

An analysis of the legally protectable interests pertaining to language

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1 Introduction

This article explores the legally protectable interests that language law (the law related to language) have to respond to. To the extent that the question has been analysed it has largely been dealt with in terms of the assumption that interests in language are a matter of individual rights, and hence the belief that individual rights – rights that vest in individuals – basically cater for all the interests pertaining to language. In consequence the primary and often almost exclusive focus of the legal discourse on language is individual rights. Important as individual rights in the context of language certainly are, they fall far short in rendering the required protection to the interests pertaining to language, since there are two sets of interests that are not individual in nature and that can therefore not meaningfully be accounted for by way of individual rights. The first set of interests is communal and relates to the linguistic community. The second set pertains to (the) language itself. These interests can only be accommodated by way of institutions and facilities that go beyond mere protection of individual rights. Hence they have to be catered for by an expanded language law that goes way beyond individual rights. In analysing the various, especially non-individual, interests in relation to language, I argue in this article that: language constitutes a meta-entitlement – that is, language is the foundation for basically all conceivable rights; the public (deliberative) use of the languages of all sizable linguistic communities in a state is a prerequisite for democratic politics; languages define identity, serve as a source of social solidarity for linguistic communities and are autonomous trans-generational artefacts of indispensable value to each linguistic community; and each language has inherent value, being the collective *intellectual property* of each linguistic community concerned, while all languages together constitute a collective set of *intellectual property* belonging to mankind universally.

2 A meta-entitlement – the linguistic foundation (conditionality) of rights

Language is, if not a precondition, at least an essential element for the exercise of individual rights. Rights are ordinarily exercised through communicative acts, and most commonly through the medium of language.

The first right that comes to mind is the right to freedom of expression. Expression ordinarily requires communication through the medium of language. If someone is denied the right to choose the language through which he or she seeks to express him or herself, the right to freedom of expression loses its significance.

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Moreover, if the conditions that would make such a choice meaningful are absent, for example if people sharing the same language are not in contact with one another or if they do not have facilities such as media to enable communication with each other, the choice to communicate in the language concerned would once again be meaningless.¹ Hence the Canadian supreme court aptly observed that freedom of expression includes the freedom to express oneself in the language of one's choice.

Language, the court stated, is so intimately related to the form and content of expression that there cannot be genuine freedom of expression by means of language if one is prohibited from using the language of one's choice.² The conditionality of language for the right to freedom of expression was also acknowledged in United States case law – namely in the *Yniguez* case.³ The court rejected the argument that freedom of speech pertains to the content of the speech alone and not to the choice of language in which the speech is articulated. If a particular language is therefore regulated (or prohibited from use) freedom of speech is in itself infringed.⁴ The prohibition of a language as such instead of only a specific word, phrase, paragraph or even a book, is a much more grave invasion of the right to freedom of expression, as entire vocabularies are in that way prohibited, which strikes at the whole of the language community using that language.⁵

However, the essential importance of language for exercising rights does not stop with freedom of expression. There are many rights that are as critically dependent as the right to freedom of expression on communication through language. The right to religion and the right to education are premised on communication in the language of choice of the rights-bearers. It is generally accepted in educational circles that the right to basic education cannot meaningfully be exercised other than through the medium of the mother tongue of the rights-bearers.⁶ The right to freedom of association is also inconceivable without meaningful communication among *associates*.

The rights to administrative justice, access to information and access to justice are all conditional upon the rights-bearer being communicated with and being allowed and enabled to communicate in her or his language of choice.⁷ In its turn the right to vote is quite obviously of little use if the voter cannot understand the available options.⁸

Rights within the criminal justice system – the right of arrested and detained persons and the right to a fair trial, which primarily accrue to the accused (defendant), are all dependent upon meaningful communication through the medium of language. The rights of arrested and accused persons are all dependent upon the

¹ See further Malan “The deficiency of individual rights and the quest for community protection” 2008 *THRHR* 415-437.

² *Ford v Quebec (Attorney-general)* 1988 2 SCR 712 748-749 par 39 and 40.

³ *Yniguez Arizonans for English* 42 F 3d 1217 (9th Circuit 1994).

⁴ 1231.

⁵ 1232.

⁶ This is increasingly recognised in legal instruments. See *eg* 4(3) of the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992); a 14(1) and (2) of the United Nations Declaration on the Rights of Indigenous Peoples (2007); a 28(1) Indigenous and Tribal Peoples Convention (1989) Convention 169 of the International Labour Organisation; a 8 of the European Charter for Regional or Minority Languages (1992) and a 14 of the Framework Convention for the Protection of National Minorities (1995).

⁷ An advanced law that meticulously provides for this is the Belgium Law known as the *Taalwet Bestuurszaken* (Language Act of Administrative Affairs) of 8 July 1966.

⁸ Rubio-Marin “Language rights: exploring the competing rationales” in Kymlicka *et al* (eds) *Language Rights and Political Theory* (2003) 52 65.

meaning of these rights being explained to such persons, followed by their making informed choices and then exercising their rights by way of communication through the medium of their preferred language. In consequence, the right to be tried in a language that the accused (best) understands, to testify in his preferred language and to receive interpreting services are increasingly being recognised.⁹ Hence, although it is true that the right to be tried in a language that one (best) understands is not a language right *strictu sensu* but an element of the right to a fair trial,¹⁰ it is as true that the right to a fair trial is dependent upon optimal communication through the medium of the language that the accused best understands. To that end the necessary facilities will have to be provided so that criminal trials can be conducted in the language of the accused (defendant) and in civil trials in the language of the litigants.¹¹ The same holds true for the rights of witnesses (among whom the victims of crime usually count) whose participation in trials (which is a precondition for a fair trial) can meaningfully take place only through the medium of their preferred language.

Welfare rights – second-generation rights – such as the right to public health are obviously also dependent on meaningful communication between the rights-bearers and the organ of state in question. The right to public health care would for example be meaningless in many instances if one is not able to communicate properly with the medical practitioner in question. It is against this background that the contemporary Canadian law on this question should be understood. Duty accounting for the dependence of healthcare rights on effective communication between patient and medical practitioner it provides for measures ensuring that healthcare services are provided on the basis of communication in the language of the patient.¹² In general, language difficulties will create big obstacles of access to many of the benefits provided by the state – housing, water, food, social grants, etc – if people who apply for these benefits do not understand the language/s used

⁹ The Belgium *Wet op het Gebruik der Talen in Gerechtszaken* (Act on the Use of Languages in Judicial Matters) of 15 June 1935 provides for an elaborate system that assures that trials be conducted in the language of the accused (defendant). In Canada s 19(1) of the Charter of Rights and Freedoms of 1982 stipulates that either English or French may be used by any person in, or in any pleading in or process issuing from, any court established by parliament. As to the use of official languages for evidence, s 15(1) of the charter provides that every federal court has, in any proceedings before it, the duty to ensure that any person giving evidence before it may be heard in the official language of his choice, and that in being so heard the person will not be placed at a disadvantage by not being heard in the other official language. Under s 15(2) of the act these courts also have the duty to provide interpreting services in any court proceedings whenever requested.

¹⁰ Accordingly Cardo “Regional minority language use before judicial authorities: provisions and facts” 2007 *JEMIE* 14 states that the right to an interpreter is not a language right in the first place, seeking to afford tolerance, protection or promotion of any language or any linguistic identity. It does not independently value the language of the accused. Its rationale lies somewhere else – namely in securing a fair trial for the purpose of which effective communication is required.

¹¹ It is precisely to that end that a 9 of the European Charter for Regional and Minority Languages of 1992 requires state parties to establish facilities that enable trials to take place in the region of minority languages of the accused, litigants and parties to administrative disputes.

¹² S 19(2)(b) of the Regional Health Authorities Act, RSNB 2011, c 217 provides that health services to members of the public shall be provided in the official language of their choice through the regional health authority’s network of health establishments, facilities and programmes. S 33(2)(a) of the Official Languages Act, SNB 2002, c O-0.5 provides that when establishing a provincial health plan under the Regional Health Authorities Act, the minister of health shall ensure that the principles upon which the provision of health services are to be based include the delivery of health services in both official languages in the province.

in the forms or are required to complete the forms in a language over which they do not have command.¹³

Rights that are not at first sight associated with acts of communication such as the rights to dignity, equality, the right against unfair discrimination, the rights against violence, the right to privacy and freedom of movement are all in many respects critically dependent on communication through language. Especially when they are under threat, the rights-bearer's first and almost natural defence of the right is through the medium of his or her own language.

These observations about the role of language clearly reveal that language is not marginal or accessorial in the exercising of rights; on the contrary, language is a precondition – a *conditio sine qua non* – for the actual existence of rights, that is, for rights to be actually exercised. Situations in which communication through language would not be essential for exercising rights might be conceivable. These, however, would be the exception, not the rule. Hence a dispensation of rights is largely premised on the meaningful communication through language between rights-bearers and duty-bearers, revealing that language occupies a fundamental position as the precondition and foundation of basically all rights. On close analysis, therefore, language is a meta-entitlement. No other right can meaningfully exist without it and all rights are dependent on and rooted in it. Viewed against this backdrop, the meta-entitlement to language is a pre-eminent right, as all other rights are dependent upon it. A system of (human) rights that does not entail the rights-bearers being able to exercise their rights through the language they command best is quite clearly deeply flawed.

3 *A prerequisite for democratic politics*

By speech, Aristotle noted, associations of men are distinguished from flocks or packs in which animals unite.¹⁴ Language is the essential prerequisite for democratic politics, that is, for citizens to participate in joint control over their commonwealth.¹⁵ Absent (a) common language/s that enable everyone to engage in political discourse it is obviously impossible to have meaningful interaction and to take care of the commonwealth, which lies at the very heart of democratic government and politics. Deliberative democracy presupposes that people share the same language.¹⁶ Therefore establishing a common language of public deliberation can be seen as one of the pre-conditions for genuine inclusive democracy.¹⁷ The importance of language for democracy in contrast to its lesser importance in authoritarian regimes harks back to the concurrent emergence of rhetoric and democracy in classical Greek society.¹⁸

From a democratic point of view all citizens should be placed in the best possible position to participate on an equal footing in democratically deliberating and deciding on all matters of the commonwealth. Therefore it should be clear that

¹³ Rubio-Marin (n 8) 65.

¹⁴ Barker *The Political Thought of Plato and Aristotle* (1947) 270.

¹⁵ See in this regard my discussion on language as a crucial *res* of the *res publicae* in Malan *Politocracy: An Assessment of the Coercive Logic of the Territorial State and Ideas around a Response to it* (2012) 290-293.

¹⁶ Patten and Kymlicka "Introduction: language rights and political theory: contexts, issues and approaches" in Kymlicka *et al* (eds) (n 8) 1-51.

¹⁷ Patten and Kymlicka (n 16) 13-15.

¹⁸ Aristotle *The Art of Rhetoric*, translated with an introduction and notes by Lawson-Trancred (1991) 3.

politics would be most participatory and democratic when it is conducted in the language of the people.¹⁹ By the same token a common language may be regarded as the natural basis of socio-political association.²⁰ Hence, a multilingual society seems to present a serious challenge for democratic politics. If the language of one community in a multilingual state is not used (or prevented from being used) in political deliberations in such state it might severely constrain the democratic participation of the speakers of that language. Such people are not at liberty to use their own language/s on par with those whose languages are used for political deliberation and decision-making.²¹ They are disadvantaged by not being able to participate as freely as those whose mother tongue is being used, to engage in the democratic discourse, thus severely diminishing the democratic quality of the political order. This is even truer when there is a shift away from a merely vote-centric to a discussion-centric deliberative model of democracy in accordance with which language has become even more essential for democratic politics.²² Hence, in a multilingual political order the preference of one language for conducting government and politics to the exclusion of others can aptly be regarded as discriminatory, exclusionary and unjust, placing those whose languages have not been chosen – usually politically non-dominant minorities – at a disadvantage. Such people are forced to adopt the dominant language as their own, thus sacrificing their linguistic identity and assimilating into the majority, or else face exclusion from participation in politics.²³ This state of affairs can be rectified only when the political dominance by dominating linguistic elites is lifted, and all languages are used, thus removing the reason for giving up one's own language in favour of a dominant language.²⁴

Selecting the preferred language or the mother tongue of only one community and excluding the languages of other communities in political deliberation and decision-making would secure this preferred language as a basic *res publica*, that is, as one of the common public goods binding them together in the political order, whilst denying it to the latter; those whose language is used for political decision-making are enabled to assume the capacity of actual citizenship through linguistically unrestrained participation, while the others, whose participation is constrained, are excluded or at least hampered from actually practising their citizenship through active participation;²⁵ it would establish factional rule for those conversant with and preferring the preferred language over, and to the detriment of, those who do not prefer or are not fully conversant with it. Such constitutional arrangement would obviously be inequitable and undemocratic.²⁶

The most extreme statist answer to a multilingual situation, particularly prevalent in the era in the centralised territorial state, comes in the guise of programmes

¹⁹ These remarks correspond with those made by Patten and Kymlicka (n 16) 10.

²⁰ See in general the discussion by Barnard *Herder's Social and Political Thought From Enlightenment to Nationalism* (1965) 142 on the views of Herder.

²¹ Nettle and Romaine *Vanishing Voices The Extinction of the World's Languages* (2000) 173.

²² Patten and Kymlicka (n 16) 13-15.

²³ See the observations of Patten and Kymlicka (n 16) 16.

²⁴ See in this regard the observations made by Nettle and Romaine (n 21) 173.

²⁵ This would particularly be the case if we subscribe to an active form of citizenship in terms of which citizenship is not only a legal status but rather, and much more significantly, refers to active participation in the governing of the polity, something that was subscribed to very fervently in classical Greek politics, in particular by Aristotle. Aristotle (n 18) Bk III, ch 13 131; Bk III, ch 1 103; r Bk III, ch 5 112.

²⁶ See in general my discussion on language as *res publica* in Malan (n 15) 290-293 more in particular 291.

of state building – masquerading as nation building.²⁷ According to this approach one (the dominant) language is selected as the preferred language of the state and used as the sole language in all public affairs (and in extreme cases also as the sole language in the private domain). That language would be harnessed to impose a statist identity in the image and sound of the dominant faction within the territorial state. Accordingly, speakers of the non-dominant languages (members of non-dominant linguistic communities) are compelled to abandon their own language (and similar particular characteristics and values) in order to be assimilated into a statist identity in accordance with the dominant forces within the territorial state.²⁸ This would be an inexcusable affront to the personal identity of those belonging to non-dominant communities in favour of the community/ies that dominate the state. This is incongruent with what genuine democratic politics would demand. A true democratic order would require the constitutional order to be constructed in a way that reflects the varied linguistic as well as cultural and religious characteristics of the multi-communal population, and not in accordance with the demands of the dominant (linguistic) force within the territorial state. Accordingly, the language of every linguistic community would be afforded equal worth, and every language would qualify as a fundamental public good of the community in question, and therefore as a language serving as medium of democratic politics and government over the commonwealth of the relevant community.

A language of restricted scope should not pose a stumbling-block in the exercise of one's citizenship and to joint government of the commonwealth. On the contrary, it would be the means that enable the members of such community to exercise their citizenship and to participate in genuine democratic politics and joint government. This would become possible specifically within the confined ambit of culturally, linguistically and territorially limited *habitative* communities: these are cultural and/or local communities in which people live their daily lives, which are very often homogeneous in linguistic terms.²⁹ Consequently, a more dominant or global language would not be required at all for conducting the government and politics of the state. By using without restraint and inhibition their own mother tongue, people would be capable of having an impact on the political discourse, and thus to assume the responsibility of citizenship in the full sense of the word and as such be able to engage in democratic politics and participate in joint government.³⁰

Also from another perspective there is a close affinity between democracy and the actual public use (and by implication the promotion) of languages in a multilingual state. Democracy (in the modern state) is dependent on a vigorous civil society. In its turn a functional civil society consists of a galaxy of vigorous and articulated formations of people in all spheres, articulating their views and negotiating their interests. These civil society formations occupy the space between the individual and the state and also play a crucial part in safeguarding freedom and protecting individuals against a potentially overpowering state (government).

²⁷ Malan (n 15) 127-154.

²⁸ There is a long and dreadful history of statist policies in terms of which a dominant language is chosen as the single language of the state and enforced against minorities communities whose languages are marginalised or even forbidden, if not generally then at least for public use such as in all education, the courts of law and communication with the state. See in general De Varennes *Language, Minorities and Human Rights* (1996) 10-23.

²⁹ For a discussion of the term “habitative community”, see Malan (n 15) 273 ff.

³⁰ See also in this regard Rodrigues “Language and participation” 2006 *California Law Review* 687-720 ff, who also argues for politics to be conducted on mid-level cultural and social institutions that structure most people's daily lives, thus making political discourse in one's own language possible.

In the absence of such intermediary formations of civil society individuals find themselves in a precarious position against an overbearing and potentially corrupt and authoritarian government. Individuals in an atomised situation – each one only fending for him or herself – devoid of the empowering presence of organisations of civil society are easily cowed, intimidated and silenced by a government (enlisting the power and force of organs of state as well as the force of majority support), thus also suppressing democratic discourse and weakening the very democratic quality of the political order itself.³¹ Organised civil society provides indispensable protection for otherwise individualised persons against an overpowering state. Linguistic (cultural and other) communities, forged and held together by a common language, provide a congenial environment for a healthy civil society, thus playing a crucial part in democratic politics. Moreover, linguistic communities, arguably more than other communities, promote even more diversity by reason of the fact that they channel (political) discourse through a different language, thus articulating (the same or new) views and interests with distinctive slants, feelings and meanings, not present and articulated in other languages. In this way minority languages in a multilingual state possess valuable inherent democratic capital that could enhance the democratic quality of the political dispensation, providing at a stroke on the one hand an important infrastructure for civil society (formations) and protecting individuals against an overpowering government, and, on the other hand, enhancing the democratic discourse in a distinctive way only allowed by the expressive capabilities of the language of the linguistic community in question.

4 *A marker of identity, source of social solidarity and an autonomous and trans-generational artefact (under on-going construction)*

In dealing with the issues announced in the above heading, I will begin with a concise discussion (and some of my own comments) of the insights on language by the German philosopher Herder (1744-1803). Then follows a discussion of the views of selected contemporary scholars and jurisprudential dicta, leading eventually to my own analysis, which centres largely on written language as a continuous, autonomous and trans-generational artefact. Some preliminary observations are then made on how the law should be responding in order to account for the linguistically related interests dealt with in this section.

In the thinking of Herder we find the first comprehensive account of the place of language in society. Herder's thinking is as important now (if not more so) as it was in the days when it was first articulated back in the eighteenth century.³² In Herder's view language is at the very core of the human condition. It was the crucial factor distinguishing humankind from the animal world and for defining humanity. Unlike the instinct-rich animal world, humans are particularly poor in instinct, yet endowed with language that must be learnt and mastered. It is solely through the mastery of language, and not through the inheritance of instinct, that human beings assume

³¹ See in this regard the discussion in Malan (n 15) 151-152 with reference to the views of Tocqueville.

³² See in general Barnard (n 20). It used to be in vogue at one stage to portray Herder as a right-wing thinker, and even as one of the early precursors of National Socialism. There is no better rebuttal of this slur than the thinking of Herder himself, who as a pure humanist pleaded for the recognition of all cultures and languages, also those outside Europe, denounced the slave trade and Western colonialism, which were the order of the day at his time. Herder also advocated an all-inclusive humanity on the basis of the equal recognition of all cultural and linguistic communities, which he regarded to be of equal worth and equally worthy of respect.

a particular identity and culture emanating from the language(s) within which they had grown up and had managed to master. That command of language allows one to participate in (human) culture – and in particular in the culture/s of the linguistic community or communities that people form part of. Without language individuals remain isolated, at best roaming at the margins of genuine human communal life.

Language is the central marker of communal and individual identity, the natural basis for organising the socio-political order and the foundation for a universal humanity based on the equal recognition of each linguistic community³³ (modern and traditional alike). Precisely for that reason the destruction of a linguistic community is a particularly grave abuse which in one blow not only destroys the (linguistic) community in question as such but also inflicts harm on humanity in general, which is made up of linguistically based communities that together constitute universal humanity. Hence Herder was horror-struck by Western colonial ravaging of colonised communities, which in his view constituted precisely such a double-stroke against the ravaged colonised communities and of (universal) humanity.³⁴

Language is the medium through which humans become conscious of their inner self, and at the same time it is the key to their understanding of their social relationships. Language, at least in part, defines the individual person and also defines what he or she is not. It is also the primary factor forging a single community over generations with the thoughts, feelings and prejudices of past generations of the same linguistic community being revealed to the present (members of) such community through basically the same language, which previous, present and future generations share. This, one should highlight, is particularly true for written language. Written language records the feelings, experiences, consciousness and views of the previous generations and transmits that to future generations. The language in question (especially in its recorded written form) ensures the continuation of that linguistic community for posterity. As Herder states, language is thus the *organ of social activity and co-operation*, the bond of social classes and the means for their integration.³⁵ Hence it is at the same time the sphere of co-operation between its biologically living members at any given time as well as a partnership of generations, comprising previous and later generations.³⁶ In this way language embodies the living manifestation of historical growth and the psychological matrix in which people's awareness of their distinctive social heritage is aroused and deepened. The cultural community (volk or nationality) is therefore made possible – that is, created and sustained by the shared language.³⁷ When one language that is passed on (in evolving form) from previous to later generations, is replaced by another language, the nationality – or, rather, the cultural identity – that was defined by and expressed through the replaced language ceases to exist, and the old cultural community loses its identity as it is pushed aside or assimilated by another. Humanity as such also suffers as a result of the departure of the deceased language and its community.

Cultural communities, in Herder's thought, provide the natural divisions of humankind, each endowed with its own language, which is the cultural community's most precious possession. Language for Herder was not something detachable from

³³ Barnard (n 20) 97-102; 145.

³⁴ Barnard (n 20) 101-102.

³⁵ Barnard (n 20) 58.

³⁶ Barnard (n 20) 71.

³⁷ This is the crux of Herder's argument. For Herder (Barnard (n 20) 55) language was also the most natural and indispensable basis of socio-political association.

the cultural community but the very embodiment of a cultural community's (volk's) inner being, without which it ceased to exist.³⁸ Language is as much the embodiment of the soul or character of the cultural community as it is the expression of an individual's unique personality. By forsaking it, a cultural community destroys its very self, since language and the national consciousness to which it has given rise and is sustaining are inseparably joined.³⁹

Language to Herder was the criterion by means of which a group's identity as a homogeneous unit can be established. Without its own language, a cultural community is an absurdity, something that is incapable of existence. It is simply nothing – a *non-existent* (an *Unding*, as Herder described it in German). It is a contradiction in terms. Neither blood and soil, nor conquest and political fiat can engender that unique consciousness that alone sustains the existence and continuity of a social entity. Even if a cultural community does not have or loses its own state it remains intact provided it maintains (and cultivates) its distinctive linguistic traditions.⁴⁰ Hence whereas humankind is essentially marked by the phenomenon of language, and in practical terms consists of the totality of linguistic communities, each cultural community is demarcated in accordance with and characterised by its own language.⁴¹

Herder's view that a cultural community (*volk*) without its own language is an impossibility is open to question. Examples might be cited of communities such as the Serbs, Irish and the Scots, who have (largely) lost their languages, yet still somehow manage to maintain a distinctive sense of their own cultural identity. This point should be conceded. It is as true, however, that losing a language, as in the case of the Scots and the Irish, represents a major loss of one of the basic features of cultural identity. This loss makes the communities in question certainly less pronounced, less distinctive and manifestly poorer in their capacity for self-expression than they would have been had they retained their languages. Although it might not be accepted that language is the critical precondition for the existence of a cultural community, as Herder maintained, it remains true to say that it is still a crucially important definer of a cultural community and a force for cohesion within such a community, if not on its own then in concert with other defining markers.⁴² Language is a concrete expression of community⁴³ and is a binding force between its people, capable of motivating trust, co-operation and mutual sacrifice.

³⁸ Barnard (n 20) 142.

³⁹ Barnard (n 20) 58.

⁴⁰ Barnard (n 20) 57-58.

⁴¹ It should be glaringly obvious that Herder did not advocate any form of state nationalism in accordance with the motto of *one state, one nation, one language*. This view proceeds from the state as the moving factor in politics and constitutional law. In terms of this approach the state comes first, and all other factors, such as language and culture, should be adapted in order to suit, secure and promote the state. Herder subscribed to the exact opposite. For Herder the languages and the linguistic communities are primary and politics and public law should be adjusted in order to fully accommodate these languages and communities thus also allowing for an all-inclusive humanity comprising all these communities.

⁴² Without language, communities often have tremendous problems of self-definition and expression, in contradistinction with communities whose language is the self-recognised core of the cultural identity. This, for example, is particularly true for the Basques as opposed to the Catalans, with the former, owing to the weakness of the Basque language (*Euskara*) experiencing huge difficulties of self-definition and expression, as opposed to the latter, who define and express their cultural identity around the alluring vibrancy of Catalan. See in this regard the discussion by Conversi *The Basques, Catalans and Spain* (1978).

⁴³ Green "Are language rights fundamental?" 1987 *Osgoode Hall Law Jnl* 639 659.

It is an aspect of communal identity and provides a basis for belonging⁴⁴ and the possibility of social solidarity based on shared linguistic traditions.⁴⁵ Réaume holds a similar view. The gist of her argument is that language has intrinsic (thus not merely instrumental) value to the members of the cultural community concerned, and that such intrinsic value is the key to justifying the special character of minority cultural rights.⁴⁶

The loss of a language therefore means loss of a primary characteristic of the community concerned. Hence, if the community would have retained its language, it would have been something different, more splendid, richer in content and more capable and robust in self-expression than it is without it. Loss of language might therefore not necessarily spell the demise of a cultural community, but it is most certainly always a serious loss, enfeebling such cultural community and thus placing it in a more precarious position than it would have been in had it retained its language. Since language also serves as a basis of social cohesion at any given time, and serves, as Fishman points out, as the bond between generations, what is lost when a language is lost is the sociocultural integration of generations, the cohesiveness, naturalness and quiet creativity, the secure sense of identity (even without a politicised consciousness of identity) and the sense of collective worth of that community and a people.⁴⁷

Although therefore arguably it may be conceded that language does not (always) define identity in the pure Herderian sense, or might possibly not even be an important factor in defining the identity of some cultural communities, language is clearly more than a matter of utility, mobility and political expediency⁴⁸ or merely a matter of communication.⁴⁹ Languages are not merely an innocent means of communication. They stand for or symbolise peoples, *ie* ethnocultures. They are valid and precious markers of cultural belonging, behaviour and identity.⁵⁰ For many people it is a crucial aspect of self-understanding and social self-description. Like cultural membership, language membership provides individuals with a means by which they can understand their place in the social world.⁵¹ Language is a defining feature of identity, with many people identifying with their own (local) community of speakers in their common language. They are proud of their language and the cultural achievements expressed through it. They take pleasure in using the language and in encountering others who are willing to do so. They hope that the language community will survive and flourish into the indefinite future. They feel respected and affirmed when others address them in their language and denigrated when others impose their own language preferences.⁵² Hence Green, echoing Herder, stated that if one changes one's mother tongue for another, one in fact assumes a different identity and becomes a different person.⁵³ Thus Green declared: "In so

⁴⁴ Réaume "Beyond personality: the territorial and personal principles of language policy reconsidered" in Kymlicka *et al* (eds) (n 8) 271 283.

⁴⁵ Blake "Language death and liberal politics" in Kymlicka *et al* (eds) (n 8) 210 213.

⁴⁶ Réaume "Official language rights: intrinsic value and the protection of difference" in Kymlicka *et al* (eds) *Citizenship in Diverse Societies* (2005) 245-272.

⁴⁷ Fishman "On the limits of ethnolinguistic democracy" in Skutnabb-Kangas *et al* (eds) *Linguistic Human Rights: Overcoming Linguistic Discrimination* (1994) 48 60.

⁴⁸ May "Misconceiving minority language rights: implications for liberal political theory" in Kymlicka *et al* (eds) (n 8) 123 141.

⁴⁹ Blake (n 45) 213.

⁵⁰ Fishman (n 47) 51.

⁵¹ Blake (n 45) 213.

⁵² Patten and Kymlicka (n 16) 45.

⁵³ Green (n 43) 651.

far as such questions are intelligible, it may be true to say that if one's mother tongue had been Cree instead of English one would have been a different person and thus that language partly constitutes one's identity.⁵⁴

There are also strong jurisprudential statements in which the importance of language has been recognised in similar terms. In *Chapman v The United Kingdom*⁵⁵ the European court of human rights noted that there is an emerging international consensus among the contracting states of the Council of Europe recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle, in particular the Framework Convention for the Protection of National Minorities, not only for the purposes of safeguarding the interests of the minorities themselves but to preserve a cultural diversity of value to the whole community.

In *Ford v Quebec (Attorney-general)*⁵⁶ the Canadian supreme court stated that the importance of language is grounded in the essential role that language plays in human existence, development and dignity, and that language is a means by which people express their cultural and personal identity and sense of individuality. Language is the means by which an individual gives outward expression of his or her personal identity and the means by which a people may express its cultural identity.⁵⁷

Precisely due to the principal importance of language, struggles about regional and minority languages in the territorial state⁵⁸ are never only struggles about languages but also about identity. Debates about regional languages, it is observed, are never just debates over language. For language groups are almost also "national" groups, viewing themselves as not only having a distinct language, but also as forming a distinct "nation" within the larger state. These groups mobilise for self-government and language rights, which are part of a larger programme of sub-state nationalism. Debates over the status of regional languages are also debates over nationhood. For the minority language group, recognition of its language is experienced as a symbol of recognition of its nationhood. For the minority group, official multilingualism is yearned for in part because it is a symbol of, and a step towards, acceptance that it lives in a multi-nation state in which it is part of a partnership of two or more nations within a single state.⁵⁹

Written language adds a further dimension to the critical importance of language and therefore calls for specific attention. The literature of a cultural community gives recorded and thus durable definition and expression to such cultural community, expression in particular of its self-consciousness, in a way that oral expression, owing to its unrecorded and therefore much more transient and unstable nature, is not capable of doing. The literature which a cultural community produces over generations defines the cultural community in a (tangibly) objective way, something which oral

⁵⁴ Green (n 43) 651.

⁵⁵ (27238/95) 2001 ECHR 43 (18 Jan 2001).

⁵⁶ (n 2) 712 748-749 par 39 40; see also *R v Beaulac* (1999) 1 SCR 768 par 16-17

⁵⁷ (n 2) 712 par 40.

⁵⁸ My preference is for the term 'territorial state', since this provides a more reliable description of the state than does 'nation state'. It indicates that what is common to the population living within the boundaries of the state is merely the fact that they share a common space and not necessarily any common bonds of language, culture, religion, etc. The term is also preferred by a host of scholars in a variety of fields. See in this regard Malan (n 15) 8 n 38.

⁵⁹ Patten and Kymlicka (n 16) 5. In South Africa this is borne out by the fact that Afrikaner nationalist leaders in the negotiations that led to the formation of the Union (the Union of South Africa) in 1910 invested tremendous energy into ensuring equal recognition for Afrikaans (Netherlands) alongside English. See in this regard Van den Heever *Generaal JBM Hertzog* (1943) 267-269.

language is not capable of. The evolving literature spans and outlasts generations, thus assuming a specifically corporeal and almost autonomous existence, in part distinct from the living members of the cultural community themselves at any given moment. The corpus of literature of any given language is an artefact through which the cultural community in an evolving fashion continually defines and expresses itself as every new text – every new piece of literature – is added to the existing corpus. The evolving literature is the ever-developing artefact that embodies the cultural community in an objective way. The literature can be read and thus experienced by the current (biologically living) members of the cultural community (and by others who are conversant in that language), but, significantly, it can also be engaged with – read, discussed cited and critiqued – by the future generations of that community. In this way the ancestral generations of a cultural community, not only metaphorically, but in a strikingly literal and literary fashion, keep on living among the present generations of that community through the literature that they have produced. They do so very *literally* and thus prominently because they do it in a *literary* mode – through the literature they had created – thus participating in the on-going discourse and life of the present (biologically living) generations and thus also, even after their death, through their literary contributions. In this way they are actively still forming part of the same cultural community together with the biologically living members of that community and the generations still to come. To speak of a bond between generations of a cultural community is therefore not only a metaphorical exercise but a description of an actual literal phenomenon that owes its existence to the continuing literature of a cultural community. Considering the importance of literature in the continuing bond that keeps successive generations in discursive engagement with one another, the portrayal of a cultural community in an organic fashion that spans successive generations is also much more than mere metaphorical speech. Indeed, the fledging language, existing in the on-going literature, is the very embodiment in an objective and thus experienceable sense of the actual continuing life of the cultural community from generation to generation. Each individual who has received that language from previous generations and is versed in that language by fellow members of that community, as well as in a broader sense all generations, adding on to the literature of the language of the cultural community, contributes towards and participates in the life, well-being and continuation of that cultural community. They thus still form part of the same community.

At a particular point in time the cultural community exists in its living members, who are occupying particular places and are engaging in their daily activities. However, in the long run over the course of generations – trans-generationally – the community essentially lives in its language. Trans-generationally the cultural community exists if not exclusively then mainly in the language, more in particular the language in the guise of the evolving corpus of literature of the language concerned. Hence there is much truth in the Afrikaans and Dutch saying: “De taal is gansch het volk” in Dutch and “die taal is gans die volk” in Afrikaans (English: the language *is* the cultural community). Precisely for that reason legal measures designed to protect the language as such in contrast to the (biologically) living individuals or communities consisting of biologically living individuals are not only conceivable but necessary, because on close analysis such measures seek to protect not merely the community in its limited generational sense consisting of the

living members at any given moment, but community in its fullness – in the trans-generational sense as described.⁶⁰

An oral language can also be rich in expressive capacity. Without literature, however, the products of such creativity remain unrecorded and might easily wither away in a way that numberless oral languages have already quietly faded away. The oral contributions of the previous and present generations of a community lacking its own literature do not create the literary artefact in the form of the corpus of literature in the same way as literary cultures do. Without the fledging literary corpus in which the creativity of the community is recorded and safeguarded, the contribution of the previous generations easily falls into oblivion. These contributions might still be there in the form of oral transmission (and possibly also in ancestral spirits), but in the absence of the *ipsissima verba* of the literary contributions of previous generations (existing in the literary corpus), these contributions lack the objective, corporeal and autonomous quality of the literary cultures. In the absence of the objective and autonomous existence in the literary corpus, the contributions of the previous generations – that what previous generations had allegedly said but never actually wrote – are inherently erratic, unreliable and their content entirely at the mercy of what the present generation says they entail. In the literary culture we continue to hear an author's own voice. However, in the oral culture in which the previous generations had spoken for themselves at the time when they were still alive but where, after their death, those who are living (have to) speak for them as they – the deceased – had never transcribed their thoughts into writing.⁶¹

In view of this, the trans-generational discourse is conducted, and thus the trans-generational community exists in a much more real sense than the oral-based community, through its evolving corpus of literature in the communal language shared by that community.

The kind of trans-generational conversation that is possible and that is in fact the essential characteristic of a literary culture can therefore not take place in an oral culture, as a literary corpus in which the contributions of the previous generations were recorded and safeguarded for posterity is not in existence here. The previous generations, owing to the fact that their thoughts were not recorded, do not maintain

⁶⁰ The European Charter for Regional and Minority Languages of 1992 is in large measure aimed at the protection of the (regional and minority) languages themselves in contradistinction to the language-related rights of individuals. This a 7(1)(a),(c) and (d) provide as follows in respect of the objectives and principles of the Charter: In respect of regional or minority languages ... the Parties shall base their policies, legislation and practice on the following objectives and principles:

a the recognition of the regional or minority languages as an expression of cultural wealth; c the need for resolute action to promote regional or minority languages in order to safeguard them; d the facilitation and/or encouragement of the use of regional or minority languages, in speech and writing, in public and private life.

The same can be said of certain provisions of the Law No 94-665 of 4 Aug 1994, JO 5 August 1994 in France the so-called *Loi Toubon*. See in this regard also discussion of Wexler "Official English nationalism: a French lesson" 1996 *Washington Law Review* 285 320.

⁶¹ Written language is also the basis of the rule of law, specifically in modern constitutional orders. See in this regard Malan "The rule of law versus decisionism in the South African legal discourse" 2012 *De Jure* 272.

an actual presence in this case. The trans-generational bond is therefore quite clearly much less in existence in this case.⁶²

As argued above, a language, especially a written language, assumes the nature of a continually created artefact over generations. It should remain under construction, as it is continuously being developed by each member of that community over the course of generations. If it does reach completion it also means the end of the actual existence of the cultural community itself. As soon as the artefact is completed – that is, as soon as the development of the language is concluded – the linguistic community also reaches its terminal stage. From then on the language community ceases to exist. It does, however, continue to live on in its concluded corpus of literature. From then on the linguistic community is a historical community existing in the form of a completed artefact, yet not alive anymore in the form of actually living members of the community still using, developing and refining that language – that artefact. In this respect there is a clear contrast between a literary language – a language with a corpus of literature – and an oral language. The former bequeaths a solvent inheritance in the form of its corpus of literature; the latter, however, not having recorded (inventorised) its assets, has none of this. It meets its demise silent and insolvent.

From this it should be clear that literary language cultures (communities with a corpus of literature in their own language) would experience language – and particularly their own language – very differently from oral cultures without a literary corpus. Events that might restrain (members of) a literary culture to write – to produce literature – in their own language, thus impairing the continuation of the literary corpus and loosening the trans-generational bond, are obviously a grave violation of the integrity of the written culture. To the oral culture it is of less consequence, if at all.⁶³ (In turn, there are eventualities of a different kind that might cause harm to orally based communities.)

The richer the scope and depth of the literature created by a cultural community, the more registers of language-use that literature is capable of serving. The more brisk and vibrant its expressive capacity proves to be, the healthier and wealthier is the language and the more culturally versatile and vigorous is its creator-community. Conversely, the weaker its expressive capacity, the fewer registers it is capable of serving and thus the more meagre is its literature and the frailer is that language and its community.

However, a cultural community needs spaces in the form of institutions to enable it to use, evolve, refine, expand and generally develop the various registers of the language of such a community: it must have schools and universities allowing for the use and refinement of the language in question in the registers of the full

⁶² I am not claiming that what was written has a purely objective meaning. It is still subject to interpretation, as the insights into hermeneutics clearly show. See *eg* Gadamer *Truth and Method* (1989) (translated by Weinsheimer *et al*) 267-377; Gadamer “Truth in the human sciences” (translated by Wachterhauser) in Wachterhauser (ed) *Hermeneutics and Truth* (1994) 25-32. Gadamer “What is truth?” (translated by Wachterhauser) in Wachterhauser (ed) *Hermeneutics and Truth* 33-46. However, interpretation of a text is not boundless. It is disciplined by the author of the text (and of course by the conventions of interpretation communities) and therefore does not allow for boundless “textlessness”, as is the case with oral transmission.

⁶³ For the difference for example between the experience of speakers of African (mostly oral) languages and the way in which Afrikaans is experienced by Afrikaners, see Malan “n Oorweging van die sosio-politieke kragte wat inwerk op die betekenis en toepassing van die diskresionêre taalklausule van die Suid-Afrikaanse grondwet” 2012 *Litnet Akademies* also available with an extended English abstract at <http://repository.up.ac.za/handle/2263/18928> (3-04-2013).

variety of scientific disciplines and scholarly endeavours; radio stations, television channels, theatres, libraries, publishers, etc. allowing for the use and development of that language in relation to public activities, including all artistic activities; courts of law enabling legal language to be used and developed; places of religious worship allowing for the religious (and theological) register of the language to be used and developed and generally all other institutions covering all forms of cultural and intellectual activity in the broadest sense of the word. When a language community lacks or is denied spaces – institutions – of this nature, it results in the following: first, denial of spaces and institutions, which impairs the freedom of expression of all members of such community. Secondly, such community is denied the opportunity to develop its language to the point where it is able to fulfil these functions or, if it had already developed these functions, it is denied the opportunity to retain and further refine and develop the language. It is important in this regard to remember that linguistic functions and registers (like language itself in general) simply falls into oblivion if it is not used.⁶⁴ It is simply forgotten. Denial of institutions therefore amounts to denial of the opportunity to retain and develop language registers and functions and therefore the language – the linguistic artefact – itself.

Thus viewed – and this is the third consequence of the denial of spaces and institutions – such impairment is similar yet more invasive than damage to the cultural heritage of a community such as the physical damage to monuments, statues, historical buildings, etc. It is more invasive since, as was shown, over the long term – trans-generationally – the linguistic community consists to a large extent of the corpus of its literature. Since the denial of spaces and institutions hampers the creation and evolution of literature, it impinges on the survival of the community as such or at least the versatility of the language in the form of the various registers of the language that are affected by the denial of institutions.

A legal order cannot safeguard the role of language as a creator and marker of identity, a source of social cohesion and as an autonomous trans-generational artefact only by providing for individual rights. Language can fulfil these functions only and a linguistic community will be able to maintain and develop itself only if the language itself is safeguarded and if the linguistic community is placed in a position to use and develop its language on a consistent basis for all possible functions of language use. This will be possible only if institutions and facilities that enable communal existence and thus the use of the language in question for all possible purposes are available. This would obviously require much more than what individual rights can account for.

5 *Inherent value – collective intellectual property of linguistic communities and humankind*⁶⁵

Each language individually is an on-going collective accomplishment that comprises and provides for its community a way of looking at and understanding the world. It is a source of knowledge and insight, a way of bringing to life all phenomena and a way of explaining and elucidating everything that a community is engaged in. As such it is a comprehensive complex of collective intellectual property. Each

⁶⁴ Nettle and Romaine (n 21) 53.

⁶⁵ With regard to the aspects dealt with under this heading see for example the argumentation in Crystal *Language Death* (2000) 35; Nettle and Romaine (n 21); Patten and Kymlicka (n 16) 1-51; Blake (n 45) 210-229; Réaume (n 44) 271-295; Boran “Global linguistic diversity, public goods, and the principle of fairness” in Kymlicka *et al* (eds) (n 8) 189-209; Réaume (n 46) 245-272.

language through its literature in each language register, through its poetry, drama, plays, etc as well as through all forms of oral communications provides the medium through which many art forms can be performed and conducted, thus allowing for the aesthetic capabilities of the language to be displayed to the benefit of the language community concerned.

What is true for each language individually also goes for all languages collectively. All languages together comprise the totality of worldviews and the total source-complex of knowledge and insight and ways of bringing to life all phenomena and ways of explaining and elucidating everything that humankind is engaged in through the spoken and written word. As such the totality of languages represents the total complex of collective intellectual property of humankind. All languages through the literatures in each language provides the totality of means through which all forms of art that manifest itself through language can be performed and/or produced and thus through which the aesthetic capabilities of that language come to life and are exhibited to the benefit of everyone understanding such languages.

Thus Crystal aptly stated that, in principle, each language provides a new slant on how the human mind works, and how it expresses itself in linguistic categories. Language, he notes, represents the intellectual wealth of the people who use it. Crystal quoted the famous American writer, Ezra Pound, who said the sum of human wisdom is not contained in any one language, and no single language is capable of expressing all forms and degrees of human comprehension.⁶⁶

Réaume stated that languages are intrinsically valuable. Languages are valuable as collective human accomplishments and on-going manifestations of human creativity and originality. Each language is a unique form of expression in its own distinctive way of framing and conceptualising the world. Like a living organism it evolves and adapts to the environment, often in strikingly imaginative ways that no individual could have predicted or directed. Languages also act as a repository of the history of a particular culture, its traditions, arts, ideas, etc.⁶⁷

Nettle and Romaine based their argument on an ecological premise and metaphor. They stated that linguistic diversity has scientific value, and thus called for the protection of all languages, including indigenous languages. The vocabulary of each language contains a wealth of knowledge concerning the things that each community has been engaging in and of the discourse within that language community that other languages might not have or at least do not have to the same extent.⁶⁸

Adding on to this, Boran highlights the artistic and aesthetic value and contribution of each language – what he refers to as the *aesthetic value argument* – as an additional ground for the preservation of linguistic diversity as being beneficial to the larger world community of human beings. There are many different languages and, as a result, many different ways of expressing views or emotions and of producing art.⁶⁹

Languages are only in part translatable. Because a language is unique, a translation from one into another language is never complete. There are always aspects unique to each language that makes it impossible to translate it in all its entirety, minuteness, and subtlety, and with all unique sensations that it arouses. Precisely in this lies a pivotal reason for the protection of each language. It is to the benefit of each linguistic community to do so. Moreover, it is also to the benefit of humanity

⁶⁶ Crystal (n 65) 35 51-53.

⁶⁷ Réaume (n 44) 283; See also Patten and Kymlicka (n 16) 45.

⁶⁸ Nettle and Romaine (n 21); see also the observations made by Boran (n 65) 196.

⁶⁹ Boran (n 65) 196.

as such, because if any specific language disappears it represents a loss of scientific and aesthetic value, a loss of a particular way of looking and understanding of the world and a loss of insight into and experiencing and elucidating phenomena, that existed in each language and that is never fully translatable. As Crystal pointed out, language is like a natural resource that cannot be replaced once it is removed from the earth.⁷⁰ It follows logically that multilingual abilities are obviously beneficial, since bilingual (or multilingual) individuals have permanently at their disposal two (or more) different perspectives on and understandings of large areas of life.⁷¹

The language of a particular community is therefore the way in which such community forms part of and participates in universal humanity. Language death represents an impoverishment of universal humanity. Therefore the protection of languages is a distinctive way of not only protecting the sense of identity, solidarity, sense of belonging etc. of the members of each such community; it also guards over the assets of humanity as such.⁷² Hence, humankind in general is impoverished whenever a distinct language tradition is destroyed.⁷³

There is close affinity between valuing any specific language, being the foundational substance of any specific cultural community, and universal humanity, comprising the full collection of all individual languages. The recognition and protection of each language as the authentic expression of the humanity of the linguistic community concerned is the prerequisite for the existence of humanity, which consists of the totality of languages of all communities together. This view of humanity, based on the recognition of each language and community, tolerates no policy of imperialism or programme of nation building that could be harmful to any community, specifically harmful to their languages. Neither does it countenance any convictions of group superiority that could do damage to the integrity of any community regardless of how small, primitive or peculiar such community might be or might be perceived to be, because that would run counter to the very notion of an inclusive humanity. Humanity defined in this way presents the basis for a comprehensive politics of recognition. This idea of humanity premised on the recognition of linguistic-based communities was at the root also of Herderian philosophy (and politics). For Herder each nation (more correctly, *volk* in the Germanic languages such as German, Dutch, Afrikaans, etc. but for which there is no suitable translation in English and French) conceived as a cultural community with its communal language, was an integral and indispensably valued part of mankind. Precisely for that reason Herder was one of the most outspoken critics of colonial subjugation, slavery and the slave-trade, which were indeed vigorously practised in his day. He regarded them as base crimes against *Humanität*.⁷⁴

Herder rejected any notion of identifying humanity with only one supposedly superior group or culture. There was no single culture to the exclusion of others that could claim to be the actual and authentic expression of humanity. For that reason he

⁷⁰ Crystal (n 65) 34. The eco-linguistic argument holds that preserving languages is part of the larger preservation of biodiversity as Keebe "Language policy and linguistic theory" in Maurais *et al* (eds) *Languages in a Globalising World* (2003) 47-58 says "the loss of a language is the permanent irrevocable loss of a certain vision of the world comparable to the loss of a plant or animal species".

⁷¹ Crystal (n 65) 35.

⁷² Thus Nettle and Romaine (n 21) 199 state that allowing languages and cultures to die directly reduces the sum total of our knowledge about the world, for it removes some of the voices articulating their richness and variety just as the extinction of any species entails sacrificing some unique part of the environment.

⁷³ Blake (n 45) 216.

⁷⁴ Barnard (n 20) 99-101.

frowned upon those who identified *Humanität* with European culture – something that was particularly prevalent in Herder’s age in the latter part of the eighteenth century. His denunciation was directed in particular to those who thought that in claiming cultural superiority for European civilisation they thereby acquired the right to subject non-European peoples to their cultural and political domination and economic exploitation.⁷⁵

Herder did not oppose slavery and colonial subjugation purely out of sympathy for the so-called *Noble Savage*. He opposed it mainly because he viewed practices of slavery and colonisation as the destruction of national self-respect and the denial of national diversity of the peoples subjected to these policies and thus at the same time a serious affront to *Humanität* in general. No nation (*volk*) in his view ought to be allowed to wield the sceptre over other nations by virtue of their supposed innate superiority. The political application of *Humanität* clearly presupposes the freedom of all nations (*volkere*). There can be no *Humanität* as long as there is one single slave left in the world. Herder’s emphasis on the unity of humanity, particularly evident in his later works, did not mean the abandonment of the principle of diversity. *Volk* was not sacrificed to *Humanität*; both continued to constitute indispensable complementary elements in one and the same process of socio-political development. As Barnard stated, the sort of international ‘unity’ that Herder had in mind was essentially the consciousness of common interests, needs, and purposes of diverse nations, each of which had a natural right to separate and independent existence.⁷⁶

6 Conclusion

A proper legal order cannot be designed if the interests that are to be protected are obscure. Questions around the facilities in the guise of rights, procedures, remedies and institutions that a legal order should be providing in whatever field of human existence must therefore always begin with a clear understanding of the legal interests that the facilities must respond to and cater for. That is why this analysis was conducted. In the field of language-related law there is an over-emphasis on individual rights, emanating from the misconception that language-related interests attach or accrue only to individuals. This, as this discussion has sought to show, is wrong. There are many legally protectable interests that cannot adequately be catered for by way of individual rights. Language-related interests often vest in a language community, which is not divisible into the individual interests vesting in the (individual) members of such community. Moreover, languages are in themselves also legally protectable assets. Individual rights are not up to the task of responding to these language-related interests. The crux therefore is that the interests pertaining to language relate to three clearly distinguishable (yet interwoven) aspects: the individual, the community and the language itself.

Ill-considered liberal approaches to law tend to place the emphasis almost exclusively on the individual and thus on individual rights – in the present context individual rights pertaining to language. This is clearly necessary, yet materially inadequate, because the interests relating to language also include the language community and the language itself. A much more comprehensive approach, going far beyond individual rights, is therefore required. This would require wider-ranging

⁷⁵ Barnard (n 20) 100-101.

⁷⁶ Barnard (n 20) 102-105.

and more comprehensive measures of a constitutional nature, arguably in the form of institutions and self-government for linguistic communities.

SAMEVATTING

'N ONTLEDING VAN DIE REGSBESKERMINGSWAARDIGE BELANGE MET BETREKKING TOT TAAAL

In die mate waarin die vraag na die regsbeskermingswaardige belange met betrekking tot taal aandag geniet, geskied dit grootliks op sterkte van die oortuiging dat belange rakende taal in individue setel en dat individuele regte derhalwe wesenlik toereikend is om alle belange rakende taal te beskerm. Ofskoon individuele regte in die taalkonteks ongetwyfeld belangrik is, is daar ten minste twee nie-individuele belange waarna individuele regte nie behoorlik kan omsien nie. Die eerste is die *taalgemeenskap*, in die besonder die gemeenskappe van moedertaalsprekers wie se gemeenskaplike identiteit in beduidende mate deur hul gemeenskaplike taal gedefinieer word en wat derhalwe 'n gemeenskaplike belang in hul taal het, welke belang nie individueel verdeelbaar is nie en nie na enige spesifieke individu, losstaande van ander herlei kan word nie. Die tweede belang is die *taal self*, wat noodwendig in stand gehou moet word ten einde sowel individuele as gemeenskapsbelange in die taal moontlik te maak. Hierdie twee nie-individuele belange kan alleenlik toereikend deur instellings en fasiliteite geakkommodeer word, wat na hulle aard anders as individuele regte is en dit te bowe gaan. Die hoofdoel en inhoud van die onderhawige bespreking is juis om hierdie nie-individuele belange rakende taal toe te lig. Daar word gevolglik aangevoer dat:

- taal 'n *meta-reg* is, dit wil sê die grondslag en bestaansvoorwaarde vir bykans alle individuele regte;
- die openbare en veral beraadslagende en besluitnemende aanwending van die taal van ten minste alle getal-gewys beduidende taalgemeenskappe in 'n staat 'n voorwaarde vir die beoefening van demokratiese politiek is;
- tale 'n bron van sosiale solidariteit vir (taal)gemeenskappe is, dat tale gemeenskappe definieer en meer nog dat tale, in die besonder geskrewe (letterkundige) tale, gemeenskappe oor geslagte heen met mekaar in kontak hou, bind en stabiliseer en dat elke letterkundige taal gevolglik die aard van outonome transgenerasie-artefakte aanneem wat deels outonoom van enige spesifieke (lewende) generasie bestaan. Gevolglik bestaan 'n taalgemeenskap in wese in die literatuur wat sy lede oor geslagte heen opgelewer het; en
- dat elke taal oor inherente waarde beskik en die aard aanneem van die kollektiewe intellektuele goedere van die betrokke gemeenskap en dat alle tale gesamentlik die aard van 'n kollektiewe stel intellektuele goedere aanneem wat die universele mensdom toekom.

'n Behoorlike begrip van hierdie volledige bestel van taalverwante belange is noodsaaklik vir die skeep van 'n werklik toereikende taalreg-bestel.