Protecting Minority Languages and the Mute-ability of International and Australian Law

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This article explores the right of minority groups to use and enjoy their own language and the degree to which that right is protected under international and Australian law. Non-binding international instruments, human rights legislation, jurisprudence of the United Nations Human Rights Committee and a recent judgment from the Federal Court of Australia are reviewed. It is contended that both the international legal regime and Australian law are deficient. International law reflects the will of incumbent states who will resist recognising language rights for fear of a further push by minorities for political autonomy. Australian law can prove incapable of remedying a plaintiff's grievance, including because no human rights violation can be established. But political recognition for minority groups is not an inevitable consequence of ensuring respect for and the protection of language rights.

The right of minority groups to enjoy their own language is inadequately protected under international and Australian law. Both legal regimes protect incumbent political actors from assertions of self-expression, differential treatment and ultimately political recognition by minority groups. To that extent, these legal systems will resist change. This article explores some of the reasons as to why this is the case.

The parameters of a 'minority' group under international law are unclear.[1] Definitions have been suggested, for example, by human rights specialists,[2] as well as international courts and tribunals.[3] However a minority group may be defined, a distinctive language is a common attribute. But international law does not offer any authoritative guidance on what is a 'language'. A common language is part of the rights enjoyed by a minority group, but is also used as an identifier for the existence of a minority group. In other words, language is both an identifiable attribute and a definitional aspect. But this approach emphasises the functionality of language rather than its definition. The ordinary meaning of language could be used, provided it was not self-limiting. In any event, the essential elements of minority identity commonly include religion, language, traditions and cultural heritage, and it might be thought that obligations

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1. See generally Kristin Henrad, *International Protection of Minorities* (Max Planck Encyclopedia of Public International Law, 2011).
2. Francesco Capotorti, Special Rapporteur, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, UN Doc E/CN.4/Sub.2/384/Rev 1 (1979) para 568.
3. *Grego-Bulgarian Communities (Advisory Opinion)* [1930] PCIJ (Ser B) No 17, 17.

should be imposed on states to promote the necessary conditions in which minorities can maintain each of those aspects.

The *International Covenant on Civil and Political Rights* (*'ICCPR'*) relevantly provides that, '[i]n those States in which ... linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group ... to use their own language'.[4] But article 27 raises more questions than answers.[5] The obligation for states parties is stated in negative terms, and direct, positive measures of government support for minority languages are not mandated. In other words, article 27 is framed as a 'tolerance right', which ensures non-interference by the state in language use, rather than a 'promotion-oriented' one, which extends to positive measures to improve language access in public institutions, such as courts, public schools and public services.[6] This approach is generally consistent with the treatment afforded to other civil and political rights which typically defer to a state's attitude and measures. One consequence is that international law is rendered subsidiary to a state's domestic law to a point of near-total inefficacy.

In its interpretation of article 27, the United Nations Human Rights Committee ('the Committee') has not recommended any particular positive steps to be taken by states (for example, the required level of funding for minority language schools) and primarily assesses compliance by reference to the legal position rather than the actual effects of national language policy. The Committee has recognised that, although minority rights, like other personal rights, are conferred on individuals as such, use of a language is enjoyed in community with other members

4. Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 27.
5. Ibid; see also Christian Tomuschat, 'Protection of Minorities under Article 27 of the International Covenant on Civil and Political Rights' in Rudolf Bernhardt et al (eds), *Völkerrecht als Rechtsordnung Internationale Gerichtsbarkeit Menschenrechte: Festschrift fur Hermann Mosler* (Springer, 1983) 949.
6. Heinz Kloss, *Grundfragen der Ethnopolitik im 20 Jahrhundert. Die Sprachgemeinschaften zwischen Recht und Gewalt* (1969), cited in Lauri Mälksoo, 'Language Rights in International Law: Why the Phoenix is Still in the Ashes' (1998–2000) 12 *Florida Journal of International Law* 432, 442. Within the latter category, instead of granting 'official' recognition to minority languages, states may employ a 'norm-and-accommodation' approach, which involves accommodations granted as a special exception to the general rule that the 'normal' or dominant language is used in the public sphere: Will Kymlicka and Alan Patten, 'Language Rights and Political Theory' (2003) 23 *Annual Review of Applied Linguistics* 3, 8–9.

of a group.[7] The relevant right is the right of individuals belonging to a linguistic minority to use their language among themselves in private or public, which is distinct from other language rights protected under the *ICCPR*, including the right to freedom of expression protected under article 19 which is available to all persons, irrespective of whether they belong to minorities or not.[8] Article 27 is directed towards ensuring the survival and continued development of the cultural, religious and social identity of minorities, thereby enriching the fabric of society as a whole.[9]

Standards concerning minority languages are also elaborated under the 1992 United Nations *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* ('the *Minority Rights Declaration*').[10] For example, article 4(3) provides that 'States should take appropriate measures so that, wherever possible, persons belonging to minorities may have adequate opportunities to learn their mother tongue or to have instruction in their mother tongue'.[11] States shall also 'take measures to create favourable conditions to enable persons belonging to minorities … to develop … their … language … except where specific practices are in violation national law or are contrary to international standards'.[12]

The protection of minority languages is most advanced within Europe. The leading instrument is the *European Charter for Regional or Minority Languages,*[13] which is, again, not binding. The *Framework Convention for the Protection of National Minorities* recognises the right of minorities to use their language in private and in public, and in particular to speak their language when engaging with administrative authorities.[14] Moreover, states are required to take steps to ensure that minorities have an effective voice within the institutions of national government.[15]

7. Human Rights Committee, *CCPR General Comment No 23: Article 27 (Rights of Minorities)*, 50th sess, UN Doc HRI/GEN/1/Rev.1 (8 April 1994) paras 5.2, 5.3 and 9.
8. *ICCPR* art 19.
9. Ibid art 27.
10. GA Res 47/135, UN GAOR, 47th Session, 92nd plen mtg, Agenda Item 97(b), UN Doc A/RES/47/135 (18 December 1992).
11. Ibid art 4(3).
12. Ibid art 4(2).
13. Opened for signature 5 November 1992, ETS No 148 (entered into force 1 March 1998).
14. Opened for signature 1 February 1995, ETS No 157 (entered into force 1 February 1998) art 10.
15. Organization for Security and Co-operation in Europe, High Commissioner on National Minorities, *The Lund Recommendations on the Effective Participation of National Minorities in Public Life and Explanatory Note* (1999) 6.

Special arrangements include minority representation, allocating seats to minorities in the executive and judiciary, and ensuring the appointment of minorities within the public service.

It is additionally noteworthy that minority language rights are bound-up with other rights, including minority rights generally, cultural rights, the right to equality and freedom from non-discrimination, freedom of expression, children's rights, the right to an education and the right to a fair trial. Bundling rights together is neither good nor bad per se provided respect for one right does not entail a trade-off for another. For example, an accused has a right to be informed of the reasons for their arrest as well as the charge in an understandable language.[16] Everyone is entitled to have the free assistance of an interpreter if they cannot understand or speak the language used in court.[17] Although states must ensure that an accused can participate in judicial processes in a language they understand, individuals cannot opt to speak in their mother tongue if they can understand and speak the official language.[18]

Overall, therefore, the right to speak a language is one of the most important rights for protecting minorities. The right has a particular relevance in an individual's interaction with the administrative structures of a state and before national courts. The right to be educated in one's mother tongue could extend to state support within the national education system. The 1919 *Polish Minority Treaty*, for example, provided that Polish minorities had the right to 'establish, manage and control at their own expense charitable, religious and social institutions, schools and other educational establishments, with the right to use their own language and to exercise their religion freely therein'.[19] The right to establish and manage schools is 'indispensable to enable the minority to enjoy the same treatment as the majority, not only in law but also in fact'.[20] By way of alternative to maintaining their own educational institutions,

16. *ICCPR* art 14(3).
17. Ibid 14(3)(f); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 40(2)(vi).
18. Human Rights Committee, *Communication No 219/1986*, UN GAOR, 45th sess, UN Doc CCPR/C/39/D/219/1986 (23 August 1990) ('*Dominique Guesdon v France*'). On the problems of court interpretation for minority language users in criminal proceedings, see Charles M Grabau and Llewellyn Joseph Gibbons, 'Protecting the Rights of Linguistic Minorities: Challenges to Court Interpretation' (1996) 30 *New England Law Review* 275.
19. *Minorities Protection Treaty between the Principal Allied and Associated Powers and Poland*, signed 28 June 1919, 225 CTS 412, art 8 ('*Polish Minority Treaty*').
20. *Minority Schools in Albania (Advisory Opinion)* [1935] PCIJ (Ser A/B) No 64.

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minority languages could be taught in state schools, unless 'national sovereignty' is prejudiced or the minority is precluded from engaging with the community.[21]

It is therefore perplexing that international law does not generally recognise language rights per se. International law assumes that language, identity and culture are static, distinctive and internally consistent concepts.[22] Language rights are not considered to be fundamental rights – the regime of international human rights is piecemeal, incoherent and non-binding.[23] A treaty has been proposed to address those deficiencies.[24] States may consider minority languages to be too politically volatile, with any associated rights giving too much international recognition to potentially seceding minorities. Protecting languages, if done properly, might also be prohibitively expensive. The linguistic human rights movement[25] thus seeks to promote linguistic justice by strengthening institutional support for minority languages.[26] However, as there is only so much that international law can achieve insofar as it reflects the will of incumbent states, it may be perceived to be unduly rigid and unreceptive to the concerns of minority groups.

Why would international law shirk from the key issues? Language is an aspect of identity, whether as a minority group or nation state. Minority languages can be territorially located based on historical roots (eg, French in Quebec, Canada), relatively endangered (eg, indigenous languages) or associated with specific immigrant groups. But language is consistently portrayed only as a cultural right.[27] This downplays the

21. *Convention Against Discrimination in Education*, opened for signature 14 December 1960, 429 UNTS 93 (entered into force 22 May 1962) art 5(1)(c)(i).
22. Jacqueline Mowbray, 'Ethnic Minorities and Language Rights: The State, Identity and Culture in International Legal Discourse in International Legal Discourse' (2006) 6 *Studies in Ethnicity and Nationalism* 2, 21.
23. Robert Dunbar, 'Minority Language Rights in International Law' (2001) 50 *International and Comparative Law Quarterly* 90, 119.
24. Joseph P Gromacki, 'The Protection of Language Rights in International Human Rights Law: A Proposed Draft Declaration of Linguistic Rights' (1992) 32 *Virginia Journal of International Law* 515.
25. See Atsushi Ishida, Miya Yonetani and Kenji Kosaka, 'Determinants of Linguistic Human Rights Movement' (Paper presented at European Consortium for Political Research General Conference 2003, Philipps-Universität Marburg, 18–21 September 2003) <http://www.bib.uab.es/socials/exposicions/dretllengua/docs/ishida.pdf>.
26. Fernand de Varennes, *Language, Minorities and Human Rights* (Springer, 1996).
27. For example, states are encouraged to 'adopt measures aimed at protecting and promoting the diversity of cultural expressions' including language use: *Convention on the*

political, economic and social dimensions of language. On one view, granting minority language rights furthers national peace by improving governmental relations with aggrieved minorities and encouraging solidarity. State support for diversity prevents multi-ethnic fragmentation and instability.

On the other hand, nation building tends towards language convergence or assimilation and discourages linguistic diversity. The extent of minority language recognition is determined among other influences by the political power of a minority group relative to the state. Language rights may be just one aspect of a push by minorities for a recognition of cultural difference and autonomy which incumbent governments will resist. The political ramifications of bilingualism has proven to be a challenge,[28] particularly for states such as Sri Lanka.[29] National language policy can differentially affect the disempowered members of linguistic majorities.[30]

For democratic states, the challenge is to establish a basis where, within decisions made by the majority, minority groups can exercise their rights in regard to their unique language.[31] A 'balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position'.[32]

The Australian (state- and territory-based) human rights charters espouse the approach that: the minority right to a language is considered on par with minority rights to culture and religion; and the right to language falls under the broad rubric of cultural rights. For example, section

Protection and Promotion of the Diversity of Cultural Expressions, opened for signature 20 October 2005, 2440 UNTS 311 (entered into force 18 March 2007) art 6.

28. On classifying bilingual approaches, see Alan Patten, 'What Kind of Bilingualism?' in Will Kymlicka and Alan Patten (eds) *Language Rights and Political Theory* (Oxford University Press, 2003) 296.
29. See Sadhana Abayasekara, 'A Dog Without a Bark: A Critical Assessment of the International Law on Language Rights' (2010) 17 *Australian International Law Journal* 89; Richard W Bailey, 'Majority Language, Minority Misery: The Case of Sri Lanka' in Douglas A Kibbee (ed) *Language Legislation and Linguistic Rights* (John Benjamins Publishing Company, 1998) 206.
30. Janina Brutt-Griffler, 'Class, Ethnicity, and Language Rights: An Analysis of British Colonial Policy in Lesotho and Sri Lanka and Some Implications for Language Policy' (2002) 1 *Journal of Language, Identity, and Education* 207, 225.
31. Bertus de Villiers, 'Language, Cultural and Religious Minorities: What and Who Are They?' (2012) 36(1) *University of Western Australia Law Review* 92, 113.
32. *Gorzelik v Poland* (European Court of Human Rights, Grand Chamber, Application No 44158/98, 17 February 2004) [90].

19(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) relevantly provides that 'all persons with a particular … linguistic background must not be denied the right, in community with other persons of that background … to use his or her language'.[33] Aboriginal persons holding 'distinct cultural rights must not be denied the right, with other members of their community … to maintain and use their language.[34] To similar effect – but with subtly different nuances – section 27(1) of the *Human Rights Act 2004* (ACT) relevantly provides that '[a]nyone who belongs to … [a] linguistic minority must not be denied the right, with other members of the minority … to use his or her language'.[35] Aboriginal and Torres Strait Islander peoples 'hold distinct cultural rights and must not be denied the right to … maintain, control, protect and develop … their languages and knowledge'.[36]

The practical upshot of all these concepts and approaches for individuals under Australian law can be briefly illustrated. Over 2007 and 2008, the Church of Jesus Christ of Latter-Day Saints Australia ('the Church') discontinued Samoan-speaking wards. This meant that the appellants were unable to publicly worship (including in prayer and song) as a group in their native Samoan language in services conducted by the Church. They contended that the decision to exclusively use the English language was unlawful under the *Racial Discrimination Act 1975* (Cth). The primary judge held that there was no interference with the right to freely practice their religion. Furthermore, the appellants' desire to have Church services conducted in their native Samoan language had to be balanced against the rights of those who did not understand the language in order to worship.

An appeal was dismissed.[37] The appellants invoked the Minority Rights Declaration as well as commentary from the working group on minorities. Kenny J (with whom Greenwood and Logan JJ agreed) accepted that the Declaration elaborated on article 27 of the *ICCPR* but neither it nor article 27 assisted the appellants' case.[38] Article 27 did not give

33. *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 19(1).
34. Ibid s 19(2)(b).
35. *Human Rights Act 2004* (ACT) s 27(1). A note to section 8 identifies discrimination by reason of language as an example of a basis of discrimination prohibited under *Human Rights Act 2004* (ACT) s 8(3).
36. Ibid s 27(2)(a)(ii).
37. *Iliafi v The Church of Jesus Christ of Latter-Day Saints Australia* (2014) 221 FCR 86 ('*Iliafi*').
38. Ibid 107 [69].

rise to a right for the appellants to use their native language when they worshipped publicly as a group in the Church's services.[39] The minority language rights protected under article 27 had not been impaired because the appellants were free to use their native language amongst themselves; the ban was on them using their native language to worship in community with Samoan and non-Samoan speaking persons. The appellants erred insofar as the language right in article 27 was being treated as if it merged with the right to freedom of expression.[40] Additionally noteworthy – and recognised in international human rights jurisprudence – is that article 27, unlike article 19, on freedom of expression, has much clearer collective undertones, so that article 27 should probably suggest using language in public contexts.

Furthermore, article 27 had to be exercised consistently with other provisions.[41] This included the right to freedom of religion being exercised by the Church on behalf of its adherents, including its ability to enforce unanimity in religious matters. The Federal Court of Australia cited the Human Rights Committee for the proposition that some restrictions on using a minority language were permissible.[42] In particular, a challenged restriction had to have an impact 'so substantial' that it effectively denied to a complainant the right to enjoy his or her cultural rights.[43]

The Federal Court ultimately concluded that the rights to freedom of religion, freedom of expression and nationality did not protect the appellants' ability to worship publicly as a group in the Samoan language in the Church's services.[44] No language or other right in article 27 of the *ICCPR* remedied the deficiency. Thus the appellants failed to establish the existence of a right which engaged the *Racial Discrimination Act 1975* (Cth).[45]

International law fails to adequately protect the right of minority groups to use their own language. Key concepts are undefined and non-

39. Ibid 113–115 [95]–[103].
40. Ibid 114 [98].
41. Ibid 114 [99].
42. Ibid 112 [92].
43. Human Rights Committee, *Communication No 1334/04*, UN Doc CCPR/C/95/D/1334/2004 (19 March 2009) [8.7] ('*Mavlonov and Sa'Di v Uzbekistan*'). In that communication, denying re-registration to a minority language newspaper established a violation of article 27 because 'the use of a minority language press as means of airing issues of significance and importance to the Tajik minority community in Uzbekistan, by both editors and readers, is an essential element of the Tajik minority culture': at [8.7].
44. *Iliafi* 115 [103].
45. Ibid 117 [110]–[112].

blinding instruments overutilised. The cultural aspects of this right are emphasised and the political dimension subverted. Some of the defects observable at the international level concerning the ambit of this right have been transposed into Australian law. Complainants may be unable to find any support in Australian law upon which to articulate their particular grievance. A dialogue to remedy these deficiencies must begin, but who will listen?