Madinabeitia, *Los derechos lingüísticos en el derecho internacional*, 33 REVISTA DE LENGUA I DRET 23, 25-26 (2000) (explaining that in international law, the right of every person to express themselves in the chosen language is subject to a double conditioning factor: it has to be their own or minority language, and the person needs to fit into a national, ethnic or linguistic minority. *Id.* On the deficiencies in the writing of international law instruments: “no implican que este derecho no corresponda a las personas pertenecientes a un grupo mayoritario, pues estas disposiciones son concreciones del derecho a la igualdad, pues si una persona perteneciente a un grupo minoritario tiene el derecho a emplear su lengua, a practicar sus tradiciones, su religión, etc., no es por el hecho de pertenecer a una minoría, sino porque las personas pertenecientes a la mayoría disfrutan de iure o de facto de estos derechos” (English version: “[they] do not imply that this right does not correspond to persons belonging to a majority group, since these regulations are specifications of the equality right. If a person belonging to a minority group has the right to use their language, practice their traditions, their religion, etc., it is not because they belong to a minority, but rather because the persons belonging to a minority enjoy *de iure* or *de facto* these rights”). *Id.* In addition even though the expression *own language* is used in article 27 of the ICCPR, “toda persona tiene derecho a expresarse en la lengua de su elección porque este derecho es en realidad una manifestación concreta de la libertad de expresión” (English version: “every person has a right to express themselves in the chosen language since this right is actually a concrete manifestation of freedom of expression”). *Id.*

⁵⁰ *Id.* at 31 (explaining that against restrictive interpretations of the right of

We will now focus on examining The Declaration of Rights belonging to National or Ethnic, Religious and Linguistic Minorities, approved in December 18, 1992 by the United Nations (UN) General Assembly, which was inspired by the 27 ICCPR, with the aim of exceeding its incidental limitations.⁵¹ The 1992 Declaration of Rights belonging to National or Ethnic, Religious and Linguistic Minorities, the only instrument by the UN that separately tackles special rights of minorities, grants people belonging to minorities, which includes indigenous peoples, a set of important rights from the point of view of native languages and their use: protection, by States, of their existence and their national or ethnic, cultural, religious and linguistic identity and the right to enjoy their own culture and to use their own language in private and in public.⁵² Bearing in mind the right to their own linguistic identity and the use of their own language, the Declaration includes other rights that are somehow linked in the sense that they affect a public and collective dimension.⁵³

On the other hand, the protection and promotion of the rights being recognized to minorities, in this case indigenous peoples, force the States to adopt certain steps:

- to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture and language,
- to allow them adequate opportunities to learn their mother tongue or to have instruction in their mother tongue,
- to encourage knowledge of the history, traditions, language

defense, “interpretado generosamente, puede permitir a todo acusado expresarse en la lengua de su elección si ofrece un intérprete a su costa, no se trata de una maniobra dilatoria y no se producen perjuicios a la acción de la justicia” (English version: “freely interpreted, it may allow an accused to express himself in the chosen language if they provide an interpreter and pay for it. This is not a dilatory measure and the action of justice is not restricted”)).

⁵¹ See Stavenhagen, *supra* note 38, at 9.

⁵² Declaration of Rights belonging to National or Ethnic, Religious and Linguistic Minorities, G.A. Res 47/135, Annex, U.N. GAOR, 47th Sess. Supp. No. 49 (Vol. 1), U.N. Doc. A/47/49 (Vol. 1), at 211-212 (Dec. 18, 1992).

⁵³ *Id.* at 212.

and culture of minorities existing within their territory and ensure that members of such minorities have adequate opportunities to gain knowledge of the society as a whole.⁵⁴

The Declaration ends by imposing on the states the right to cooperate “in order to promote respect for the rights set forth in the present Declaration,”⁵⁵ and stating that “the specialized agencies and other organizations of the United Nations system shall contribute to the full realization of the rights and principles set forth in the present Declaration, within their respective fields of competence.”⁵⁶

As important, from the perspective of indigenous peoples, though it does not specifically refer to them, is the 1969 International Convention on the Elimination of All Forms of Racial Discrimination (ICEFRD), and the principle of non-discrimination included there.⁵⁷ The Committee on the Elimination of Racial Discrimination (CERD), in its General Recommendation on Rights of Indigenous Peoples,⁵⁸ states that discrimination against indigenous peoples is an issue concerning the Convention and that appropriate measures should be carried out to battle and eliminate discrimination. Along this line, the CERD urges the States, among other things, to recognize and respect the culture, history, language and way of life of indigenous peoples as a factor of enriching the cultural identity of the state and of guaranteeing its preservation. Furthermore, the CERD stresses the role of the International Labor Organization (ILO) Convention No.169, to which the article will later refer to, as a

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ On the Declaration, see, e.g., Patrick Thornberry, *The Convention on the Elimination of Racial Discrimination, Indigenous Peoples and Caste/Descent-based Discrimination*, in *INTERNATIONAL LAW AND INDIGENOUS PEOPLES* 17-52 (J. Castellino and N. Walsh eds., 2005).

⁵⁸ See Comm. on the Elimination of Racial Discrimination, General Recommendation 23, Rights of indigenous peoples (51 Sess. 1997), U.N. Doc. A/52/18, annex V at 122 (1997), *reprinted in* *COMPILATION OF GENERAL COMMENTS AND GENERAL RECOMMENDATIONS ADOPTED BY HUMAN RIGHTS TREATY BODIES*, at 212, U.N. Doc. HRI/GEN/1/Rev.6 (2003); Anaya, *supra* note 38, at 46-47.

standard for the protection of indigenous peoples.⁵⁹

If we now pay attention to the Inter-American system of human rights, The 1948 American Declaration of the Rights and Duties of Man and The 1969 American Convention on Human Rights, which are the main regulatory instruments, do not make any reference to the indigenous peoples of the continent; not even the additional protocol on economic, social and cultural rights (known as Protocol of San Salvador) passed in 1996.⁶⁰ Nevertheless, similar to some of the instruments drawn up within the United Nations, they establish a set of individual rights that are particularly relevant for the protection of indigenous peoples and their cultural identity.⁶¹ Thus, some of the articles in both the Declaration and the Convention, establish the obligation on part of the States of respecting and guaranteeing life, liberty and personal integrity; no State belonging to the Convention may discontinue neither these rights nor others considered vital by any means; not even in emergency situations such as armed conflicts, state of siege, et cetera.⁶² Furthermore, the aforementioned Inter-American

⁵⁹ See Comm. on the Elimination of Racial Discrimination, *Concluding Observations of the Comm. on the Elimination of Racial Discrimination: U.S.A.*, G.A. Res. 56/18, U.N. GAOR, 56th Sess., Supp. No. 18, U.N. Doc. CERD/C/59/Misc.17/Rev.3, at 64 (Aug. 14, 2001).

⁶⁰ See Rodríguez-Piñeiro Royo, *supra* note 38, at 155-57.

⁶¹ Organization of American States, American Declaration of the Rights and Duties of Man, Apr. 1948, O.A.S. XXX [hereinafter Rights and Duties of Man] ("All men are born free and equal, in dignity and in rights, and, being endowed by nature with reason and conscience, they should conduct themselves as brothers one to another. Since culture is the highest social and historical expression of [...] spiritual development, it is the duty of man to preserve, practice and foster culture by every means within his power"); Organization of American States, Charter, Dec. 13, 1951, O.A.S.T.S. No. 1-A, 119 U.N.T.S. 3. ("The Member States agree that equality of opportunity, the elimination of extreme poverty, equitable distribution of wealth and income and full participation of their peoples in decisions relating to their own development are, among others, basic objectives of integral development").

⁶² Organization of American States, American Convention of Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, at art. 27(2) [hereinafter American Convention] (stating the rights that cannot be suspended as articles: 3 (Right to Juridical Personality), 4 (Right to Life), 5 (Right to Humane Treatment), 6 (Freedom from Slavery), 9 (Freedom from Ex Post Facto Laws), 12 (Freedom of

instruments of human rights recognize other rights that are of particular relevance to indigenous people, such as the right to profess their religious ideas and beliefs freely and to manifest and practice them both in public and in private;⁶³ the right to the preservation of health and well-being;⁶⁴ to the benefits of culture;⁶⁵ to the recognition of juridical personality and civil rights;⁶⁶ to vote and to be elected to public office;⁶⁷ to freedom of association, to promote, exercise and protect their rights regardless of their nature;⁶⁸ to own, use and enjoy their property;⁶⁹ to privacy;⁷⁰ and to a fair trial and due process.⁷¹

On the other hand, both the Inter-American Commission on Human Rights (IACHR) and the Inter-American Court of Human Rights, have adopted important resolutions and reports referred to the rights of the indigenous peoples who live in any of the member

Conscience and Religion), 17 (Rights of the Family), 18 (Right to a Name), 19 (Rights of the Child), 20 (Right to Nationality), and 23 (Right to Participate in Government)). *Id.* This prohibition also applies to the judicial guarantees which are essential for the protection of the aforesaid rights. *Id.*

⁶³ *Id.* at art. 12; Rights and Duties of Man, *supra* note 61, at art. III.

⁶⁴ Rights and Duties of Man, *supra* note 61, at art. XI.

⁶⁵ *Id.* at art. XIII.

⁶⁶ *Id.* at art. XVII; American Convention, *supra* note 62, at art. 3.

⁶⁷ Rights and Duties of Man, *supra* note 61, at art. XX; American Convention, *supra* note 62, at art. 25.

⁶⁸ Rights and Duties of Man, *supra* note 61, at art. XXII; American Convention, *supra* note 62, at art. 16.

⁶⁹ Rights and Duties of Man, *supra* note 61, at art. XXIII; American Convention, *supra* note 62, at art. 21.

⁷⁰ Rights and Duties of Man, *supra* note 61, at art. V; American Convention, *supra* note 62, at art. 11.

⁷¹ Rights and Duties of Man, *supra* note 61, at art. XXIII, XXV, XXVI; American Convention, *supra* note 62, at art. 8, 25. *See generally* Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC-10/89 of July 14, 1989, Inter-Am. Ct.H.R. (Ser. A) No. 10 (1989) (discussing, in ratifying the American Convention, that the states acquire binding obligations. The American Declaration is also a source of legal obligations as the instrument which sets forth the human rights obligations of member states to the Organization of American States Charter, and because many of the provisions contained therein have become international customary law).

States of the Organization of American States.⁷² In the fulfillment of their duty, they have turned to article 27 ICCPR and they have interpreted it in the same sense: it “recognizes the right of ethnic groups to special protection on the use of their own language, for the practice of their own religion, and, in general, for all those characteristics necessary for the preservation of their cultural identity.”⁷³ The IACHR has pointed out that the right to use their own language is recognized under the 1989 International Convention on the Rights of the Child⁷⁴ and ICESCR, which recognizes the right of each person to take part in the cultural life of the community [article 15.1.a)], and adds that those rights depend on:

the ability of the minority group to maintain its culture, language or religion. Accordingly, positive measures by the States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practice their religion, in community with other members of the group.⁷⁵

In short, indigenous peoples may find in international law

⁷² See SHELDON H. DAVIS, *LAND RIGHTS AND INDIGENOUS PEOPLES: THE ROLE OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS* (1988).

⁷³ See Inter-Am. Comm’n on Hum. Rts. [IACHR], Resolution n° 12/85, Case N° 7615 (Brazil), in *Annual Report of Inter-American Commission on Human Rights 1984-1985*, OEA/Ser.L/V/II.66, Doc. 10 rev. 1, (Oct. 1, 1985) (considering 7); IACHR, *Report on the situation of Human Rights of a segment of the Nicaraguan population of Miskito origin*, at pt. 2, B, OEA/Ser.L/V.II.62, Doc. 10 rev. 3, (Nov. 29, 1983).

⁷⁴ Convention on the Rights of the Child art. 2.1, Nov. 20, 1989, available at <http://www.unhcr.org/refworld/docid/3ae6b38f0.html> (“States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, color, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status”); Id. at art. 30 (“In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language”).

⁷⁵ See IACHR, *Report on the situation of Human Rights in Ecuador*, at 104, OEA/Ser.L/V/II.96, Doc. 10 rev. 1, (Apr. 24, 1997).

related to human rights elements that strengthen the practice of their human rights, in general, and linguistic rights, in particular.⁷⁶ Nevertheless, as the article will elaborate below, the treatment of indigenous rights has run its normal course.

*B. Specific Protection Instruments of International Law for
Indigenous Peoples: Reference to Linguistic Rights*

The protection of indigenous peoples has found a specific pathway through two important instruments of international law: The Declaration on the Rights of Indigenous Peoples, approved in 2007 by the UN General Assembly, and the 1989 ILO Convention n.169 on Indigenous and Tribal Peoples (entered into force on September 5, 1991).⁷⁷ These two instruments open a new avenue in the recognition and protection of linguistic rights.

The 1989 ILO Convention guarantees the right for the respect of social and cultural identity of indigenous peoples,⁷⁸ with language being a fundamental component, and for them to control, as far as possible, their own economic and cultural development.⁷⁹ Another

⁷⁶ See International Covenant on Civil and Political Rights art. 27, Dec. 16, 1966, 999 U.N.T.S. 171, U.N. Doc. A/6316 (1966); Convention on the Rights of the Child art. 30, Nov. 20, 1989, 1577 U.N.T.S. 3; Declaration of Rights Belonging to National or Ethnic, Religious and Linguistic Minorities, Dec. 18, 1992, A/RES/47/135, available at <http://www.unhcr.org/refworld/docid/3ae6b38d0.html>.

⁷⁷ See Arzoz, *supra* note 39, at 115-17; Raidza Torres, *The Rights of Indigenous Populations: The Emerging International Norm*, 16 YALE J. INT'L L. 127, 127-28 (1991).

⁷⁸ Indigenous and Tribal Peoples Convention, 1989: The General Conference of the International Labour Organisation, June 27, 1989, 76 [hereinafter ILO Convention] (explaining the application field in article 1.b), where a definition of indigenous peoples is offered, "peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions." *Id.* Further, "Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply"). See Gómez, *supra* note 38, at 137-38, 149-51.

⁷⁹ ILO Convention, *supra* note 78, at arts. 2-7.

right which is connected to the use of the language, recognized by the 1989 ILO Convention, is for indigenous peoples to initiate or participate in proceedings for the defense of their rights, guaranteeing the adoption of measures “to ensure that members of these peoples can understand and be understood in legal proceedings, where necessary through the provision of interpretation or by other effective means.”⁸⁰

Likewise, in the 1989 ILO Convention the right to education in their mother tongue is recognized, that is, “in their own indigenous language or in the language most commonly used by the group to which they belong.”⁸¹ And “measures shall be taken to preserve and promote the development and practice of the indigenous languages of the peoples concerned.”⁸² The influence of this directive addressed at the States has been very relevant, as we will see, and has been translated in reforms of constitutional and legal texts to recognize those languages. Nevertheless, with the aim of avoiding the isolation and rejection of indigenous peoples, certain measures are planned to be adopted “to ensure that these peoples have the opportunity to attain fluency in the national language or in one of the official languages of the country.”⁸³

Finally, the 1989 ILO Convention establishes that States need to inform indigenous peoples about their rights and duties, especially those concerned with work, economic means, education and health issues, social services and rights springing from the current Convention, and if necessary “this shall be done by means of written translations and through the use of mass communications in the languages of these peoples.”⁸⁴

The catalogue of linguistic rights recognized to indigenous peoples in the 2007 UN Declaration on the Rights of Indigenous Peoples is of a wider range and it functions as a minimum standard of legal protection (as can be inferred from articles 43 and 45); this

⁸⁰ *Id.* at art. 12.

⁸¹ *Id.* at art 28.1.

⁸² *Id.* at art 28.3.

⁸³ ILO Convention, *supra* note 78, at 28.2.

⁸⁴ *Id.* at arts 30.1, 30.2.

catalogue begins with the prohibition to discriminate on the basis of language, which constitutes the original nucleus of protection and promotion of linguistic rights and ethnic and cultural minorities.⁸⁵ Furthermore, they establish a clause to safeguard their own cultural identity, and by extension their language, when they recognize the individual and collective right of indigenous peoples not to be subjected, neither to a forced assimilation, nor to a destruction of their culture.⁸⁶ Due to this, States will establish efficient mechanisms for the prevention and restitution of “any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities.”⁸⁷

The right to use their languages in public and private spheres, to preserve and promote them in order to secure their transmission to future generations is specifically established in article 13.1.⁸⁸ With the aim of implementing the aforementioned right, the States should adopt efficient measures to ensure their protection “and also to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means,” which stresses the public use of indigenous peoples’ languages.⁸⁹

The teaching of the indigenous language, *in* the indigenous language constitutes another fundamental component of the linguistic rights protected by the 2007 UN Declaration. Therefore, the indigenous peoples have the right to establish and control their

⁸⁵ Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, at arts. 1-2 U.N. Doc. A/RES/61/295 (Sept. 13, 2007) [hereinafter Declaration on the Rights of Indigenous Peoples] (stating that indigenous peoples and individuals “have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity”).

⁸⁶ *Id.* at 8.1.

⁸⁷ *Id.* at 8.2(a).

⁸⁸ *Id.* at 13.1 (stating “Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons”).

⁸⁹ *Id.* at 13.2.

educational systems and institutions instructing education in their own languages, in equal terms with their cultural teaching-learning methodology; this right reaches all levels and forms of education in the State without discrimination.⁹⁰ And even more, they are rights that operate outside of the boundaries of the indigenous community; in this sense, the States “shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language.”⁹¹

Linguistic rights are extended, in the 2007 UN Declaration, to the sphere of external exposure on indigenous languages through the media. The indigenous peoples have a right to establish their own media in their own languages and to access all other non-indigenous media without discrimination.⁹² All in all, the States shall adopt efficient measures to ensure that the public media clearly reflects indigenous cultural diversity.⁹³

Finally, indigenous peoples have the right, following the 2007 UN Declaration, to maintain, control, protect, and develop their cultural heritage (where language is obviously included through literature and oral tradition), to develop intellectual property that is part of that cultural heritage, and to international cooperation in the cultural field, in the case of, among others, linguistic communities divided by international borders.⁹⁴

In connection with the 2007 UN Declaration, it is worth mentioning the Proposed American Declaration on the Rights of Indigenous Peoples, approved by the Inter-American Commission on Human Rights on February 26, 1997, at its 95th regular session, 133rd meeting. In this project, linguistic rights of indigenous peoples are clearly and naturally recognized and protected.⁹⁵ Thus, under the

⁹⁰ *Id.* at 14.1, 14.2.

⁹¹ Declaration on the Rights of Indigenous Peoples, *supra* note 85, at art. 14.3.

⁹² Declaration on the Rights of Indigenous Peoples, *supra* note 85, at art. 16.1.

⁹³ *Id.* at 16.2.

⁹⁴ *Id.* at arts. 31.1, 36.1.

⁹⁵ See Rodríguez-Piñero Royo, *supra* note 38, at 162-64.

premise of “indigenous peoples have the collective rights that are indispensable for full enjoyment of the individual human rights of their members,” the States recognize the right of indigenous peoples *inter alia* to use their languages and “the right to freely preserve, express and develop all aspects of their cultural identity, untrammelled by any attempt at assimilation.”⁹⁶ Likewise, the States are entrusted with recognizing the indigenous languages as official in the areas of linguistic predominance, and the right to education in the indigenous languages and the teaching of it.⁹⁷

⁹⁶ Permanent Council of the Organization of American States, Proposed American Declaration on the Rights of Indigenous Populations, arts II.2, V.1, OEA/Ser.K/XVI/GT/DADIN/doc.1/99rev.2 (Dec. 6, 2000), available at <http://www.oas.org/consejo/cajp/docs/cp07733e02.doc>.

⁹⁷ *Id.* at art. VIII (“Concepts and language: 1. Indigenous peoples have the right to their own languages, philosophy, and concepts as a component of national and universal culture, and as such, shall respect them and facilitate their dissemination thereof in consultation with the peoples involved. 2. The states shall take measures to promote and ensure that radio and television programs are broadcast in the indigenous languages in areas having a strong indigenous presence, and to support the creation of indigenous radio stations and other means of indigenous communications. 3. The states shall take effective measures to enable indigenous peoples to understand administrative, legal and political rules and procedures, and to be understood in relation to these matters. In areas where indigenous languages are predominant, states shall expend the necessary efforts to have them established as official languages and to grant them the same status that is accorded to non-indigenous official languages. 4. Indigenous peoples have the right to use their indigenous names, and the right to have the states recognize them as such”); *Id.* at art. IX (“Education: 1. Indigenous peoples shall be entitled: a) to establish and set in motion their own educational programs, institutions and facilities; b) to prepare and implement their own educational plans, programs, curricula and teaching materials; and c) to train, educate and accredit their teachers and administrators. The states shall take steps to ensure that such systems guarantee equal educational and teaching opportunities for the general population as well as complementing with the national educational systems. 2. When indigenous peoples so desire, educational systems shall be conducted in the indigenous languages and shall incorporate indigenous content, and they shall also be given the necessary training and means for complete mastery of the official language or languages. 3. The states shall ensure that those educational systems are equal in quality, efficiency, accessibility and in all other respects to that provided to the general population. 4. The states shall include in national general educational systems content reflecting the multicultural nature of their societies. 5. The states shall provide financial and any other type of assistance needed to implement the

Without questioning the importance of linguistic rights derived from both the 1989 ILO Convention and the 2007 UN Declaration, the truth is that in the Latin American sphere, there is no international instrument that specifically deals with linguistic rights of indigenous peoples. In sharp contrast, the two instruments elaborated by the Council of Europe, i.e. the European Charter for Regional or Minority Languages (Strasbourg, November 1992) and the Framework Convention for the Protection of National Minorities (Strasbourg, February 1995), pay close attention to linguistic rights, though these are not their only purpose. The reason stems from the difficulties, both theoretical and practical, in elaborating international standards of linguistic rights, bearing in mind the situation of language diversity, linguistic communities and values of different states.⁹⁸

Nevertheless, the protection of indigenous languages in Latin America may find an important reference in the Universal Declaration on Linguistic Rights, approved by the World Conference on Linguistic Rights, celebrated in Barcelona from June 6 to June 9, 1996, and submitted to UNESCO for its approval. The declaration is the result of a rigorous process of work with the participation of sixty-six non-governmental organizations, forty-one PEN centers and forty-one international experts on linguistic case law, with the moral and technical support of UNESCO. Apart from the high symbolic value, the Declaration proves to be of interest due to the wide catalogue it includes of individual and collective rights that may serve as a standard in the protection of Latin American linguistic minorities.⁹⁹ They start from the idea that “all languages are the

provisions of this article”).

⁹⁸ See Arzoz, *supra* note 23, at 551-54; Arzoz, *supra* note 39, at 109-10.

⁹⁹ Pons Parera, *supra* note 38, at 86. (“Las posibilidades de una adaptación literal o sustancial de la [Declaración Universal de Derechos Lingüísticos, Conferencia Mundial de Derechos Lingüísticos, Junio 6 – 9, 1996, Declaración de Barcelona, UNESCO Doc. 150 EX/37 (Oct. 10, 1996)] como instrumento jurídico internacional por parte de las organizaciones de ámbito universal parecen hoy limitadas, al implicar unos planteamientos que superan la predisposición demostrada por la mayoría de los estados frente al reconocimiento de los grupos lingüísticos minoritarios. En todo caso, se trataría de poner las bases para que sus principios puedan asumirse los más universalmente posible y se intensifique la

expression of a collective identity and of a distinct way of perceiving and describing reality and must therefore be able to enjoy the conditions required for their development in all functions.”¹⁰⁰ The following are considered inalienable rights:

At an *individual level*, the right to be recognized as a member of a linguistic community; the right to the public and private use of the language; the right to the use of their own name; the right to associate and relate to other members of the linguistic community of origin; and the right to maintain and develop their own culture.

At a *collective level*, the right to the teaching of their own language and culture; the right to have cultural services; the right to an equal presence of the language and culture of the group in the Media; the right to be helped in their language in official buildings and socioeconomic relations.¹⁰¹

The claim to the rights of indigenous peoples, the respect of their ethnic and cultural identity, expression of multiculturalism and multilingualism values, and the search for mechanisms for its articulation; together with the path taken by instruments of International Law, is going to generate a change in Latin American constitutionalism. This is clearly noticeable in texts passed or reformed after the 1990s in the 20th century.

garantía jurídica internacional de los derechos lingüísticos, en el marco de un clima respetuoso para con la diversidad lingüística”). [English version: “The possibilities for adapting literally or substantially the [Universal Declaration on Linguistic Rights, World Conference on Linguistic Rights, June 6 – 9, 1996, Barcelona Declaration, UNESCO Doc. 150 EX/37 (Oct. 10, 1996)] as an international law instrument on the part of international organizations, appears to be limited due to the fact that they imply approaches exceeding the majority of states willingness to recognize minority linguistic groups. All in all, it is about taking those principles as a base so they can be assumed universally and international law rights for linguistic rights are intensified, within a respectful atmosphere with linguistic diversity.”] *Id.*

¹⁰⁰ UNESCO, Universal Declaration on Linguistic Rights, World Conference on Linguistic Rights, art. 7.1 (June 9, 1996), <http://www.unesco.org/cpp/uk/declarations/linguistic.pdf> [hereinafter Declaration on Linguistic Rights].

¹⁰¹ Declaration on Linguistic Rights, *supra* note 100, at art. 3.

III. Treatment of Linguistic Rights of Indigenous Peoples Within the Latin American Constitutional Framework

In the last third of the 20th century, Latin American constitutions showed a clear tendency towards recognition of indigenous peoples and of their ethnic and cultural identity,¹⁰² which also applied to other minorities such as peoples of African descent (afro-descendants).¹⁰³ This recognition, as several authors have pointed out, does not necessarily mean that the actions carried out by the State and the policies for the indigenous peoples have improved in an irrevocable way.¹⁰⁴

¹⁰² For an overview on the treatment of indigenous rights in the constitutions of Latin America, see DERECHOS DE LOS PUEBLOS INDÍGENAS EN LAS CONSTITUCIONES DE AMÉRICA LATINA (Enrique Sánchez ed., 1996); SILVINA RAMÍREZ, LA EXPERIENCIA EN AMÉRICA LATINA SOBRE LA INCORPORACIÓN DE LOS DERECHOS INDÍGENAS EN LAS NUEVAS CONSTITUCIONES (2006).

¹⁰³ See Alejandro Rojas Martínez, *El surgimiento de lo Afrodescendiente en América Latina y el Caribe*, in ATLAS SOCIOLINGÜÍSTICO DE PUEBLOS INDÍGENAS EN AMÉRICA LATINA, *supra* note 8, at 1007-33.

¹⁰⁴ Clavero, *supra* note 25, at 331 (stating “no debe tomarse como signo de progreso cualquier mención o cualesquier registros de la presencia indígena en los textos constitucionales” (English version: “the fact that the indigenous presence might be registered in the constitutional texts should not be taken as a sign of progress”). JIMÉNEZ BARTLETT, *supra* note 26, at 73-74 (stating, similar to Clavero, that diverse constitutional texts “al tiempo que reconocen la existencia de una sociedad multicultural con base en sus pueblos indígenas, disminuyen o limitan también otros derechos fundamentales de estos pueblos, como son, por ejemplo, los derechos relacionados a las tierras, territorios y recursos” (English version: [they] “recognize the existence of a multicultural society based on the indigenous peoples, and at the same time they diminish or limit other fundamental rights of these peoples, such as the rights related to lands, territories and resources”). *Id.* Further, there is “otro motivo para mirar con cierta reserva estas reformas es que la mayoría de ellas no se aplican. Si bien es cierto que incluyen en sus textos el reconocimiento de los pueblos indígenas, así como una serie de derechos, el modo en que está formulados –ya sea porque utilizan un lenguaje ambiguo, ya porque utilizan verbos en tiempo futuro y se refieren para su desarrollo a leyes que aún no han sido formuladas– complica u obstaculiza su exigibilidad” (English version: “Another reason to take these reforms with reservation, as the majority of them will not be applied. However, they include the recognition to the indigenous peoples in the texts, as well as a series of rights, the way in which these have been formulated - whether they use ambiguous language or verbs in the future tense, and in order to be developed they refer to laws that

The Latin American constitutions contain some precautionary principles for the indigenous languages, since language itself possesses a relevant political and social dimension, and it constitutes an essential element in the identity of the indigenous peoples. There are constitutions that provide one or more indigenous languages with full or partial official language status, there are others which acknowledge the indigenous languages as cultural property that is part of the national heritage, and therefore deserve protection and promotion. Moreover, in some constitutional texts positive linguistic rights are recognized, mainly in Education. It seems obvious that, in all cases, Latin American constitutions cannot be considered as homogeneous in terms of how indigenous languages are treated, nor in terms of the recognition of linguistic, individual or collective rights.

The examination of Latin American constitutional texts is defined from a negative perspective in those cases in which either the constitution does not provide for the language or the indigenous reality, or the only language being recognized is a non-native language (Spanish).

Chile and Uruguay are the only Latin American states whose constitutions do not provide for language, which does not impede Spanish to be considered, *de facto*, the only official language. However, in the case of Chile, the lack of a constitutional regulation is partly lessened by the recognition and protection granted to the indigenous languages in the communities of Mapuche, Aimara Rapa Nui or Pascuenses, the communities of Atacameñas Quechuas, and Collas from the north of the country, and the communities of Kawashkar or Alacalufe and Yamana or Yagan from the canals in Southern Chile, as it appears in the Indigenous Law 19.253, dated September 28, 1993.¹⁰⁵ This recognition of indigenous languages implies their use and preservation, together with Spanish in areas of high indigenous population, and the introduction of a bilingual intercultural educational system, as well as the right to anthroponomy and to the promotion of indigenous languages in the

have not been formulated yet - hinders and complicates their request”).

¹⁰⁵ The Indigenous Law, 19.253 (Oct. 5, 1993) (Chile).

mass media.¹⁰⁶

In other cases, as was pointed out earlier, the constitutional regulations explicitly state the officialdom of an only language, which confirms the monolingual character of the State. Both in article 2 of the Cuban Constitution dated February 24, 1976, and in article 29 of the Constitution of the Dominican Republic dated January 26, 2010, it is stated that the *official language* is *Spanish*, which is justified by its linguistically homogeneous societies.¹⁰⁷ In similar terms, in article 6 of the Constitution of Honduras, dated January 11, 1982, it is stated that, “The official language in Honduras is Spanish. The State will preserve its purity and will increase its educational spread.” However, in the case of Honduras the native cultures and the cultural heritage of the nation are given a vague distinction, in which, hypothetically, indigenous or native languages (*Garífuna*, *Misquito*, *Tol* or *Tolupan*, *Sumo Tawahka*) are included.¹⁰⁸

The diverse ways in which indigenous languages are recognized in Latin American constitutions allows for the establishment of two broad categories with systematic purposes, notwithstanding subsequent clarifications in each of them whether they recognize or not positive linguistic rights: (a) the monolingual constitutions, one only official language non-indigenous — together with the safeguard of the remaining linguistic heritage, and (b) the multilingual constitutions, two or more official languages with a different scope.

¹⁰⁶ See The Indigenous Law, 19.253 (Oct. 5, 1993) (Chile), at arts. 28, 32.

¹⁰⁷ CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CUBA DE 1976, art. 2 (“The name of the Cuban state is Republic of Cuba, the official language is Spanish and its capital city is Havana”); CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DOMINICANA DE 2010, art. 29 (“The official language in the Dominican Republic is Spanish”).

¹⁰⁸ CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE HONDURAS DE 1982, art. 172 (stating “all anthropological, archaeological historical and artistic wealth in Honduras is part of the cultural heritage of the nation,” and that it is the duty of Law to establish “the regulations that will act as the base for its preservation, restoration and maintenance, accordingly”). *Id.* Moreover, the State is given the duty to preserve and stimulate “native cultures, as well as genuine expressions of national folklore, popular art and craftsmanship.” *Id.* at art. 173.

A. Monolingual Constitutions: One Official Language — Non-Indigenous— and Safeguarding of the Remaining Linguistic Heritage

The declaration of Spanish or Portuguese as the only official language in the constitution does not impede recognition of the multilingual reality of the State, and it grants the indigenous languages recognition for their existence and a value as cultural property. Moreover, this recognition deals with the necessity to approach their protection and promotion, sometimes from tolerance, towards discrimination or assimilation of indigenous cultures, sometimes by clearly establishing positive linguistic rights.

In the constitutions of Costa Rica, El Salvador, and Panama, after stating that Spanish is the official language of the State, assuming the added commitment to safeguard its defense, spread and purity,¹⁰⁹ it is expressed that the national indigenous languages,¹¹⁰ or the native languages,¹¹¹ or the aboriginal languages,¹¹² will be subject to protection and promotion, as they are part of the national cultural heritage.

The Panamanian Constitution should be emphasized due to the importance it gives to the recognition of the ethnic, cultural and linguistic identity of the indigenous communities. On the one hand, the Panamanian state recognizes “the ethnic identity of the national indigenous communities, and will carry out programs that tend to develop material, social and spiritual values in each of their cultures,

¹⁰⁹ See REPUBLICA DE COSTA RICA, CONSTITUCIÓN DE 1949, art. 76 (introduced in the Constitutional Reform of May 27, 1999); REPUBLICA DE EL SALVADOR, CONSTITUCIONES, art. 62; REPUBLICA DE PANAMA, CONSTITUCIONES, art. 7, 82.

¹¹⁰ REPUBLICA DE COSTA RICA, CONSTITUCIÓN DE 1949, art. 76 (“[...] the State shall safeguard the maintenance and growth of the national indigenous languages”).

¹¹¹ REPUBLICA DE EL SALVADOR, CONSTITUCIONES art. 62, para. 2, (“Native languages spoken in the national territory are part of the cultural heritage and will be subject to preservation, spread and respect”).

¹¹² REPUBLICA DE PANAMA, CONSTITUCIONES, art. 88 (“Aboriginal languages will be subject to special study, conservation and spread. The State will promote bilingual literacy programs in the indigenous communities”).

and will create an institution for the study, preservation, and dissemination of both cultures and languages, as well as for the promotion of the integral development of those human groups.”¹¹³ And on the other hand, even though education will be provided in the official language, this constitution refers to the obligation of the state to develop “programs of education and promotion for indigenous groups, as they have their own cultural patterns, with the objective of encouraging active participation of citizens.” These programs will allow the indigenous peoples to request bilingual education from the state.¹¹⁴

The treatment given to the languages of the indigenous peoples in the case of Brazil is similar to the one given to them in Panama.¹¹⁵ The Constitution of October 5, 1998, article 13, establishes the statute of officialdom of Portuguese.¹¹⁶ Additionally, the indigenous linguistic heritage is protected within the constitutional text as “cultural property,” therefore deserving guardianship and protection.¹¹⁷ According to article 215.1º, the Brazilian State takes on the duty to protect “the manifestations of popular cultures, both indigenous and Afro-Brazilian, as well as the other groups participating in the process of national civilization;” it shapes up the forms of expression, that is, languages, as an element in Brazilian cultural heritage, which carry references to identity, action, and memory of the different groups that form the Brazilian society;¹¹⁸ it also refers to a legal regulation the establishment of “incentives for the production and information about cultural property and values.”¹¹⁹ Finally, the protection of indigenous

¹¹³ *Id.* at art. 90.

¹¹⁴ See REPUBLICA DE PANAMA, CONSTITUCIONES, arts. 100, 108.

¹¹⁵ See Sérgio Leitão, *Os direitos constitucionais dos povos indígenas*, in CONSTITUCIÓN Y DERECHOS INDÍGENAS 89-91 (Jorge Alberto González Galbván ed., 2002).

¹¹⁶ CONSTITUIÇÃO FEDERAL [C.F.] [Constitution], art. 13 (Braz.) (“The Portuguese language is the official language of the Federative Republic of Brazil”).

¹¹⁷ See Robério Nunes dos Anjos Filho, *Breve balanço dos direitos das comunidades indígenas: alguns avanços e obstáculos desde a Constituição de 1988*, 8 REVISTA BRASILEIRA DE ESTUDOS CONSTITUCIONAIS 93, 95-97 (2008).

¹¹⁸ CONSTITUIÇÃO FEDERAL [C.F.] [Constitution], art 215.1º (Braz.).

¹¹⁹ *Id.* at art 216.3º.

languages is extended to education, therefore the essential article 210.2° states that, even though the basic regular education will be taught in Portuguese “the use of the indigenous mother tongues and own methods of learning will be guaranteed to the indigenous communities.”¹²⁰

If one bears in mind those constitutional regulations one may deduce that the Brazilian state will guarantee differentiated education to the indigenous population as a means to achieve their insertion in society, but also as a way to strengthening the indigenous culture through the valuation of its customs, traditions and languages. In this sense, the Statute for the Native still in force extends the current state educational system to the indigenous population and guarantees bilingual education.¹²¹

Finally, there are three cases in this category in which the constitutional text, other than granting an official language status to Spanish only (explicitly in Guatemala and *de facto* in Argentina and Mexico), recognizes the cultural and linguistic identity of the indigenous peoples and confers some linguistic rights to the speakers of the indigenous languages, which are subject to a wider legal development.

The Guatemalan Constitution dated May 31, 1985, states in article 143 that the official language of the State is Spanish, and it considers the languages of the indigenous peoples – vernacular languages – as an element of national cultural heritage.¹²² However, the recognition of the linguistic identity of the indigenous languages is more intensely formulated in the Guatemalan constitutional regulation. On the one hand, the Guatemalan Constitution recognizes the right of people and communities “to their cultural identity

¹²⁰ See GIOVANNI POGGESCHI, *I DIRITTI LINGUISTICI. UN'ANALISI COMPARATA* 315-16 (2010).

¹²¹ Lei No. 6.001, de 19 de dezembro de 1973, D.O.U. de 21.12.1973. (Braz.).

¹²² CONSTITUCIÓN DE 1985 CON LAS REFORMAS DE 1993, art. 143 (Guat.) (“The official language of Guatemala is Spanish. Vernacular languages are part of the cultural heritage of the Nation”). See José Emilio Rolando Ordóñez Cifuentes, *Las demandas constitucionales en Guatemala y México*, in *CONSTITUCIÓN Y DERECHOS INDÍGENAS* 93, 95-96 (Jorge Alberto González Galbván ed., 2002).

according to their values, their language and their customs.”¹²³ And on the other hand, the multiethnic and multilingual reality of Guatemala is strengthened, since “it is formed by diverse ethnical groups among which are the indigenous groups of Mayan descent.”¹²⁴ The duty to recognize, respect and promote “their ways of life, customs, traditions, forms of social organization, the use of the indigenous costume in men and women, and the use of languages and dialects” is therefore imposed on the state.¹²⁵ Besides, in relation to education, there is recognition of a linguistic right: the preference to bilingual education in the schools located in “areas of predominant indigenous population.”¹²⁶

The most important commitment that can be found in the Guatemalan constitutional text in relation to languages of indigenous populations has had its continuation in the Law of National Languages of 2003.¹²⁷ This regulation, in agreement with article 143 in the Constitution, states that the official language in Guatemala is Spanish, but the state “recognizes, promotes, and respects the languages of the Mayan, Garifuna and Xinka people.”¹²⁸ Additionally, this regulation establishes a group of measures in order to promote language, pending a subsequent regulation in some cases, such as making the indigenous place-names official, and using them in official ceremonies.¹²⁹ These measures sometimes imply real linguistic rights, such as addressing Public Institutions, Public Education, Health and Legal Services and economic activities.¹³⁰

¹²³ CONSTITUCIÓN DE 1985 CON LAS REFORMAS DE 1993, art. 58 (Guat.).

¹²⁴ *Id.* at art. 66.

¹²⁵ *Id.*

¹²⁶ *Id.* at art. 76.

¹²⁷ Ley de Idiomas Nacionales, Artículo 1, Decreto 19-2003 de las Leyes de Guatemala.

¹²⁸ *Id.* See Lucía Verdugo, *Mesoamérica. Guatemala*, in ATLAS SOCIOLINGÜÍSTICO DE PUEBLOS INDÍGENAS EN AMÉRICA LATINA, *supra* note 8, at 852, 860-74 (explaining how today, there are twenty-four different languages).

¹²⁹ Ley de Idiomas Nacionales [Law of National Languages], Cong. Decree No. 19 – 2003, arts. 18 & 20 (May 26, 2003) (Guat.).

¹³⁰ Ley de Idiomas Nacionales [Law of National Languages], Cong. Decree No. 19 – 2003, arts. 8 & 13 – 16 (May 26, 2003) (Guat.).

The case of Argentina, with the proviso that Spanish has not been declared its official language (*de facto officialdom*) in any regulation, whether constitutional or legal is similar to the case of Guatemala. The Argentine Constitution, which was approved on August 22, 1994, states, in article 75.17, "the ethnic and cultural pre-existence of indigenous peoples of Argentina."¹³¹ This recognition establishes the right to a bilingual and intercultural education, among other aspects. The constitutional declaration refers the state and province legislator to issue laws "protecting the cultural identity and plurality."¹³²

The Argentine constitutional text reconfirms the recognition made to the "Protection of Indigenous Communities" by Law 23.302 of 1985.¹³³ First, the Law 23.302 declares to be of national interest "the attention and support to the indigenous people and the indigenous communities in the country, and their protection and development for their participation in the socioeconomic and cultural process of the Nation, by respecting their own values and varieties."¹³⁴ Secondly, from the perspective of linguistic rights, the Law 23.302 guarantee bilingual education, giving priority, in all cases, to the mother tongue in the first years of school.¹³⁵

¹³¹ See POGGESCHI, *supra* note 120, at 315.

¹³² CONSTITUCIÓN ARGENTINA art. 75, §19. See MARCO APARICIO WILHELM, *LOS PUEBLOS INDÍGENAS Y EL ESTADO. EL RECONOCIMIENTO CONSTITUCIONAL DE LOS DERECHOS INDÍGENAS EN AMÉRICA LATINA* 95-97 (2002).

¹³³ Law No. 23.302, Nov. 8, 1985 [25803] B.O. 1.

¹³⁴ *Id.* at art. 1.

¹³⁵ See Law No. 23.302, art. 16, Nov. 8, 1985 [25803] B.O. 1. (stating "The teaching process in the areas of settlement of the indigenous communities will guarantee the curricular contents established in the common plans of studies. Furthermore, the years of Primary studies will be divided in two stages: during the first three years, teaching will take place in the appropriate indigenous mother tongue, and the national language will be taught as a special subject." *Id.* However, education will be bilingual for the remaining years: "Schools will be created, and special higher level courses designed, in order to train and develop teaching abilities in bilingual Primary teachers, paying special attention to anthropological, linguistic and pedagogical aspects, as well as to the preparation of texts and other material. Primary schools situated outside the settlements of the indigenous communities where there are native children who only or predominantly speak an indigenous language will be able to put into practice the

As was pointed out earlier, Spanish is the only language in use in the civil services nationwide. However, in the officially monolingual Argentina there is the peculiarity of how Guaraní is treated in the province of Corrientes. Law 5.598 of 2004 establishes that Guaraní is the *official alternative language* in the province of Corrientes.¹³⁶ The legal text is extremely simple, to the point that it only provides for the promotion and preservation of the language and its literary expression (articles 3 and 6), as well as for Education, the latter being a right guaranteed by constitution.¹³⁷

The case of Mexico seems to be more interesting from the point of view of the recognition of constitutional linguistic rights. The Mexican Constitution, dated February 5, 1917, has experienced several amendments from the beginning of the 1990s, especially that of 2001, which have brought forward the recognition of the multicultural character of the Mexican society, as well as its indigenous origins.¹³⁸ As a consequence, there has been recognition of the ethnical and cultural identity of the indigenous peoples, and of a group of linguistic rights that have been subjected to legal development. The officialdom of the Spanish language in Mexico is a *de facto* one, as it is in Argentina.

Article 2 in the constitutional regulation summarizes the pro-indigenous turn that the Mexican State has taken, and it lays the foundations of the treatment to the indigenous peoples, their rights and interests.¹³⁹ The Mexican nation has an indivisible character, however, in paragraph 2, article 2 of the constitution it is stated that

teaching method established in this article”).

¹³⁶ Law No. 5598, art. 1, Sept. 28, 2004, E.D.L.A.

¹³⁷ *Id.* at art. 2; CONST. ARG. Art. 75.17.

¹³⁸ See Jorge Alberto González Galván, *La validez del Derecho Indígena en el Derecho Nacional*, in COMENTARIOS A LA REFORMA CONSTITUCIONAL EN MATERIA INDÍGENA 37, 38-41 (Miguel Carbonell & Karla Pérez Portilla eds., 2002); Diego Valadés, *El derecho de la lengua*, 18 TEORÍA Y REALIDAD CONSTITUCIONAL 273, 286 (2006).

¹³⁹ See Congreso, *Cámara de Diputados*; UNAM (Instituto de Investigaciones Jurídicas ed., 2006); Jorge Alberto González Galván, *Los derechos de los pueblos indígenas*, in LOS DERECHOS DEL PUEBLO MEXICANO: MÉXICO A TRAVÉS DE SUS CONSTITUCIONES 401, 404-09; POGGESCHI, *supra* note 120, at 317; Clavero, *supra* note 25, at 326; Valadés, *supra* note 138, at 286-87.X

“The Nation is multicultural and originally based in its indigenous peoples, who are those descending from inhabited towns in the current national territories at the beginning of the colonization process, and which still preserve their own social, economic, cultural, or political institutions, or part of them.”¹⁴⁰

The unity of the Mexican nation is compatible, in conjunction with its multicultural character, with the right of the indigenous peoples to self-determination, taken as a right to autonomy.¹⁴¹ Language rises as a capital element in order to define the indigenous identity. In this sense, language is one of the criteria that constitutions and laws of federative bodies will have to take into consideration in order to specify the indigenous peoples and communities (paragraph 4, article 2).¹⁴²

In the fulfillment of that autonomy, the indigenous peoples will have some linguistic rights which are included in the constitutional text, without detriment to its specification and subsequent legal development:

First of all, the right of the indigenous peoples to “preserve and enrich their languages, knowledge and all the elements that make up their culture and identity” (article 2.A.IV) is recognized here, which will request positive actions of promotion on the part of the different public authorities.

¹⁴⁰ Constitución Política de los Estados Unidos Mexicanos, art. 2, para 3, *translated in* The Political Constitution of the Mexican United States 2 (Carlos Pérez Vázquez, translator, 2005), <http://www.juridicas.unam.mx/infjur/leg/constmex/pdf/consting.pdf> [hereinafter Mexican Constitution] (defining *indigenous peoples* as those communities that form a social, economic and cultural whole, are settled in a territory, and have their own authorities according to their habits and customs are indigenous people communities).

¹⁴¹ Mexican Constitution, *supra* note 140, at 2-3 (quoting art. 2, para 4: “The right to self determination of indigenous people shall be granted within a general framework of autonomy according to the Constitution and in a way which preserves the national unity”).

¹⁴² *Id.* at 3 (quoting art. 2, para 4: “State Constitutions and State Laws shall establish the guidelines according to which indigenous peoples will be recognized as such. In doing so, State legal systems shall take into account the general principles of the law as well as ethno-linguistic and territorial criteria”).

Secondly, legally speaking, the indigenous people have the right to be helped by interpreters and defenders who know their language and know about their culture (article 2.A.VIII).

Thirdly, there is a right to a bilingual and intercultural education. This right is directly connected to the elimination of all discriminatory practices, and it compels public authorities (Federation, States, and Town Councils) to guarantee the right to education and to increase schooling (article 2.B.II).¹⁴³

The General Law of Linguistic Rights was passed in this new constitutional framework, and published in the *Diario Oficial* on March, 13, 2003.¹⁴⁴ This law is intended to “govern the recognition and protection of the linguistic rights, both individual and collective, of the indigenous peoples and communities, as well as the promotion, use and development of the indigenous languages.”¹⁴⁵ And the General Law of Linguistic Rights defines indigenous languages as “those that come from the indigenous peoples that existed in the national territory before the establishment of the Mexican State, together with those coming from other Indo-American peoples, equally preexisting, that have rooted in the national territory later on, and that have a systematic and patterned group of functional and symbolic oral forms of communication.”¹⁴⁶ This law influences paramount aspects such as the complete validity of the public use of indigenous languages, as well as its use in public

¹⁴³ *Id.* at (quoting art. 2.B.II: “in order to eliminate shortcomings and underdevelopment that the indigenous peoples and communities might have [...] they have the duty to guarantee and increase schooling levels, and to promote a bilingual and intercultural education, as well as literacy, a completion of Basic Education, productive abilities and an upper-intermediate and higher education. In addition, they have the duty to establish a system of grants for indigenous students at all levels, to define and develop educational programs with a regional content that will recognize the cultural heritage of their peoples, according to the laws passed on this matter and in consultation with the indigenous communities, and to encourage respect and knowledge about the diverse cultures that exist in the nation”).

¹⁴⁴ Ley General de Derechos Linguisticos de Los Pueblos Indigenas (Mex.).

¹⁴⁵ *Id.* at art. 1.

¹⁴⁶ *Id.* at art. 2.

services and mass media, among others.¹⁴⁷

B. Multilingual Constitutions: Two or More Official Languages with Different Scopes

The second category in the Latin American constitutional texts comprises the multilingual states, those that have given the status of officialdom to two or more languages according to a territorial criterion, except in the case of Paraguay.¹⁴⁸

Paraguay represents a peculiar case in the Latin American scheme from the point of view of the protection of the indigenous languages and the recognition of linguistic rights.¹⁴⁹ Multilingualism in the country involves the recognition of two official languages, one of which is the original, native language that has transcended the ethnical barriers in the sense that it is not used by only one ethnic group. On the other hand, it also involves protection of other indigenous linguistic minorities whose mother tongue is not Guaraní.¹⁵⁰

Article 140 in the Constitution, dated June 20, 1992, states that Paraguay is “a multicultural and bilingual country,” and gives *Castilian* and *Guaraní* the status of officialdom, the use of which will be regulated in a law.¹⁵¹ This statement also deals with the treatment of both official languages in Education, according to two different criteria:

In an initial or mother-child teaching stage, the language of

¹⁴⁷ See González Galván, *supra* note 138, at 42, 44; Eva Pons Parera & Alicia Johnson Hernández, *La Ley de derechos lingüísticos de los pueblos indígenas de México*, in LENGUAS AMERINDIAS: POLÍTICAS DE PERVIVENCIA Y PROMOCIÓN 88, 95 (Ariadna Lluís i Vidal-Folch & Gabriela Dalla Corte Caballero eds., 2005).

¹⁴⁸ See Pérez Fernández, *supra* note 22, at 35-43 (explaining the meaning of *officialdom*).

¹⁴⁹ See POGGESCHI, *supra* note 120, at 315.

¹⁵⁰ See Esther Prieto, *El régimen constitucional y pueblos indígenas en Paraguay*, in DERECHOS DE LOS PUEBLOS INDÍGENAS EN LAS CONSTITUCIONES DE AMÉRICA LATINA: BOLIVIA, BRASIL, COLOMBIA, ECUADOR, GUATEMALA, MÉXICO, NICARAGUA, PANAMÁ, PARAGUAY, PERÚ, VENEZUELA 193-205 (Coama, Colciencias, Banco mundial, Unión europea, Naturskydds Föreningen eds., 1996).

¹⁵¹ The Guaraní was previously *national language*, but not official language.

instruction will be the official mother tongue of the pupil.

The remaining educational levels will at least be bilingual, as it is deduced from the constitutional text when it is stated that “the knowledge and use of both official languages in the Republic will be instructed.”¹⁵²

Other than the Guaraní reality, the Paraguayan Constitution recognizes “the existence of indigenous peoples, defined as groups of culture preceding the formation and organization of the Paraguayan State.”¹⁵³ This recognition attends the right of the indigenous peoples to preserve and develop their ethnic identity in their own habitat and the right to apply their cultural organization systems freely.¹⁵⁴

From the point of view of language as a fundamental component of the indigenous identity and its cultural system, it is considered that “indigenous languages, as well as languages used by other minorities, are part of the cultural heritage of the Nation.”¹⁵⁵ This is the reason why the Paraguayan state “shall respect the cultural peculiarities of the indigenous peoples, especially concerning formal education.”¹⁵⁶ This aspect, according to article 77, paragraph 2, will be shown in that education will take place in the indigenous mother tongue, at least during the first years of school, and then, it will be bilingual, the pupils having to choose one of the two official languages.¹⁵⁷

The situation in the constitutional regulations in Bolivia, Colombia, Ecuador, Nicaragua, Peru and Venezuela is different from the Paraguayan situation. Since the different texts essentially share

¹⁵² REPÚBLICA DE PARAGUAY, CONSTITUCIÓN POLÍTICA DE 1992, art 77, para 1.

¹⁵³ REPÚBLICA DE PARAGUAY, CONSTITUCIÓN POLÍTICA DE 1992, art. 62. *See* WILHELMI, *supra* note 132, at 172.

¹⁵⁴ REPÚBLICA DE PARAGUAY, CONSTITUCIÓN POLÍTICA DE 1992, art. 63.

¹⁵⁵ *Id.* at art. 140 para 2.

¹⁵⁶ *Id.* at art. 66.

¹⁵⁷ *Id.* at art. 77 para 2 (connecting to what is stated in the first paragraph about the teaching of both official languages, and showing that the system derives from a constitutional mandate, “[i]n the case of ethnic minorities whose mother tongue is not Guaraní, one of the two official languages will be chosen”).

the same model, let us now examine the most relevant aspects of them and highlight their peculiarities.

To begin with, the ethnic and cultural identity of the indigenous populations is granted the right to autonomy in the framework of a national unity in order for those populations to preserve their identity.¹⁵⁸ This is achieved through a definition of the state as multiethnic, multicultural and multilingual.¹⁵⁹ The constitutional texts in Ecuador and Bolivia, in which the indigenous aspect appears in how the state is shaped, are significant. Thus, in article 1 in the Ecuadorian Constitution, dated October 20, 2008, Ecuador is defined as a “constitutional state of rights and justice, social, democratic, sovereign, independent, unitary, intercultural, multinational, and secular. It is organized as a republic, and governed in a decentralized way.”¹⁶⁰ Additionally, in article 1 in the Bolivian Constitution, dated February 7, 2009, it is stated that “Bolivia is a social, unitary, multinational, communal, ruled by law state, free,

¹⁵⁸ CONSTITUCIÓN DE 1987, CON LAS REFORMAS DE 1995, 2000 y 2005, art. 89 (Nicar.) (stating “The Communities on the Atlantic Coast are indissolubly bound to the Nicaraguan nation, and as such they are granted the same rights and have the same duties. The Communities on the Atlantic Coast have the right to preserve and develop their cultural identity in the national unity, to acquire their own social organizational systems and to deal with their local issues according to their traditions. The State recognizes the communal property of the lands in the Communities on the Atlantic Coast. Similarly, it recognizes the possession, use and enjoyment of the water and forests in their communal lands”). CONSTITUCIÓN DE 1999, art. 121, 126 (Venez.) (stating ““As the indigenous people are cultures of ancestral roots, they are part of the Nation, the State, and the Venezuelan people as sole, sovereign and indivisible. In accordance with this Constitution they have the duty to safeguard their integrity and the national sovereignty. The term peoples will not be interpreted in this Constitution in the sense that it is interpreted in International Law”). The Constitution of Venezuela is more clear, in the sense that not only the existence of the indigenous peoples and communities as well as their right to maintain and develop their ethnic and cultural identity are recognized in it, but also the limits to this recognition are specified in Article 126. *See id.*

¹⁵⁹ CONSTITUCIÓN POLÍTICA DEL PERÚ 1993 CON LAS REFORMAS DE 1995, 2000, 2002, 2004 y 2005 art. 2.19 (Peru) (recognizing the right of all people to their ethnic and cultural identity, and stating, “the State recognizes and protects ethnic and cultural plurality in the nation”).

¹⁶⁰ REPUBLICA DE ECUADOR, CONSTITUCIONES, art. 1. *See* WILHELMI, *supra* note 132, at. 126.

independent, sovereign, democratic, intercultural, decentralized and with self-governments.¹⁶¹ Bolivia is based on plurality and political, economic, legal, cultural and linguistic pluralism inside an integrating process of the country.”¹⁶²

Other than Spanish, which is the official language of the state, partial officialdom of indigenous languages in its territories¹⁶³ or in special cases established by law (Nicaragua)¹⁶⁴ is recognized, and respect to those languages in the whole country¹⁶⁵ is imposed, as

¹⁶¹ CONSTITUCIÓN DE 1999, art. 1 (Bol.).

¹⁶² CONSTITUCIÓN DE 1999, art. 98 (Bol.). Similarly, Article 98 insists on the idea of cultural diversity as the foundation of the new Bolivian state and on interculturalism as a cohesive instrument. *Id.* Therefore, in section I it is stated that “cultural diversity is the essential base of the Plurinational Community State. Interculturalism is an instrument for cohesion and for the stable and harmonious coexistence between peoples and nations. Interculturalism will respect differences and will be equal to all.” *Id.* Moreover, it will be the duty of the state to be responsible for “preserving, developing, protecting, and spreading the cultures that exist in the country,” since the indigenous element is considered as a *strength*. *Id.*

¹⁶³ See CONSTITUCIÓN DE 1987, CON LAS REFORMAS DE 1995, 2000 y 2005, art. 11 (Nicar.) (stating “The languages of the Communities of the Atlantic Coast shall also have official use in the causes established by law”). Ley No. 162, 2 July 1993, Ley de USO Oficial de las Lenguas de las Comunidades de la Costa Atlantica de Nicaragua, art. 1, La Gaceta 132, 15 July 1996 (Nicar.) (fulfilling the constitutional mandate that Communities of the Atlantic Coast shall also have official use in the cause established by law, stating “Official use of languages in the communities of the Atlantic Coast of Nicaragua”); CONSTITUCIÓN DE 1991 CON REFORMAS HASTA 2005, art. 10 (Colom.) (stating “Castilian is the official language of the State”).

¹⁶⁴ Ley No. 162, 2 July 1993, Ley de USO Oficial de las Lenguas de las Comunidades de la Costa Atlantica de Nicaragua art. 1, La Gaceta 132, 15 July 1996 (Nicar.). See CONSTITUCIÓN DE 1987, CON LAS REFORMAS DE 1995, 2000 y 2005, art. 11 (Nicar.) (stating “Spanish is the official language of the State”). Ley No. 162, 2 July 1993, Ley de USO Oficial de las Lenguas de las Comunidades de la Costa Atlantica de Nicaragua, art. 1, La Gaceta 132, 15 July 1996 (Nicar.) (stating “the languages of the Communities on the Atlantic Coast in Nicaragua will also respect the official uses that are established in the law”). This Constitutional Mandate has been fulfilled through Law 162 “Official use of languages in the Communities on the Atlantic Coast of Nicaragua.” *Id.*

¹⁶⁵ CONSTITUCIÓN DE 1987, CON LAS REFORMAS DE 1995, 2000 y 2005, art. 11 (Nicar.). CONSTITUCIÓN DE 1999, art. 9 (Venez.) (stating “The official language is Castilian. The indigenous languages are also of official use for the indigenous peoples and must be respected in the whole territory of the Republic, as they are

they are an essential part of the cultural heritage.¹⁶⁶ The status of officialdom that was given to the indigenous languages involves the right to the public and private use of those, and the prohibition of discrimination on the basis of language.¹⁶⁷ Related to this is the second paragraph in article 2.19 of the Peruvian Constitution, 1993, which recognizes the right of all Peruvians to “use their own language in the presence of the authorities by means of an interpreter.”

The cases of Ecuador and Bolivia should be reported regarding the scope and meaning of the declaration of officialdom of their indigenous languages. In the case of Ecuador, article 2 in the Ecuadorian Constitution states:

Castilian is the official language of Ecuador; Castilian, *Kichwa* and *Shuar* are official languages for intercultural relations. Other ancestral languages have an official use for the indigenous peoples in the areas where they live and in the terms established by law. The state will respect and stimulate its preservation and use

Its peculiarity lies on the three categories that it establishes in the treatment of languages:

Official language of the State: Castilian.

Co-official languages in the territory: ancestral languages.

Official languages for intercultural relations: Castilian, *Kichwa* (*quéchua chinchay from the North*) and *Shuar* are the

cultural heritage that belongs to the Nation and the humankind”).

¹⁶⁶ REPUBLICA DE ECUADOR, CONSTITUCIONES, art. 379.1 (stating languages are “part of the both tangible and intangible cultural heritage which is relevant to the memoirs and identity of persons and groups, and subject to safeguard on the part of the Stat”).

¹⁶⁷ CONSTITUCIÓN DE 1987, CON LAS REFORMAS DE 1995, 2000 y 2005, art. 90 (Nicar.) (establishing that the Communities on the Atlantic Coast “have the right to freedom of speech and to the preservation of their languages”); CONSTITUCIÓN DE 1987, CON LAS REFORMAS DE 1995, 2000 y 2005, art. 91 (Nicar.) (explaining that the State “has the duty to issue laws with the aim to promote actions that ensure that no Nicaraguan is subjected to discrimination due to their language, culture or origin”). See also REPUBLICA DE ECUADOR, CONSTITUCIONES, art. 11.2; ESTADO PLURINACIONAL DE BOLIVIA, CONSTITUCIÓN, art. 14.2.

languages that allow for communication among individuals and culturally different communities from the point of view of recognition and respect in a system of linguistic plurality.¹⁶⁸

In the case of Bolivia, co-officialdom is granted to at least two languages in the whole territory, according to the criteria established in article 5 of the Constitution, 2009: A declaration of joint officialdom of the Bolivian languages is made: "Castilian and all languages of the originally rural indigenous peoples and nations are official languages of the State."¹⁶⁹

¹⁶⁸ Clavero, *supra* note 25, at 328 (regarding the use of Castilian as a language of intercultural relations, "[...] no se trata ahora de un factor de desequilibrio, sino de reequilibrio entre culturas a través de la comunicación mutua por el medio más expedito, el castellano. La interculturalidad parece un corolario necesario del multiculturalismo precisamente para que el mismo no confíe en guetos excluyentes, sino que equilibre en vasos comunicantes. Si la oficialidad del castellano [...] ha sido un factor discriminatorio, cuando no destructivo, de las lenguas indígenas, su función de interculturalidad vendría ahora a significar en cambio la apuesta constitucional por el reconocimiento y el respeto de las mismas" (English version: "[...] it is not a matter of instability, but of balance among cultures through mutual communication through the most expeditious way, Castilian. Interculturalism seems to be a necessary corollary for multiculturalism so that it does not confine in excluding ghettos, but in communicating vessels. If the officialdom of Castilian [...] has been a discriminatory and at times destructive element of the indigenous languages, its intercultural function would mean a constitutional bet for the recognition and respect to these languages"). *Id.* Nevertheless, the author emphasizes the danger of an inadequate use of interculturalism in Castilian if it lacks a base on an effective system of linguistic plurality; in these cases stating, "[...] la interrelación por medio del castellano puede sencillamente encubrir y hasta potenciar la dinámica arraigada de postergación y destrucción de culturas indígenas" (English version: "[...] the interrelation through Castilian can cover and foster the dynamics rooted in deferment and destruction of indigenous cultures"). For an explanation of the concept of interculturalism, see JIMÉNEZ BARTLETT, *supra* note 26, at 18-19; Fernando Trujillo Sáez, *En torno a la interculturalidad: reflexiones sobre cultura y comunicación para la didáctica de la lengua*, 4 PORTA LINGUARUM 23, 30-33 (2005).

¹⁶⁹ REPÚBLICA DE BOLIVIA, CONSTITUCIÓN DE 2009, art. 5 (listing the Indigenous languages: Aymara, Araon Araona, Baure, Besiro, Canichana, Cavineño, Cayubaba, Chacobo, Chiman, Ese Ejja, Guaraní, Guarasu'we, Guarayo, Itonama, Leco, Machajuyai-Kallawaya, Machineri, Maropa, Mojeño-Trinitario, Mojeño-Ignaciano, More, Mosen, Movima, Pacawara, Puquina, Quechua, Siriono, Tacana, Tapiete, Toromona, Uru-Chipaya, Weenhayek, Yaminawa, Yuki,

In the case of the state government and the autonomous departmental governments, at least two official languages will be used, one of them necessarily being Castilian.¹⁷⁰

The remaining autonomous and local governments will have to “use languages characteristic of their territory, and one of them must be Castilian.”¹⁷¹

Furthermore, with the purpose of making the declaration of officialdom effective while waiting for its legal specification, this constitutional text establishes that in order to be able to hold civil service positions it is required “to speak at least two of the official languages in the country.”¹⁷²

Moreover, the right to a bilingual and intercultural education¹⁷³ is recognized within the constitutional framework, especially in primary education¹⁷⁴, or in the whole system as it is repeatedly stated in the Bolivian constitutional regulation in 2009.¹⁷⁵ As an example, let us refer to the Ecuadorian Constitution of 2008 in which, after recognizing “the right of people to learn in their own language and cultural ambience” in general terms (article 29), the criteria for its specification are established:

The principles of diversity and interculturalism in the

Yuracaré y Zamuco).

¹⁷⁰ *Id.* (stating that the choice of a second language will be made “taking into account the use, suitability, circumstances, necessities and preferences of the whole population or a specific territory”).

¹⁷¹ *Id.*

¹⁷² REPÚBLICA DE BOLIVIA, CONSTITUCIÓN DE 2009, art. 234.

¹⁷³ See CONSTITUCIÓN POLITICA DEL PERU DE 1993, art. 17; CONSTITUCIÓN DE LA REPUBLICA BOLIVARIANA DE VENEZUELA, art. 121.

¹⁷⁴ CONSTITUCIÓN DE NICARAGUA 1987, art. 121; REPUBLICA DE COLOMBIA, CONSTITUCIÓN DE 1991, art. 10, 68; Official Law of Languages for the Communities of the Atlantic Coast of Nicaragua, No. 162 (1996) (guaranteeing bilingualism, especially in nursery and primary education).

¹⁷⁵ REPÚBLICA DE BOLIVIA, CONSTITUCIÓN DE 2009, art. 30 (giving indigenous peoples the right to “an intracultural, intercultural, and multilingual education in the whole educational system”); *Id.* at art. 78 (reaffirming “education is intracultural, intercultural, and multilingual in the whole education system”); *Id.* at art. 91 (applying the rights to intracultural, intercultural, and multilingual education to higher education).

design of the educational system.¹⁷⁶

Autonomy in the design of an intercultural and bilingual educational system.¹⁷⁷

The state is responsible for the progression in the teaching of the indigenous languages, “making sure that the teaching of at least one native language is included, in a progressive way, in all course syllabi.”¹⁷⁸

IV. Conclusion

Historically, the attitude of those Latin American states which were formed in the process of emancipation in the first quarter of the 19th century concerning linguistic as well as ethnic and cultural diversity was characterized by trying to achieve integration of the indigenous peoples through assimilation, in an effort to build a homogeneous national state. This was carried out by denying the native populations the condition of “differentiated minority.” This is the reason why, during this period, the indigenous peoples were not granted any type of linguistic right. For instance, it was believed that the indigenous peoples, together with their cultural and linguistic peculiarities should disappear in favor of the formation of the new national state. However, during the 1960s, there was an important change in how the indigenous issues were treated. During this period there was an increase in the demands of the indigenous peoples for cultural, linguistic and educational rights. This happened inside a process of recognition, on the part of their states, of these peoples’ ethnic identity, which was carried out through the right to autonomy

¹⁷⁶ REPUBLICA DE ECUADOR, CONSTITUCIONES, art. 343 (stating “The national educational system will form an intercultural perspective in harmony with the geographical, cultural, and linguistic diversity in the country, and will foster respect to the rights of the communities, peoples, and nationalities”).

¹⁷⁷ REPUBLICA DE ECUADOR, CONSTITUCIONES, art. 57.14 (recognizing the collective right of the indigenous communes, communities, peoples and nationalities to “develop, strengthen, and promote an intercultural bilingual educational system, following quality criteria, from early stimulation to the highest school levels, taking into account cultural diversity, in order to care for and preserve identities in accordance with their teaching and learning methodology”).

¹⁷⁸ REPUBLICA DE ECUADOR, CONSTITUCIONES, art. 347.10.

and in certain cases to self-determination.

The demands of the indigenous peoples have utilized international instruments, on the subject of human rights that allow for, at least, a basic regime of linguistic tolerance, that is, protection against discrimination and against the most varied forms of assimilation. This process implies, in certain cases, the obligation on the part of the states to apply positive measures in relation to the use and promotion of the indigenous languages. Therefore, through article 27 ICCPR, article 30 The 1989 International Convention on the Rights of the Child, or The 1992 Declaration of Rights belonging to National or Ethnic, Religious and Linguistic Minorities, indigenous peoples are given instruments that strengthen the exercise of human rights, as well as linguistic ones, such as the right of individuals who are part of the indigenous populations to express themselves and use their own language, both individually and with the rest of the members in their community.

Moreover, the protection granted by international law has been reinforced by the development of specific instruments that open a new road in the development of the linguistic rights of the indigenous peoples, which complements the one granted by International Law to minorities. Both the 1989 ILO Convention on Indigenous and Tribal Peoples and the 2007 Declaration on the Rights of Indigenous Peoples imply an important improvement in the protection of indigenous languages and the recognition of linguistic rights of their speakers, like in the vital field of education, and are destined to fulfill an essential function as minimum standards of protection.

The claim for the rights of the indigenous peoples, the search for mechanisms for their articulation, together with the task undertaken by the instruments of international law, has generated a radical shift in the treatment of the indigenous question in the Latin American Constitutionalism from the 1990's. It can be said, undoubtedly, that the constitutions of the Latin American states show a clear tendency towards the recognition of the indigenous peoples, of their ethnic and cultural identity; and the constitutional texts of Ecuador and Bolivia can be considered as the most representative in

this new way of treating the indigenous issues.

Latin American constitutions contain, in most cases, precautionary principles for the indigenous languages. Some of them grant the indigenous languages the status of official language. Others recognize the indigenous languages as cultural property which is part of the national heritage. And in some constitutional texts, some positive linguistic rights are recognized, mainly in relation to their public use, as well as to education. The question of how the constitutional principles are articulated in the daily action of the states, and how its effective fulfillment is guaranteed, is a fundamental one.

All in all, the evolution that the recognition of the indigenous peoples' rights has experienced, both in their cultural and linguistic identity, nationally and internationally, is a reflection of the search for a new relationship between the indigenous peoples and the nation-state, a way to favor its development without having to give up their identity or disappear through cultural assimilation. This is, indeed, a process that still has a long way to go.

