

Language Rights as Collective Rights: Some Conceptual Considerations on Language Rights

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ABSTRACT

Stephen May holds that language rights have been insufficiently recognized, or just rejected as problematic, in human rights theory and practice. Defending the “human rights approach to language rights”, he claims that language rights should be accorded the status of fundamental human rights, recognized as such by states and international organizations. This article argues that the notion of language rights is far from clear. According to May, one key reason for rejecting the claim that language rights should be considered human rights is the widespread belief that language rights are collective rights. In order to address this kind of objection, the collective character attributed to language rights must be carefully assessed, distinguishing two different views of what a collective right is.

KEYWORDS

Language rights, human rights, collective rights, public good.

In a recent article, Stephen May calls attention to the plight of language rights in the theory and the practice of human rights. Well-known as advocate of linguistic rights, he claims that these rights have been the “Cinderella” of human rights in the post-World War II age. According to his words, language rights are:

A ‘bastard stepchild’ in the wider family of human rights, roundly rejected as problematic and/or regularly ignored at worst, reluctantly acknowledged and desultory implemented at best. Even now, 60 years from the 1948 United Nations Universal Declaration of

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Human Rights (UDHR), *the notion that language rights might be accorded the status of a fundamental human right*, and recognized as such by nation states and supranational organizations, remains both highly contentious and widely contested (May 2011, 265, my emphasis).

May's standpoint is worthy of consideration as a fine example of the human rights approach to language rights and his article raises important questions about this kind of rights. First, what is the place of rights concerning language use in international human rights law, or how they fit into this developing legal framework. And second, why (and how) should these rights be recognized by both states and international organizations concerned with the protection and monitoring of human rights. This second issue amounts to ask for the normative arguments supporting the legal recognition of language rights as human rights.

Proponents of the human rights approach to language rights often conflate both issues, and it is not always easy to discern when they are speaking about *lex lata*, namely about the law as it exists, or when *de lege ferenda*, the law as it should be. This point is particularly important because it is difficult sometimes to know if they are talking about language rights as legal or as moral rights. However, both kinds of rights have different conditions of existence and conflating them does not favour a clear understanding of the matter under consideration.

May is more careful than usual and his arguments draw on debates in the interdisciplinary areas of political theory and international law (Dunbar 2001). Given my lack of expertise in international law, this article will focus on the side of political theory. I agree with May that it is striking the lack of sustained argument and theoretical interest in political philosophy about the issue of language rights and linguistic justice in general, at least until recently (for exceptions, see Kymlicka & Patten 2003; Van Parijs 2011). Indeed, my main concern here is not properly discussing normative arguments, but dealing with some conceptual issues involved.

A preliminary but important remark is needed, namely whether language rights are fundamental rights is a question to be answered by moral arguments (or arguments of political morality), and not just looking at the law. More precisely, following Leslie Green in a seminal article on language rights, I will assume hereinafter that "a legal right is a fundamental right if and only if it is at least partially justified by the fact that it protects a moral right" (Green 1987, 647).

Obviously, legal rights can be justified by a large variety of reasons, not all of them counting as moral reasons or that special kind of moral consider-

ations which are moral rights. But this sets an important condition for the discussion of language rights as human rights: we have to look for moral rights justifying, at least partially or in combination with other assumptions, the recognition and protection of language rights by international human rights law.

CONSIDERING LANGUAGE RIGHTS

As advocates of human rights approach to language rights usually do, May takes for granted that language rights are “a fundamental human right”. And they have coined the formula “linguistic human rights” to that effect (Skutnabb-Kangas & Phillipson 1995). There is much to say about the rhetorical effects –and political aims– to be achieved thereby. Of course, this approach seeks to attribute to language rights the aura of exceptional standing and urgency typically associated with human rights. As a result, what needs to be explained is why a basic human right has been neglected or weakly protected by national legal systems and international human rights instruments. So, the burden of proof is shifted towards the opponents of the just recognition of a fundamental moral human right.

However, it is far from clear what is meant by defining language rights as human rights.² In the first place, the concept of language rights itself has proved elusive and there is no agreement about its meaning and scope. At best, the notion is “at a relatively primitive stage of development” (Mälksoo 2000) and its precise content should be analyzed carefully. In this respect, Hohfeld’s analytical tools (claims, privileges, powers and immunities) can be helpful to come to grips with the concept of language rights, regardless of taking them as legal or moral rights.

One evident thing is the multifarious kinds of rights, or normative advantages, covered under the label “languages rights”. For that reason, talking of language rights as “a fundamental human right” is unfortunate, because it looks like a single unqualified right to use a language. Take two well-known examples. For instance, in criminal cases defendants have a right to be informed of the charges in a language they can understand (not necessarily their mother tongue), or the right to an interpreter paid by the state for translating criminal court proceedings and documents. In this case, we are speaking about the implications concerning language of a well-established fundamental right, the right to a fair trial. By contrast, enthusiastic advocates of human rights approach to language rights, like Skutnabb-Kangas and Phillipson,

2 In passing, it should be reminded that the very idea of human rights is fraught with difficulties and misunderstandings. As Joseph Raz remarked, “there is not enough discipline underpinning the use of the term ‘human rights’ to make it a useful analytical tool” (2007, 19). Yet they are currently regarded as an overriding moral concern.

have championed over the years the right to ‘mother tongue medium education’; namely, the right of linguistic minorities not just to have their languages taught in school, but used as vehicular medium for instruction in primary and secondary schools.

In these two examples, we have a right *stricto sensu* or a claim-right in Hohfeld’s terminology (1919), because the right of A to p is equivalent to B being under a duty to provide or to do p for A. In other words, if A has a claim against B that p, then B is under a duty towards A that B discharges if and only if p.

However, other significant language rights can be better understood as privileges or liberties. In that case, if A has a right to p, that means that A has no duty towards B (or towards anybody) to refrain from p. In Hohfeld’s terms, A’s privilege to p is just the fact that A is not under a duty not to p, but it does not imply that B (or anybody) has any duties to provide or facilitate p to A. Put simply, a privilege is the absence of a claim with the opposite content. For that reason we need to distinguish “naked liberties” from “protected liberties”. In the second case, we find a liberty in conjunction with a claim or claims operating like a sort of protective perimeter, according to the suggestion of H. L. A. Hart.

Take the case of freedom of speech. Being an important element of the classic civil and political liberties, well entrenched in national constitutions and international law, it is a crucial right regarding language use. Freedom of speech, as usually understood, covers both the content of communicative acts and the medium of expression, so it protects not only the views or opinions expressed but the choice of the language in which they are expressed too (Green 1991). Asserting A’s right to free speech means two things: 1) that A is at liberty to speak (or no to speak), not being under a duty no to speak; and 2) A has a claim towards other agents, namely that these agents do not interfere with A’s liberty to speak as she likes. Or, in what concerns us here, A is at liberty to choose the language for speaking and A has a claim against others protecting this choice from unwelcome interferences.

Nevertheless, we can consider claims as the central case without loss, because A’s liberty to do p is equivalent to the fact that A is not subject to a claim for not doing p. And a power is the normative capacity for creating, altering or waiving claims and liberties.

But we can make the same point in a non-Hohfeldian conception of rights. Take for example the well-known definition of rights provided by Joseph Raz in *The Morality of Freedom*:

‘A has a right’ if and only if A can have rights, and, other things being equal, an aspect of A’s well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty (Raz 1986, 166).

Two points are noteworthy in Raz's definition about the role of rights in practical reasoning. First, the clause "other things being equal" is often overlooked when using the definition, but in many circumstances other things are not equal. Briefly, rights are seen as defeasible reasons, not all-things-considered or overriding reasons, in practical reasoning. And second, rights are taken as intermediate conclusions between statements about the interests of the right-holder and statements about another's duty. In other words, the fact that a right exists is used, along with other premises, to draw conclusions concerning the duties of other people towards the right-holder (Raz 1984, 5). That allows us to contemplate rights in a dynamic way, as grounding different duties according to changing circumstances.

With this definition in mind, the analysis of language rights needs deal with four different aspects of any right: 1) who is or can be the holder; 2) what is the right's content, or what is a right to; 3) who is the addressee of the claim-right, or who bears the correlative duty; 4) and last but not least, what is the right's degree of stringency, that is, its weighing force as compared to competing considerations.

Of course, that last point depends on how we can justify the right. According to Raz's definition, we have to point out what is the interest or the good of the holder protected or promoted by the right in question. However, it is important in the present discussion on language rights because of the popular mythology about human rights, which takes them as extremely stringent or quasi-absolute rights. A related misunderstanding is the idea that all human rights have to be considered on equal footing or are equally stringent.

But no less crucial is the issue about the holder of language rights, when considering if language rights can be seen as human rights. Obviously, the contentious point turns on collective rights. By far, much of the discussion seems to turn on the first clause of the Razian definition: what kind of entities can have rights? Language rights are supposed to be a clear case of group rights or minority rights, and so taken as collective rights.³ That will be my concern here, because this is one key reason why many people are stubbornly opposed to recognizing language rights as part of human rights.

The identification of language rights with minority rights is apparent in May's work, for example. His argument in favour of language rights relies on Kymlicka's well-known justification of group-differentiated rights for cultural minorities (Kymlicka 1989, 1995), and language rights are understood as

3 More precisely, proponents of language rights take them as individual as well as collective rights (Skutnabb-Kangas & Philipson 1995, 2). For May himself the label of "group-differentiated rights" covers different possibilities regarding the holder of these rights: "they can in fact be accorded to individual members of a group, or to the group as a whole, or to a federal state/province within which the group forms a majority" (May 2011, 268).

minority rights, based on the moral significance of culture. This interpretation of language rights reduces the range of interests that could serve to justify language rights and reflects the culturalist bias of much of contemporary political philosophy (Toscano 2007). But the point to which we should pay attention here is the fact that taking them as collective rights can be misleading. Indeed, as May himself has remarked, one key weakness of the human rights approach to language rights has been the tendency to assume the notion of collective rights as unproblematic (May 2003, 106). For that reason, the collective aspect of language rights has to be carefully explained.

TWO CONCEPTIONS OF COLLECTIVE RIGHTS

For discussion on language rights, it should be noticed a crucial ambiguity concerning the notion of collective right. It matters to bear in mind a significant distinction made by important contemporary authors dealing with the issue. So, we can talk about two views on collective rights (Green 1991), depending on whether we mean by it either the holder of the right or the kind of good to which the holder is entitled to, and that means not mixing the first and second points in the analysis of rights aforementioned. Peter Jones has coined a useful terminology to express the difference between these two conceptions of collective rights, which he calls the “corporate conception” and the “collective conception” of collective rights (Jones 1999).

For the corporate conception, not only individual persons are right-holders because different kinds of social entities can have rights. So, collective rights are defined by who is the holder of the right, for example a social group. Naturally, talking about the right of a social group can be a way to refer to a right belonging to each individual within the group. Nevertheless, according to the corporate conception, collective rights are assigned to the group as such and not distributively to its individual members. For doing that, the social group has to be conceived as a single, integral entity, something like a sort of collective agent, capable of having rights and obligations of their own, different from the rights and obligations of individuals who make up the group.

To sum up, in the corporate view collective rights are regarded as the rights of collective agents. So, the crucial point for the discussion about them revolves around the first condition of the definition proposed by Raz (the capacity condition): whether collective entities, like linguistic communities for example, can have rights. It is the same kind of question often posed about whether foetuses, non-human animals or future generations can have rights.

It is often mentioned that collective entities can have legal rights. Corporations are the best example, hence the name for this conception. Under the law corporations are treated as artificial or fictitious persons (*persona ficta*)

and vested with legal personality of their own, namely with legal rights and duties. Two comments are pertinent here. First, from the point of view of the law a corporation is not a collection of individuals, but a “fictitious individual person separate from all the persons making up the sociological group” (Hartney 1993, 214). Of course, in a sociological sense corporations are roughly seen as a group of persons organized in a certain way around a division of labour, hierarchical roles, and procedural rules for taking decisions. But the legal point of view is different, dealing with the corporation as a single (artificial) person or right-holder. In that sense, corporate rights are not group rights or collective rights strictly.

In this regard, Michael Hartney has denounced a common fallacy that occurs when the sociological and legal views are muddled up considering collective rights, as in the following argumentative sketch: 1) Corporations and states have legal rights; 2) corporations and states are collective entities or social groups; 3) therefore, (some) collective entities or social groups have legal rights. Plainly, if the truth of conclusion depends on the truth of premises, it is to be noticed that the first premise is true in legal but not in sociological sense, while the second premise is true from a sociological but not from a legal point of view (Hartney 1993, 215).

And second, we are talking about *legal rights* of corporations, and for that we just have to look at the law. But our issue here are fundamental rights, that is, moral rights and not just legal rights. It is obvious that corporations have legal rights, but it is not at all obvious that corporations are endowed with fundamental rights; for that they should be regarded as having moral rights. However, assuming that only the life and well-being of individual human beings have ultimate value or moral importance, corporations cannot have moral rights. Moral individualism is a key aspect of human rights discourse. When speaking of human rights we usually think about fundamental rights for individual human beings, but corporations and other artificial legal persons are not human beings. Therefore, they cannot have human rights.

However, there is another sense in which we can understand collective rights, the “collective conception” in Jones’ terms. Accordingly, collective rights have to be considered not as the rights pertaining to collective agents, but as rights to a shared or collective good. In that conception, the holders of the collective right are individual human beings inasmuch as they share a common interest in a collective good. What is at issue here is the kind of good to which they are entitled, not who is or can be the right-holder.

Raz offers the most influential account of what a collective right is in this second view, according to which a collective right exists when the following three conditions are met:

First, it exists because an aspect of the interest of human beings justifies holding some person(s) to be subject to a duty; second, the interest in question are the interest of individuals as members of a group in a public good and the right is a right to that public good because it serves their interest as members of the group; thirdly, the interest of no single member of that group in that public good is sufficient by itself to justify holding another person to be subject to a duty (Raz 1986, 208).

This second conception of collective rights seems much more suitable to understand the language rights than the corporate conception. Linguistic communities typically lack the legal personality of corporations and, more important, they should not be considered as artificial persons with rights of their own. However, according to the “collective conception”, a language right is a right to a public good, but only individuals are entitled to that public good. The right is based on the interest of individuals in the public good, but unlike other rights the interest of each individual separately is not sufficient to justify the duty to supply the public good.

Indeed, languages meet the properties typically used for defining *public goods*: impossibility of exclusion, joint supply, and non-rivalry in consumption. Some brief observations are sufficient to explain why languages can be regarded as a public good *par excellence*. First, natural languages are accessible to anyone who wants to learn and use them. Second, the production and maintenance of any language requires the collaboration of many speakers but not all, since no speaker is necessary or sufficient for that. Third, languages exhibit non-rivalry in consumption to the extent that a speaker using the language does not detract at all from the use by others. On the contrary, languages display positive network externalities, as economists say: the more people use a language, the more useful it is for speakers, offering more communication opportunities and more linguistic goods and services available.

There are several advantages in this view of collective rights for discussing language rights. It fits in with the widespread intuition that numbers matter regarding languages. Furthermore, as they are claims to a public good, language rights can only generate imperfect duties, being highly sensitive to sociolinguistic circumstances. And, above all, it represents a sober, almost minimal, view of what a linguistic community is: a group of individuals sharing a common interest in a public good, without assuming anything more than this shared interest in using their language.

CONCLUDING REMARKS

As we have seen, the concept of language rights is not straightforward and requires extensive analysis and discussion if we want to better understand its content, scope and rationale. This article picks out one of these aspects: the collective nature attributed to language rights. For there is a good reason to address this issue in the context of the discussion about whether language rights are human rights. Plainly, the fact of being considered as collective rights seems to be a major objection to accept them as part of human rights. As May explains:

A key reason for this lack of wider discussion of promotion-oriented language rights for minority groups, and the related skepticism towards their recognition and implementation, lies in the normative understanding, post-Second World War, of human rights as primarily, even exclusively, *individual* rights (May 2011, 267).

But the terms of this opposition and scepticism need to be clarified taking into account that there is a crucial ambiguity in the notion of collective rights, as we have noted. If languages rights are seen as collective in the corporate sense, the scepticism to which May refers is well justified. Actual language communities do not fit the corporate agent model. Besides, if we talk about fundamental rights, we are looking for moral rights, not only legal rights. And, most importantly, the supposed moral rights of corporations, if they could have them, would be separate rights from and above the rights of individual speakers, leaving room for conflicts between corporate and individual rights or for imposing duties on individual speakers towards the language community taken as an artificial person.

Instead, much of the opposition loses ground if we take language rights as rights of individual speakers regarding the use of language as a collective good. As we have seen, this second view of collective rights presents some advantages in the discussion on language rights. One analytical advantage is to shift the focus of attention from the question about the rights' holder, and the longwinded discussions about what kind of entities can have rights, to look instead for the content of these rights, what interests they protect or promote, and the kind of duties generated by them. From a normative standpoint, it is a view in line with moral individualism, according to which only individual persons morally matter, while groups and corporations have moral relevance only insofar as they affect the good life and interests of individuals. At least at this point, one of the main reasons for scepticism about whether language rights are human rights can be discarded.

REFERENCES

- Dunbar, Robert 2001: “Minority Language Rights in International Law”, *International and Comparative Law Quarterly*, 50, 90-120.
- Green, Leslie 1987: “Are language Rights Fundamental?”, *Osgoode Hall Journal Law*, 25:4, 640-69.
- Green, Leslie 1991: “Two Views of Collective Rights”, *Canadian Journal of Law and Jurisprudence*, 4:2, 315-25.
- Hartney, Michael 1993: “Some Confusions Concerning Collective Rights”, in Will Kymlicka, ed., *The Rights of Minority Cultures*. Oxford: Oxford University Press, 202-27.
- Hohfeld, Wesley N. 1919: *Fundamental Legal Conceptions as Applied in Judicial Reasoning*. New Haven: Yale University Press.
- Jones, Peter 1999: “Human Rights, Group Rights, and People’s Rights”, *Human Rights Quarterly*, 21:1, 80-107.
- Kymlicka, Will and Alan Patten, eds. 2003: *Language Rights and Political Theory*. Oxford: Oxford University Press.
- Mälksoo, Lauri 2000: “Language Rights in International Law: Why the Phoenix Is Still in the Ashes”, *Florida Journal of International Law*, 12:3, 431-65.
- May, Stephen 2003: “Rearticulating the Case for Minority Languages Rights”, *Current Issues in Language Planning*, 4:2, 95-125.
- May, Stephen 2011: “Language Rights: The ‘Cinderella’ of Human Rights”, *Journal of Human Rights*, 10:3, 265-89.
- Raz, Joseph 1984: “Legal Rights”, *Oxford Journal of Legal Studies*, 4:1, 1-21.
- Raz, Joseph 1986: *The Morality of Freedom*. Oxford: Oxford University Press.
- Raz, Joseph 2007: “Human Rights Without Foundations”, *University of Oxford Faculty of Law Legal Studies Research Paper Series*, Working Paper No. 14/2007, 1-20.
- Skutnabb-Kangas, Tove & Robert Phillipson, eds. 1995: *Linguistic Human Rights: Overcoming Linguistic Discrimination*. Berlin: Mouton de Gruyter.
- Toscano, Manuel 2008: “El derecho a la legítima defensa de la lengua. Una discusión normativa”, in José Rubio-Carracedo, Ana M^a Salmerón and Manuel Toscano, eds., *Ética, ciudadanía y democracia*. Málaga: Contrastes (Suplemento 12), 203-33.
- Van Parijs, Philippe 2011: *Linguistic Justice for Europe and for the World*. Oxford: Oxford University Press.