

Linguistic preservation and legal rights: An analysis of the status of Indigenous language rights under international law

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Abstract

The United Nations General Assembly proclaimed 2019 to be the International Year of Indigenous Languages, in recognition of the continuing importance of traditional languages to Indigenous peoples around the world. The integral role of language means that its endangerment causes loss of culture, identity, and connection to land. For many Indigenous people, this also represents assimilation, disadvantage, and trauma borne of generations of systemic discrimination and genocide. This paper firstly examines the effects of language endangerment in the Kimberley, then discusses the inadequacy of the international human rights regime in protecting Indigenous languages and the rights attached to them. The few rights that are enshrined in binding international instruments have not been adequately enforced, with international judicial and quasi-judicial bodies treating them merely as a matter of procedural fairness instead of as inherent human rights. Furthermore, the current international rights regime is based on colonial perceptions of justice and fails to recognise Indigenous peoples as nations. If the international rights regime is to offer true protection to language rights, structural transformations that address the colonised nature of the international system must transpire.

This paper was written by Hannah Weston while undertaking an ANU College of Law internship with the Kimberley Community Legal Service. The views expressed are those of the author.

Introduction

As highlighted by James Crawford, ‘language death does not happen in privileged communities. It happens to the dispossessed and the disempowered, people who need their cultural resources to survive’.¹ It is in recognition of this fact that the United Nations General Assembly proclaimed 2019 the International Year of Indigenous Languages.² This paper is intended as a timely consideration of the rights attached to Indigenous languages, particularly in the Kimberley region of Western Australia, and the extent to which they are protected under international law. It was written while I undertook a six-month internship with the Kimberley Community Legal Service (KCLS), a not-for-profit organisation which aims to facilitate justice for disadvantaged people living in the Kimberley. During the internship, I worked on client tasks and social justice activities such as submissions to parliamentary inquiries. With 80 per cent of the KCLS’s clients being Indigenous, it became overwhelmingly clear throughout the internship that many miscarriages of justice, some of them quite severe, could be avoided if issues with language (such as communication and connection to culture) were adequately addressed. This paper therefore contextualises these issues and reflects on their treatment in the international sphere. It follows other papers completed by KCLS interns Sienna Lake (on language as an access to

¹ James Crawford, ‘Endangered Native American Languages: What is to be done, and Why?’ (1995) 19(1) *Bilingual Research Journal* 17 <doi.org/10.1080/15235882.1995.10668589>.

² UNESCO, ‘About IYIL 2019’, 2019: *International Year of Indigenous Languages* (Web Page, 2018) <<https://en.iyil2019.org/about#about-1>>.

justice issue),³ Brigid Horneman-Wren (on language in relation to cultural genocide),⁴ and Erin Daniels (on Indigenous language legislation).⁵

This paper examines firstly how language links with wellbeing, self-determination, and identity for Aboriginal people in the Kimberley. This involves looking at language revitalisation programs in the Kimberley and the rest of Australia, as well as the effects of language endangerment and the position language occupies in the sphere of human rights. The second section outlines international protection of Indigenous languages using a rights-based approach, focusing on the importance of the right to speak one's own language and be understood in interactions with the state. While the aforementioned papers on Indigenous languages considered this from the angles of cultural preservation, cultural genocide, and access to justice, this discussion will demonstrate the political and communicative elements of language rights. Finally, the extent to which the current international linguistic rights regime protects Indigenous language rights will be evaluated.

Indigenous languages in the Kimberley

Of the world's 6,000–7,000 languages, 96 per cent are spoken by just 3 per cent of the world's population, comprised mostly of Indigenous peoples.⁶ Most of these languages are falling out of use at an alarming rate, endangering the cultures and knowledge systems to which they belong.⁷ The Kimberley region—93.5 per cent of which is determined native title land⁸—has an Aboriginal population of 43 per cent and contains over 33 Indigenous language groups, making it one of the most linguistically diverse regions in the world.⁹ In spite of Australia's colonial history of genocide and oppression, some of these languages—like Kukatja and Walmajarri—remain in common use with over 1,000 speakers, while several—such as Andajin, Unggumi, and Warrwa—have not been spoken in living memory.¹⁰ Michael Krauss identifies the following reasons for language disappearance: 'outright genocide, social or economic or habitat destruction, displacement, demographic submersion, language suppression in forced assimilation or assimilatory education'.¹¹

Indigenous languages: Identity, culture, and communication

By continuing to use Indigenous languages in an intergenerational context, culture, traditional knowledge, and unique ways of understanding the world can be passed down through generations.¹² As articulated by former NAIDOC (National Aboriginal and Islanders Day Observance Committee) Co-Chair Anne Martin:

³ Sienna Lake, 'Aboriginal Language Interpreters in the Kimberley: An Access to Justice Issue' (Internship Paper, Australian National University and Kimberley Community Legal Service, 2017).

⁴ Brigid Horneman-Wren, 'Access to Aboriginal Interpreters in the Kimberley: What's the Problem to be Solved?' (Internship Paper, Australian National University and Kimberley Community Legal Service, 29 May 2018).

⁵ Erin Daniel, 'First Nations Legal Rights to Language: Exploring Canada's Proposed Indigenous Languages Act and the Impact an Australian Legislation Could Have on Aboriginal Language Interpreters in the Kimberley' (Internship Paper, Australian National University and Kimberley Community Legal Service, 25 February 2019).

⁶ UNESCO Office in Brazil, '2019 – International Year of Indigenous Languages', *United Nations Educational, Scientific and Cultural Organisation* (Web Page, 2017) <www.unesco.org/new/en/brasilia/about-this-office/prizes-and-celebrations/2019-international-year-of-Indigenous-languages>.

⁷ UNESCO (n 2).

⁸ Kimberley Land Council, *Historic Week of Three Kimberley Native Title Determinations* (Web Page, 2019) <www.klc.org.au/historic-week-of-three-native-title-determinations>.

⁹ RVC Fogliani, *Inquest into the Deaths of 13 Children and Young Persons in the Kimberley Region* (Coroner's Report, Coroner's Court of Western Australia, 7 February 2019) 12–13.

¹⁰ Kimberley Language Resource Centre, 'Whose Language Centre is it Anyway?' (Research Paper, 12 November 2010).

¹¹ Michael Krauss, *In Honour of Eyak: The Art of Anna Nelson Harry* (Alaska Native Language Centre, 1982) 6.

¹² Permanent Forum on Indigenous Issues, *Action plan for organising the 2019 International Year of Indigenous Languages*, 17th sess., Agenda Item 3, E/C.19/2018/1 (21 February 2018) [I:A:3].

Aboriginal and Torres Strait languages are not just a means of communication, they express knowledge about everything: law, geography, history, family and human relationships, philosophy, religion, anatomy, childcare, health, caring for country, astronomy, biology and food.¹³

Josie Farrer, a Gidga woman and the Kimberley Member for the Western Australia Legislative Assembly, adds: ‘Language supports our culture, our identity and it’s who we are’.¹⁴ Every element of lived experience is rooted in language, including lingerings from the past—such as history, memory, and traditional knowledge—but also seeds of the future.¹⁵ Much of this is not easily transferable to dominant languages, because words may contain concepts which can only be understood within particular cultural settings.¹⁶

Language as a human right

The central role of language in constituting and shaping identity means language is ‘inherent’ to the ‘dignity of the human person’.¹⁷ It is this deep connection with the common experience of humanity that enshrines language’s place in human rights discourse, which in turn has a normative effect on language rights in international law. By expressing language in terms of human rights, it endows claims with an unconditional value that acts as a moral trump card.

While this paper argues that rights to language are intrinsic to the status of being human, it should also be noted that there are instrumental arguments for Indigenous language rights. Indigenous languages are valuable assets to society at large, being repositories of complex systems of knowledge accumulated over thousands of years which may play a crucial role in addressing global issues.¹⁸ Linguistic pluralism also contributes to heterogeneity, which enriches the world by creating an environment in which intercultural dialogue and the benefits of diversity can prosper.¹⁹

Language endangerment

Language endangerment causes loss of culture, identity, and connection to land.²⁰ For Indigenous people, this also represents assimilation, disadvantage, and trauma borne of generations of systemic discrimination and genocide.²¹ The Yawuru Wellbeing Report found that:

the wellbeing of the Yawuru people as a language group relates to the importance that Yawuru attaches to ‘place’ or the country to which they have a strong and enduring connection.²²

Therefore, when this connection to country is lost, there is a ‘painful disconnection’²³ with other essential elements of Aboriginal life.

¹³ NAIDOC, *2017 NAIDOC Week Theme Announced – Our Languages Matter* (Web Page, 30 May 2017) <www.naidoc.org.au/news/2017-naidoc-week-theme-announced-our-languages-matter>.

¹⁴ Josie Farrer, a Gidga woman and the Kimberley Member for the Western Australia Legislative Assembly, quoted in the Hon Alannah MacTiernan MLC, ‘Maintaining Traditional Languages in the Kimberley’ (Media Release, Government of Western Australia, 27 October 2017).

¹⁵ Permanent Forum on Indigenous Issues (n 12).

¹⁶ *Ibid* 3.

¹⁷ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), Preamble.

¹⁸ Permanent Forum on Indigenous Issues (n 12) [2].

¹⁹ Moria Paz, ‘The Tower of Babel: Human Rights and the Paradox of Language’ (2014) 25(2) *European Journal of International Law* 473, 474 <doi.org/10.1093/ejil/chu037>.

²⁰ Permanent Forum on Indigenous Issues (n 12) [3].

²¹ *Ibid*.

²² Mandy Yap and Eunice Yu, ‘Community Wellbeing from the Ground Up: A Yawuru Example’ (BCEC Research Report No 3/16, Bankwest Curtin Economics Centre, 2016) 37.

²³ Catherine Liddle, *Why a Connection to Country is So Important to Aboriginal Communities* (Web Page, 3 August 2017) <www.sbs.com.au/nitv/article/2015/10/22/why-connection-country-so-important-aboriginal-communities>.

The recent Coroner's Report on Aboriginal youth suicide in the Kimberley region found that disadvantage is shaped by intergenerational experiences such as displacement from land and the loss of languages.²⁴ Trauma from these experiences passes through generations and continues to affect today's youth.²⁵ This inhibits the collective strength of families and communities, therefore compromising self-determination.²⁶

Language protection within Australia

The importance of teaching children's first languages in schools was highlighted in the abovementioned inquiry into Aboriginal youth suicide in the Kimberley.²⁷ Numerous witnesses emphasised that culturally sensitive and responsive schools have a greater chance of gaining the support and trust of parents, a crucial factor in improving attendance and engagement by students.²⁸ Mrs Brenda Garstone gave evidence that 'Aboriginal people learning their language and culture'²⁹ can help Aboriginal youth bridge the gap between Western and traditional culture. Recommendation 38 of the Coroner's Report is therefore that the Department of Education should 'introduce or continue to expand the teaching of Aboriginal languages in its Kimberley schools, in consultation with the local Aboriginal communities'.³⁰ The findings also highlighted programs like the Yiriman Project in Fitzroy Crossing, in which Elders teach children and young adults stories about growing up on country, drawing them back to country, culture, and language.³¹ This program was developed in response to high levels of disengagement among Aboriginal youth, and

is about recognising that when young Aboriginal people have a strong connection to country and culture, there is less risk of that person suffering from self-harm, mental problems, or getting into trouble with the law.³²

Such cultural engagement and language programs aid engagement of Indigenous youths with the education system by providing more culturally appropriate settings for learning.

The need for interpreters in interactions with the state

Given the importance of language to the communication of culture, it plays a crucial role in the courtroom setting, where nuanced representations of facts are imperative. While the right to a fair trial has been described as a 'central pillar of our criminal justice system',³³ the Australian legal system was designed to facilitate a British conception of justice and does not adequately cater for people whose culture and language are incompatible with it. This leaves many Indigenous people 'locked into a system of law that cannot and will not recognise their rights or methods of communication'.³⁴ This situation is worsened by the fact that there is no absolute common law right for an interpreter paid for by the state in legal proceedings in Australia,³⁵ and that 38 per cent of Indigenous first language speakers 'experience difficulties when communicating with service providers'.³⁶

²⁴ Fogliani (n 9) 11.

²⁵ Ibid.

²⁶ Ibid.

²⁷ Ibid 361.

²⁸ Ibid.

²⁹ Ibid 362.

³⁰ Ibid 363.

³¹ Ibid 300.

³² Ibid.

³³ *Dietrich v the Queen* (1992) 177 CLR 292, 298 (Mason CJ and McHugh J).

³⁴ Justin Evans, 'Indigenous Australians: Language, and the Law' (2002) 15(2) *International Journal for the Semiotics of Law* 127, 140 <doi.org/10.1023/A:1015877702346>.

³⁵ Michael Barnett, 'Mind Your Language – Interpreters in Australian Immigration Proceedings' (2006) 10(10) *University of Western Sydney Law Review* 109, 110.

³⁶ Australian Law Reform Commission, *10. Access to Justice: Access to interpreters* (Web Page) <www.alrc.gov.au/publications/access-interpreters>.

An implication of the right to a fair trial (established in both international and domestic law) is that actors operating within the legal system are treated inclusively and are heard in the language in which they can best express themselves—a right which has not yet been adequately established in international or domestic Australian law. Interpreters are important because many concepts are difficult to convey from one language to another, a problem which is exacerbated for people unused to interpreting in an official setting such as a courtroom.³⁷ Simple English is inadequate for the communication of essential information because it lacks the requisite complexity to deliver nuanced messages.³⁸ Similarly, while newer Indigenous languages such as Kriol have an English base and may sound like simple English, their structure and meanings are unique.³⁹ For example, the English word ‘we’ does not distinguish between the speaker and the listener, or the speaker and other people not including the speaker. In Kriol (as in most Aboriginal languages), the two meanings of the word ‘we’ are expressed using different words.⁴⁰ This can lead to serious errors in court because legal officials do not always comprehend that what they hear may not be the meaning the speaker is attempting to convey. This lack of understanding of the nuance of language was demonstrated in *Gaio v The Queen* (1960), when Menzies J described the role of the interpreter as that of a ‘machine, merely a translator’,⁴¹ when in fact interpreters perform a complex activity which involves translating entire cultural concepts into sometimes incompatible languages.

An example of the language and cultural barrier causing a miscarriage of justice is the case of Gene Gibson, a Pintupi-speaking man from Kiwirrkurra (Western Australia) convicted of manslaughter in 2014.⁴² Gibson spent five years in jail before the conviction was quashed upon appeal, where it was revealed that he spoke little English and had not understood the court process or the instructions given to him.⁴³ The initial police interviews had been thrown out of court because an interpreter had not been provided, and Gibson had been induced to plead guilty, which he stated on appeal that he had not understood.⁴⁴ Gibson’s lawyer, Michael Lundberg, asserted that ‘the burden of innocence is a heavier one for people like Gene’, those who for cultural or linguistic reasons do not fully understand the court process or the charges against them.⁴⁵ Cases such as this illustrate the need for a strong international legal framework to protect the rights of individuals in courtroom settings, where language and cultural differences place them on an uneven footing with their counterparts from the dominant culture.

The international linguistic rights regime

The international linguistic rights regime comprises a range of instruments of varying levels of effectiveness. There is currently a wide discrepancy between the ideals espoused in rights provisions and the practical judicial treatment of those rights.⁴⁶ There are no formally binding international documents that provide a comprehensive framework for the protection of Indigenous language rights, although by reframing the issue as one of minority and/or cultural rights, there is more to work with. While numerous non-binding instruments provide a more cohesive vision of the language rights which the international system aspires to protect, this is not matched in binding international agreements.

³⁷ Aboriginal Interpreting Western Australia, *Interpreter Accreditation & Skills* (Web Page) <www.aiwaac.org.au/i_accredit.html>.

³⁸ Aboriginal Interpreting Western Australia, *FAQ* (Web Page) <www.aiwaac.org.au/faq.html#faq1>.

³⁹ Ibid.

⁴⁰ Australian Bureau of Statistics, *Languages of Aboriginal and Torres Strait Islander Peoples: A Uniquely Australian Heritage* (Catalogue No 1301.0, 4 June 2010) 3.

⁴¹ *Gaio v The Queen* (1960) 104 CLR 419, 432–3.

⁴² Calla Wahlquist, ‘Wrongful Conviction of Indigenous Man Sparks Calls for Interpreter Funding’ *The Guardian* (online at 13 April 2017) <www.theguardian.com/australia-news/2017/apr/13/wrongful-conviction-of-indigenous-man-sparks-calls-for-interpreter-funding>.

⁴³ Jacob Kagi, ‘Gene Gibson Gets \$1.3m Payment after Wrongful Conviction over Josh Warneke’s Broome Death’ *ABC News* (online at 18 April 2018) <www.abc.net.au/news/2018-04-18/gene-gibson-gets-payment-after-josh-warneke-wrongful-conviction/9671792>.

⁴⁴ Wahlquist (n 42).

⁴⁵ Kagi (n 43).

⁴⁶ Paz (n 19) 163–164.

Rights theory

Rights scholars divide rights into two main categories: tolerance rights and promotion-oriented rights.⁴⁷ The aim of tolerance rights is to prevent state interference in the private exercise of rights: in this case, speaking one's mother tongue in informal settings.⁴⁸ Such rights are widely held to be inviolable in liberal democracies.⁴⁹ Promotion-oriented language rights, in contrast, carry more substantial obligations for states to take positive steps towards embracing minority languages in all spheres of society, including education, public services, and the courts.⁵⁰

Will Kymlicka and Alan Patten further divide promotion rights into accommodation rights and recognition rights.⁵¹ The first category involves the state granting exceptions to speakers of minority languages, allowing them to use their languages in the public sphere. This approach recognises that the 'benign neglect' model is insufficient because while it does not persecute minorities for using their languages, it fails to allow them to fully participate in public life due to language barriers.⁵² Recognition rights, going one step further, grant minority languages 'official' recognition, giving them formal equality with the dominant language.⁵³ In practice, this may not amount to true equality, because the dominant language will inevitably be the primary means of communication in institutions such as the mainstream mass media. However, they may to some extent relieve some of the exclusion and marginalisation experienced by Indigenous people, as the state's choice of language is linked to inclusion in its political identity.⁵⁴

Non-binding linguistic rights under international law

The following section discusses language rights that have been internationally recognised but have not yet attained binding legal status. Their non-binding nature has two implications: (i) the language in these provisions tends to be more affirmative and promotion-oriented than the language in binding instruments; and (ii) these rights cannot be enforced under international law, so are often merely aspirational.⁵⁵

Despite their lack of enforceability, non-binding human rights instruments play an important role in setting the direction of international law. The development of human rights norms is a 'dynamic and evolutionary process',⁵⁶ beginning with 'norm entrepreneurs' reframing issues as 'norms'.⁵⁷ Norms are standards of behaviour that carry an 'aura of legitimacy',⁵⁸ which are spread through society and across borders.⁵⁹ Non-binding declarations can be important tools to achieve this. Once norms have been embraced by state and non-state actors, they redefine what behaviour is acceptable in international

⁴⁷ Sadhana Abayasekara, 'A Dog without a Bark: A Critical Assessment of the International Law on Language Rights' (2010) 17(17) *Australian International Law Journal* 89, 92.

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ Will Kymlicka and Alan Patten, 'Language Rights and Political Theory' (2003) 23(1) *Annual Review of Applied Linguistics* 3, 8–9, <doi.org/10.1017/S0267190503000163>.

⁵² Abayasekara (n 47) 92.

⁵³ Ibid.

⁵⁴ Jacqueline Mowbray, *Linguistic Justice: International Law and Language Policy* (Oxford University Press, 2012) 137 <doi.org/10.1093/acprof:oso/9780199646616.001.0001>.

⁵⁵ Abayasekara (n 47) 163.

⁵⁶ Makau Mutua, *Human Rights Standards: Hegemony, Law, and Politics* (State University Press of New York, 2016) ch 1 9.

⁵⁷ Knut Traisbach, *International Law* (1 January 2017) E-International Relations <www.e-ir.info/2017/01/01/international-law/>.

⁵⁸ Ann Florini, 'The Evolution of International Norms' (1996) 40(3) *International Studies Quarterly* 363, 364–365 <doi.org/10.2307/2600716>.

⁵⁹ Traisbach (n 57).

society.⁶⁰ At this point, norms are often codified in treaties and become justiciable by international judicial bodies.⁶¹

The (non-binding) Universal Declaration of Linguistic Rights 1996 (UDLR)⁶² was one attempt to consolidate aspirational rights for members of linguistic groups, recognising something that the binding international law regime often misses: that the collective and individual aspects of linguistic rights are inseparable because languages exist within and often define communities.⁶³ Language is a tool for communication and a way of experiencing culture, both of which are collective experiences. Linguistic rights granted to individuals are therefore only coherent when they are equally afforded to linguistic groups collectively, thereby giving individuals a space within which they can enjoy and practise language. Therefore, while minority language rights are generally legally bestowed upon individuals, this conferment is contingent on individuals' memberships within particular groups.⁶⁴

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP),⁶⁵ adopted by the UN General Assembly in 2007 and endorsed by the Australian Government two years later,⁶⁶ provides for the right of Indigenous people to facilitate education in their own languages.⁶⁷ This provision is supplemented by Article 14(3), which requires the assistance of the state 'when possible'. While UNDRIP is not formally binding, the Commonwealth's Parliamentary Joint Committee on Human Rights (PJCHR) has stated that UNDRIP is an important tool in the interpretation of treaties of which Australia is a signatory, and that the PJCHR will therefore refer to UNDRIP 'where relevant'.⁶⁸ The Permanent Forum on Indigenous Issues noted in 2017 that UNDRIP has achieved some successes, including 'constitutional and legislative frameworks that recognise Indigenous peoples [and] targeted policies and programmes',⁶⁹ as well as increasing jurisprudence across signatories recognising the domestic legal rights of Indigenous peoples. However, the forum also noted the concerning gap between formal recognition of Indigenous rights and the practical protection of them.⁷⁰

The Declaration on the Rights of Minorities⁷¹ contains perhaps the most robustly worded provisions respecting language rights in the international regime. The Declaration was intended to be an interpretive declaration of Article 27 of the International Covenant on Civil and Political Rights (ICCPR).⁷² However, international law continues to lack universal norms in relation to language rights, meaning that the Declaration remains soft (unenforceable) law.⁷³ Australia has also signed the Universal

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² *Universal Declaration of Linguistic Rights*, (Translations and Linguistic Rights Commission of the International PEN Club and the CIEMEN, 1996).

⁶³ Cultural Rights: Culture and Development, *Universal Declaration of Linguistic Rights, 1966* (Web Page, 2010) <www.culturalrights.net/en/documentos.php?c=18&p=184>.

⁶⁴ Robert Dunbar, 'Minority Language Rights in International Law' 2001 50(1) *The International and Comparative Law Quarterly* 90, 99 <doi.org/10.1093/iclq/50.1.90>.

⁶⁵ United Nations Declaration on the Rights of Indigenous Peoples, A/RES/61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, (2 October 2007).

⁶⁶ Australian Human Rights Commission, *UN Declaration on the Rights of Indigenous Peoples* (Web Page, 14 September 2007) <www.humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/projects/un-declaration-rights>.

⁶⁷ United Nations Declaration on the Rights of Indigenous Peoples (n 65) art 14(1).

⁶⁸ Parliamentary Joint Committee on Human Rights, 'Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Stronger Futures in the Northern Territory Act 2011 and related legislation' (Report No 11, Commonwealth of Australia, 2013) 36.

⁶⁹ Permanent Forum on Indigenous Issues, *Report on the 16th session*, ESCOR 2017, Supp No 23, E/2017/43-E/C.19/2017/11 (24 April-5 May 2017) [6].

⁷⁰ Ibid.

⁷¹ Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, A/RES/47/135, UN GAOR, 92nd plen mtg (18 December 1992).

⁷² Paz (n 19) 174.

⁷³ Abayasekara (n 47) 92.

Declaration on Cultural Diversity, adopted at the 31st UNESCO General Conference,⁷⁴ which recognises cultural rights such as the right to use one's first language. As will be demonstrated, however, international judicial and quasi-judicial bodies have a poor record in upholding this right in interactions with the state, except when procedural fairness hinges on it.

Another limit on international language rights provisions is that they are often worded in such a way that makes it easy for states to argue that they are not in fact in breach.⁷⁵ For example, Article 6(1) of the Convention on the Protection and Promotion of the Diversity of Cultural Expression permits divergence from the principles it supposedly enshrines 'taking into account [states'] own particular circumstances and needs'.⁷⁶ Similarly, Article 4 of the ICCPR allows states to derogate from their obligations 'in time[s] of public emergency'. As the standard for either of these situations is undefined, states are free to construe these provisions broadly. While a state of 'public emergency' is implausible in the Australian context, the Australian Government invoked similar terminology in the Northern Territory Emergency Response in 2006, a policy which was criticised by the former UN Special Rapporteur on Human Rights, James Anaya, for its breaches of international human rights obligations.⁷⁷ In order for language rights to influence state behaviour in practice, it is therefore necessary that they be codified in binding international law in tightly worded provisions.

Language rights under binding instruments

Most of the language rights contained within binding instruments are expressed in negative terms of non-interference and non-discrimination by the state (as discussed below).⁷⁸ The implication of this is that there are few, if any, binding obligations imposed on states to take positive measures to promote language rights beyond preventing discrimination. While at face value this implies that they do little beyond creating a formally—but not practically—fair environment for minority languages,⁷⁹ decisions by international judicial bodies have established that positive obligations on states may be implicit in negatively phrased rights provisions.

The most significant provision contained within the international linguistic rights regime is Article 27 of the ICCPR:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.⁸⁰

Article 27 is important, because it is the most specific *binding* commitment in the international regime to uphold linguistic rights. It has been incorporated into Australian domestic law by the *Australian Human Rights Commission Act 1986* (Cth), which states that the Australian Human Rights Commissioner must 'have regard to ... the International Covenant on Civil and Political Rights'.⁸¹ The negative phrasing of Article 27 does not explicitly impose any specific obligations upon states to protect the right of Indigenous groups to 'enjoy their own culture' or 'practise their own language' beyond refraining from making policies that hinder such actions. However, the UN Human Rights Committee

⁷⁴ UNESCO Universal Declaration on Cultural Diversity, adopted by the 31st Session of the General Conference of UNESCO in Paris (2 November 2011).

⁷⁵ Abayasekara (n 47) 91.

⁷⁶ *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, 2440 UNTS (entered into force 18 March 2007).

⁷⁷ Diana Perche, 'Ten Years On, It's Time We Learned the Lessons from the Failed Northern Territory Intervention' *The Conversation* (online at 26 June 2017) <www.theconversation.com/ten-years-on-its-time-we-learned-the-lessons-from-the-failed-northern-territory-intervention-79198>.

⁷⁸ Abayasekara (n 47) 90.

⁷⁹ *Ibid* 91.

⁸⁰ *International Covenant on Civil and Political Rights* (n 17) art 27.

⁸¹ Australian Human Rights Commission Act 1986 (Cth) art 46C(4)(a).

(UNHRC), which provides authoritative interpretations of the ICCPR, has clarified that positive obligations on state parties are in fact implicit in the rights contained within the Article.⁸²

Article 27 goes beyond mere procedural protection from discrimination by obligating states to create circumstances where their cultures, religions, and languages can be ‘enjoy[ed]’. This has been established by the UNHRC in its General Comments and in international jurisprudence dealing with the ICCPR.⁸³ Most notable is General Comment No 23,⁸⁴ in which the UNHRC confirmed that—despite its negative wording—Article 27 ‘recognise[s] the existence of a “right” and requires that it shall not be denied’.⁸⁵ As such, state parties are ‘under an obligation to ensure that the existence and the exercise of this right are protected’, requiring ‘positive measures of protection’.⁸⁶ Similarly, in *Lovelace v Canada*,⁸⁷ the UNHRC stated that ‘Article 27 of the Covenant requires state parties to accord protection to ethnic and linguistic minorities’.⁸⁸

However, the protection afforded by Article 27 has proven relatively ineffectual in practice. As Moria Paz notes, ‘during all its years of operation, the UNHRC has never once found an Article 27 breach in relation to language violations in the functions surveyed’.⁸⁹ Every claim of a direct language right that has been brought to the UNHRC has been treated as a procedural justice issue rather than a separate rights claim. These claims, therefore, have achieved nothing beyond what is already enshrined in other rights, such as the right to a fair trial.⁹⁰ This illustrates the tendency of the UNHRC not to treat language rights as inviolable and inherent, instead viewing them as instrumental to achieving justice in relation to other issues.⁹¹

The right to a fair trial is the clearest example of positive obligations on states relating to language rights.⁹² This is the most rigorously upheld right relating to language, but it is limited in nature and fails to account for the intricacies of language differences and the politics of language use. The right to a fair trial is enshrined in Article 14(3) of the ICCPR. Article 14(3)(a) grants protection to the accused’s right to be informed of the charges against them in a language they understand, and Article 14(3)(f) protects the right ‘[t]o have the free assistance of an interpreter if he [the accused] cannot understand the language used in court’. However, case law has firmly established that this provision is narrowly construed, and that the bar for ‘understanding’ is low. The following two cases illustrate this.

*Dominique Guesdon v France*⁹³ established that parties cannot choose to speak in their first language if they are ‘capable of expressing [themselves] adequately’⁹⁴ in the language of the court. In this case, Guesdon and his witnesses demanded to give evidence in Breton through an interpreter to be paid for by the state. Guesdon raised two claims: one under Article 14 (the right to a fair trial), the other under Article 27 (the right to ‘enjoy culture and language’). Guesdon’s submission was that minority language speakers have a right to use the ‘language [of their] ancestors’⁹⁵ and ‘to express themselves with ease ... in the language which they normally speak’.⁹⁶ The UNHRC chose to consider the two claims

⁸² Abayasekara (n 47) 174.

⁸³ *Ibid.*

⁸⁴ Human Rights Committee, *General Comment No 23(50) (art. 27): International Covenant on Civil and Political Rights*, 50th sess, 1314th mtg, CCPR/C/21/Rev.1/Add.5 (26 April 1994).

⁸⁵ *Ibid* [6.1].

⁸⁶ *Ibid.*

⁸⁷ *Sandra Lovelace v Canada (Communication No. 24/1977)* (United Nations Human Rights Committee, UN Doc CCPR/C/OP/1, 1984).

⁸⁸ *Ibid* [7.2].

⁸⁹ Paz (n 19) 165.

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

⁹² Abayasekara (n 47) 90.

⁹³ *Dominique Guesdon v France (Communication No. 219/1986)* (United Nations Human Rights Committee, UN Doc CCPR/C/39/D/219/1986, 23 8 1990).

⁹⁴ *Ibid* [10.2].

⁹⁵ *Ibid* [6.4].

⁹⁶ *Ibid* [6.2].

separately, focusing on the due process component and taking the language right contained within it as a subset of procedural fairness.⁹⁷ Once the requirement for Guesdon to understand English was satisfied, the Court considered it unnecessary to bring Article 27 into its analysis.

The second case is *Cadoret v France*.⁹⁸ In this case, the UNHRC ignored ‘the intrinsic significance of the *language* of expression’⁹⁹ in its failure to distinguish this from the ‘*content* of expression’.¹⁰⁰ This was significant because the use of Breton by the applicants was necessary to convey the political message that France should recognise and take greater steps towards accommodating the Breton community.¹⁰¹ The choice of language itself was the political statement in that it was a ‘performance of identity’,¹⁰² therefore presenting the case in French would have been self-defeating.

The UNHRC takes a similar approach to protecting minority language use in the public domain, once again ignoring the element of Article 27 that recognises culture and languages. In *Diergaardt v Namibia*,¹⁰³ a minority group claimed that Namibia was breaching its duties under Articles 26 (equality before the law) and 27 of the ICCPR by not allowing them to use their first language (Afrikaans) in ‘administration, justice, education and public life’.¹⁰⁴ The UNHRC found a violation of Article 26 because Afrikaans was singled out by the state for different discriminatory treatment. Once again, the emphasis was on procedural fairness, not on cultural and linguistic rights (note that the majority decision found that there had been no violation of the right to enjoy culture,¹⁰⁵ and did not consider the language element of the claim under Article 27).¹⁰⁶ The implication of this is that the international language rights regime upholds the tolerance right of freedom of language in the private sphere, but there is no freedom of language beyond procedural fairness in interactions with the state.¹⁰⁷

This discussion has illustrated that the international rights regime is not yet treating language rights as fundamental to human dignity and equality.¹⁰⁸ Firstly, the codification of minority language rights has been piecemeal, failing to formulate a cohesive conception of the obligations necessary to fulfil such rights. Secondly, minority language rights are limited in nature and generally framed in negative terms which lack explicit positive obligations for states. Finally, the most substantial provisions relating to language rights are contained within non-binding documents. Their impact is therefore felt only through reputational costs, or—when they are binding—the Court tends to overlook commitments to cultural preservation in favour of functional guarantees.¹⁰⁹

Reflection on the international Indigenous linguistic rights regime

While the above section discussed how the international linguistic rights regime operates in practice, this section considers the theoretical implications that flow from its structure. When applying international language laws, judicial and quasi-judicial bodies have tended to approach their decisions from an assimilationist perspective, rather than upholding rights in a promotional sense as the language of the provisions would indicate.¹¹⁰ By protecting rights that merely enable a colonialist understanding

⁹⁷ Paz (n 19) 190.

⁹⁸ *Cadoret Le Bihan v France* (Communication No. 323/1988) (United Nations Human Rights Committee, UN Doc CCPR/C/41/D/323/1988, 11 April 1991).

⁹⁹ Mowbray (n 54) 143.

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*

¹⁰³ *J G A Diergaardt v Namibia (Views)* (United Nations Human Rights Committee, UN Doc CCPR/C/69/D/760/1996, 25 July 2000).

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid* [10.6].

¹⁰⁶ Paz (n 19) 195.

¹⁰⁷ *Ibid.*

¹⁰⁸ Abayasekara (n 47) 91.

¹⁰⁹ Paz (n 19) 190–191.

¹¹⁰ *Ibid* 157.

of procedural fairness, minority languages are effectively treated as a disability which needs to be accommodated by superficially levelling the playing field.¹¹¹

The Indigenous rights contained in the international regime promote recognition of culture, but do not encourage a nation-to-nation relationship between states and their Indigenous peoples.¹¹² Mere negative rights framed in terms such as ‘shall not be denied’ fail to actively decolonise rights regimes, and instead promote a politics of ‘affirmative recognition’.¹¹³ Glen Coulthard—a member of the Yellowknives Dene First Nation (Canada) and professor of political science and First Nations and Indigenous Studies—contends that such politics perpetuate colonialism in present society, undermining Indigenous groups’ status as independent nations and thereby inhibiting self-determination. This calls into question whether reconciliation can ever truly be achieved within the contemporary neoliberal framework.¹¹⁴ Coulthard, in his criticism of ‘the assimilative power of the statist politics of recognition’,¹¹⁵ emphasises that rather than ‘recogni[sing]’ cultural rights, the colonialist framework of domination and mere accommodation of Indigenous cultures must be deconstructed. While Coulthard writes as a First Nations person in Canada, he argues that this analysis is broadly applicable across settler-colonial states, of which Australia is one.

One way in which this issue is manifested in Australia is the tendency of government initiatives to ‘problematize Indigenous peoples as just a population of disadvantaged persons who must catch up with other Australians’.¹¹⁶ This is an epistemic injustice:¹¹⁷ prejudices held by Australian society left over from Australia’s colonialist past obscure the government’s view of the inherence of Indigenous rights, leading such rights to be treated as an obligation on the part of the government to successfully integrate Indigenous people into the dominant culture. This assimilationist approach denies the legitimacy of Indigenous laws, languages, and cultural practices, treating them as a cause of disadvantage rather than the foundational elements of nations. Sarouche Razi, former Principal Solicitor of the KCLS, contends that this narrative should be inverted:

Why is it that the onus gets put on the client to say, ‘I need an interpreter?’ Why isn’t the judge or coroner sitting there asking or presuming she is going to understand everything? Why don’t we ... presume that it’s the system that needs to understand things better?¹¹⁸

The right to an interpreter in interactions with the state can thus be reframed as a right to be heard and understood, which would remedy the epistemic injustice that causes the assumption of the legal system that Indigenous peoples should be brought within the dominant system, rather than the dominant system seeking to understand their expertise.

The concept of granting rights to Indigenous peoples is in itself problematic, because Aboriginal law and social systems existed at the time of colonisation and were never legitimately extinguished. Granting rights to language therefore denies their continued existence in the face of colonialism and subjugation. Irene Watson, a Tanganekald and Meintangk woman and Aboriginal rights activist, argues that ‘[t]he colonial state cannot “grant” us who we are, for it was never theirs to give’.¹¹⁹ Sovereignty

¹¹¹ Ibid 164.

¹¹² Devin Zane Shaw and Veldon Coburn, *The Colonial Politics of Recognition in Trudeau’s Relationship with Indigenous Nations* (7 September 2017) E-International Relations <www.e-ir.info/2017/09/07/the-colonial-politics-of-recognition-in-trudeaus-relationship-with-indigenous-nations/>.

¹¹³ Glen Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (University of Minnesota Press, 2014) 3 <doi.org/10.5749/minnesota/9780816679645.001.0001>.

¹¹⁴ SFU’s Vancity Office of Community Engagement, ‘Recognition, Reconciliation and Resentment in Indigenous Politics, with Dr. Glen Coulthard’ (YouTube, 16 May 2016) <www.youtube.com/watch?v=usrJIFVpKaM>

¹¹⁵ Coulthard (n 113) 13 and 48.

¹¹⁶ Laura Beacroft, ‘Indigenous Language and Language Rights in Australia after the Mabo (No 2) Decision: A Poor Report Card’ (2017) 23 *James Cook University Law Review* 113, 133.

¹¹⁷ Mahendra Chitrarasu, ‘Ideas of the Anthropocene: The Place of Aboriginal Philosophy in Contemporary Ecological Thought’ (Internship Paper, University of Adelaide, November 2017) 10.

¹¹⁸ ANU TV, ‘Pindan, Peripheries and Power: First Nations Peoples, Civil Law and Justice in the Kimberley’ (YouTube, 9 August 2017) 00:55:05–01:03:44 <www.youtube.com/watch?v=4fcBApCIS7M&feature=youtu.be>.

¹¹⁹ Irene Watson, ‘Buried Alive’ (2002) 13(3) *Law and Critique* 253, 256 <doi.org/10.1023/A:1021248403613>.

over Indigenous laws was imposed by the state through violence,¹²⁰ and subsequent attempts by the state to ‘recognise’ Indigenous peoples merely serve to disguise extinguishment under a veil of legal legitimacy.¹²¹ The decision in *Mabo (No 2)*,¹²² for instance, while recognising native title, also made title extinguishable. Watson asserts that this places Indigenous people in an impossible position; by seeking native title through the court system they accept the possibility of it being extinguished by the state, but by remaining outside the system their rights to their land are inevitably denied. She describes this as a ‘choice only of how to take genocide’.¹²³ The *Mabo (No 2)* decision therefore perpetuates colonialism in its failure to recognise that Indigenous law continues to exist parallel to the Australian legal system and in its entrenchment of the state’s discretion to grant or withdraw rights from Indigenous peoples.

Conclusion

Indigenous languages in the Kimberley region are some of the most endangered in the world, and while international law may play a role in framing language as a human right—and eventually changing the way states treat Indigenous languages—it currently offers them inadequate protection. In the Kimberley, Aboriginal languages are integral to shaping identity, the transmission of culture, and the communication of important and nuanced ideas; the loss of language as a result of state policies can amount to cultural genocide.¹²⁴ However, most international language rights are contained within soft law, which has little practical effect in holding states to their commitments. The few rights that are supposedly protecting in binding international instruments such as the ICCPR have not been adequately enforced, with the UNHRC treating them merely as a matter of procedural fairness instead of as inherent human rights. Underlying this is a failure to understand the complexity of language, not just as a tool for communication but also as a means of expressing identity and culture. Furthermore, the current international rights regime is based on colonial perceptions of justice and fails to recognise Indigenous peoples as nations. This narrative must change. The making of international law is a ground-up process, beginning with advocacy that transforms norms within states and across borders. Indigenous peoples have achieved remarkable successes in this regard, not least the creation of UNDRIP, but the process must continue if international law is to provide more substantial protection for Indigenous language rights.

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¹²⁰ Ibid 257.

¹²¹ Ibid 259.

¹²² *Mabo and Others v Queensland (No 2)* (1992) 175 CLR 1.

¹²³ Watson (n 119) 264.

¹²⁴ Horneman-Wren (n 4).

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