

ARTICLE

Not My Language, Not My Problem: The Relegation of Pacific Languages to the Private Sphere

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All Pacific languages in New Zealand suffer substantially from signs of language loss and are at risk of being lost completely if this decline continues. This article explores the reasons for this loss, which not only has significant consequences on languages, but also on the well-being, identity and culture of Pasifika. In particular, the purpose of this article is to explore why the government is not effectively meeting the problem of Pacific language loss through affirmative action. The article argues that minority languages have been relegated to the private sphere, allowing the government to avoid maintaining and supporting minority languages. The focus of this article is on Pacific languages. Although Pacific languages are often grouped with te reo Māori into a “Māori and Pacific” category, te reo is an official language of Aotearoa, while Pacific languages are not offered the same level of official support. This article analyses the laws and rights surrounding language in New Zealand through a Critical Race Theory lens. It comes to the conclusion that these laws both uphold the public-private divide and strengthen racialised inequalities.

I Introduction

“A person who cannot speak their own language is thirsty, as if for water.” An Uber driver told me this some weeks ago. He had lived in New Zealand for 20 years and still felt this unrelenting thirst. He was concerned that his son would grow up without knowing his own language, as he was not being taught it in schools or exposed to it outside of his family.

This problem is all too common in New Zealand and it must be questioned why the government is not meeting this problem with positive action. The purpose of this article is to argue that the relegation of minority languages to the private sphere has provided the

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State with an excuse for not actively maintaining and supporting Pacific languages. Through a Critical Race Theory lens, I will argue that the laws and rights surrounding language uphold this public-private divide and reinforce racial inequalities.

Part II of this article discusses the steep decline in the use of Pacific languages, the reasons that this loss is significant, and the steps taken thus far to address this problem. Part III explains the liberalism theory of the public-private divide and how Pacific languages have largely been relegated to the private sphere. Part IV outlines the right to use and speak one's own language, as found in New Zealand's domestic law and in international law. Part V applies a Critical Race Theory lens to this right and identifies shortcomings with it. Finally, Part VI explores the history of the banning of Pacific languages.

II The Problem: Language Loss

A *Decline in the use of Pacific languages*

“Pasifika” is a term that encompasses those peoples from South Pacific nations and territories who live in New Zealand. This includes those who have migrated to this country, and those who were born in New Zealand and identify as Pasifika by ancestry or descent.¹ The definition of Pasifika is not constant and has shifted over time.² For the purposes of this article, I use the term “Pacific languages” to refer to the languages spoken in those South Pacific nations, with the exception of English as this is not a minority language in New Zealand.

All Pacific languages in New Zealand are suffering from language loss.³ Research demonstrates that there is a decline in the number of Pasifika in New Zealand who can speak their own language. For example, data from the 2018 census shows that 50.4 per cent of Samoans could hold an everyday conversation in Samoan.⁴ This is a decrease from 55.6 per cent in 2013 and 60.7 per cent in 2006.⁵ These figures become even more significant when observing certain demographics of Pasifika. In particular, New Zealand-born Pasifika are shifting from speaking Pacific languages to only English.⁶ Only 36.1 per

1 Airini and others *Teu Le Va—Relationships across research and policy in Pasifika education: A collective approach to knowledge generation & policy development for action towards Pasifika education success* (Ministry of Education, 2010) at 49.

2 At 50–51. I note that there is some controversy over the term “Pasifika” at a policy level as it can homogenise the Pacific nations and is demographically dominated by Samoans. See Tanya Wendt Samu “Pacific education: An Oceanic perspective” (2010) 1(1) *Mai Review* 1.

3 John McCaffery and Judy Taligalu McFall-McCaffery “O Tatou Ō Aga! I Fea?/Oku Tau Ō Ki Fea?/Where Are We Heading?: Pacific languages in Aotearoa/New Zealand” (2010) 6 *AlterNative: An International Journal of Indigenous Peoples* 86 at 86.

4 In 2018, census results showed that 92,058 out of 182,721 people who identified as Samoan can speak Samoan. Stats NZ “2018 Census ethnic group dataset” (30 June 2020) <www.stats.govt.nz>. Data set can be viewed by downloading the CSV zipped file “2018 Census ethnic group summaries (updated 14 August 2020)”; through the folder “Ethnicity-culture-and-identity-csv”; and opening the file “2018-census-ethnic-group-summaries-ethnicity-table4-csv”.

5 Stats NZ “2013 Census ethnic group profiles: Samoan” <www.stats.govt.nz>. At the time of publishing, this website has now been archived. PDFs of the census ethnic group profiles can be requested from info@stats.govt.nz. Archived data sets can also be generated from NZ.Stat <<http://nzdotstat.stats.govt.nz>>.

6 Komiti Pasifika ““Mind your language”: Our responsibility to protect and promote Pacific Islands languages in New Zealand as part of a National Languages Policy” (paper presented at the PPTA Annual Conference, Wellington, September 2010) at 3.

cent of New Zealand-born Samoans can speak Samoan.⁷ As the number of New Zealand-born Pasifika increases, the proportion of this group who can speak Pacific languages is also decreasing dramatically.⁸ Pasifika youth are much less likely to speak languages other than English, with research indicating that the ability of young Pasifika to speak a Pacific language is declining.⁹ The rate of language shift and loss is so marked that scholars predict some languages will not survive unless urgent steps are taken.¹⁰

B *Flow-on effects: importance of language*

Language is both intrinsically and instrumentally valuable, and the loss of languages has complex and damaging repercussions. Languages embody values and knowledge that give meaning and purpose to the people who speak them.¹¹ They are closely related to the well-being, identity and culture of both individuals and groups. This means that any group facing language loss “runs a very serious risk of losing its culture, identity and traditional values as well”.¹² Melenaita Taumoefolau discusses how people develop worldviews through language, stating: “Pacific worldviews are intimately connected to and reflected in the Pacific languages that Pacific peoples speak or understand”.¹³ Thus, the loss of languages or the shift to speaking only English has the consequence of a larger loss of worldviews and ways of thinking about the world.

The loss of language also has significant flow-on effects. Taumoefolau discusses the idea of in-betweenness, where New Zealand-born Pasifika are caught between two different societies and cultures.¹⁴ This in-betweenness can be caused or exacerbated by an inability to speak or understand Pacific languages.¹⁵ In-betweenness can lead to feelings of marginality and not belonging to a community, which negatively impact other areas of an individual’s life, such as education.¹⁶ In contrast, Taumoefolau asserts that bilingual Pasifika youth have a more solid emotional and social foundation.¹⁷ Not learning a Pacific language can also mean that young New Zealand-born Pasifika are less connected to relatives and elders in their communities who may not speak English.

C *Current attempts to address the problem*

There have been some attempts to address the problem of Pacific language loss, but these have been scarce and are often not far enough to make meaningful change. One positive step has been the provision of funding to set up preschool language nests, as well as

7 Stats NZ, above n 5.

8 Galumalemana Hunkin-Tuiletufuga “Pasefika Languages and Pasefika Identities: Contemporary and Future Challenges” in Cluny Macpherson, Paul Spoonley and Melani Anae (eds) *Tangata O Te Moana Nui: The Evolving Identities of Pacific Peoples in Aotearoa/New Zealand* (Dunmore Press, Palmerston North, 2001) 196 at 197.

9 McCaffery and McFall-McCaffery, above n 3, at 96.

10 At 86.

11 Hunkin-Tuiletufuga, above n 8, at 198.

12 Bernard Spolsky *Report on the Samoan language in the New Zealand educational context* (Department of Education, 1988) at 16.

13 Melenaita Taumoefolau “Respect, Solidarity, and Resilience in Pacific Worldviews: A Counseling Perspective” in Margaret Nelson Agee and others (eds) *Pacific Identities and Well-Being: Cross-Cultural Perspectives* (Routledge, New York, 2013) 115 at 118–119.

14 At 116.

15 At 116.

16 At 116.

17 At 117–118.

teaching Pacific languages modelled on Māori Kōhanga Reo.¹⁸ However, this initiative has not extended beyond preschool, with only few of these languages being formally taught in primary schools and high schools. The Ministry of Education has formulated a curriculum statement for the Samoan language,¹⁹ and provided language curriculum guidelines for some Pacific languages.²⁰ However, some languages remain wanting for any official support. Further, even where support materials are available, schools may still lack the teachers and resources necessary to make teaching a Pacific language viable.

Galumalemana Hunkin-Tuiletufuga argues that policies by various ministries attempting to address this problem have been haphazard, relying on available resources and the assessed priority of the issue.²¹ Many current initiatives are not government-run, but led by community organisations such as FAGASA: a group of Samoan teachers promoting the language through initiatives such as Samoan Language Week.²² There are also some media outlets that use Pacific languages, but these are in short supply and the few that exist have limited resources.²³

Policymakers have not made a significant contribution to the maintenance of Pacific languages, despite the incontrovertible evidence showing that this is a problem to be addressed. Part III of this article will discuss why the government and policymakers “have not accepted the magnitude and seriousness of the challenge”²⁴ they must face to maintain these languages and prevent further language loss.

III Public-Private Divide

This Part will outline the theory of the public-private divide, and provide examples of Pacific languages in different domains: the private spheres of the family and church, and the public spheres of education, workplaces and the courts.

A Liberalism theory

One of the core tenets of liberalism is the distinction or divide between the public and private spheres.²⁵ Activities can be categorised as belonging to the public sphere, where the government can legitimately intervene, or the private sphere, where the government cannot legitimately intervene or regulate.²⁶ By categorising activities this way, liberal

18 Hunkin-Tuiletufuga, above n 8, at 198.

19 See Ministry of Education *Ta'iala mo le Gagana Samoa i Nui Sila: Samoan in the New Zealand Curriculum* (1996).

20 For examples of language curriculum guidelines for other Pacific languages, see Ministry of Education *Gagana Tokelau: The Tokelau Language Guidelines* (Learning Media, 2009); Ministry of Education *Te Kaveinga o Te Reo Māori Kūki 'Āirani: The Cook Islands Māori Language Guidelines* (Learning Media, 2012); Ministry of Education *Ko e Fakahinohino ki he Lea Faka-Tonga: The Tongan Language Guidelines* (Learning Media, 2012); and Ministry of Education *Tau Hatakiaga ma e Vagahau Niue: The Niue Language Guidelines* (Learning Media, 2012).

21 Hunkin-Tuiletufuga, above n 8, at 200.

22 Vaimoana Tapaleao “Samoa Language Week 2018 celebrates alofa - love and kindness” *The New Zealand Herald* (online ed, Auckland, 29 May 2018).

23 Hunkin-Tuiletufuga, above n 8, at 199.

24 At 204.

25 Charles Sampford “Law, Institutions and the Public/Private Divide” (1991) 20 FL Rev 185 at 187–188.

26 Robert H Mnookin “The Public/Private Dichotomy: Political Disagreement and Academic Repudiation” (1982) 130 U Pa L Rev 1429 at 1429.

theory purports to uphold the rights of individuals and stop the State from encroaching into private matters.²⁷

This public-private divide has been criticised for being a false dichotomy, as “[t]he private is public for those for whom the personal is political.”²⁸ This encapsulates the idea that those activities relegated to the private sphere are in fact political and place duties upon the State. This criticism can be extended to the relegation of Pacific languages to the private sphere.

According to liberal theory, matters of identity—such as language—belong to the private sphere and are not appropriate areas for the State to regulate.²⁹ Pālagi politicians and policymakers have adopted this attitude, viewing language as an issue for the private domain.³⁰ The relegation of language to the private sphere has been upheld by discourse that reinforces the idea that Pacific languages are to be used in the private domain only.³¹ The effect of this relegation is that the State is not under a duty to actively maintain and support Pacific languages in New Zealand, confining Pacific languages to the private sphere.

B *Pacific languages: divide in practice*

(1) Private sphere

In general, the use of Pacific languages tends to be confined to two main private domains: family and church.³² These languages are largely used in spheres of life where the majority of people are also Pasifika, and most can speak and understand Pacific languages. Thus, while Pacific languages are still used, they are mainly used in Pasifika communities and in relationships with other Pasifika people.

One problem with this is that there must be people within Pasifika communities who are fluent and continue to speak their language to ensure the survival of Pacific languages. The Pasifika population is increasingly New Zealand-born and growing up in a society where English is the predominant language. This may spill over into the private sphere and result in Pacific languages being spoken less, even at home. The relegation of Pacific languages to the private sphere poses a dangerous risk when its survival is contingent on the older generations.

(2) Public sphere: education

The lack of room for languages other than English is most noticeable in the public sphere area of education. This is particularly problematic given that the decline in Pacific languages is occurring most rapidly amongst youth.

The current New Zealand Curriculum demonstrates an absence of any real support for Pacific languages. In 1993, the Curriculum guaranteed that “students whose mother tongue is a Pacific Islands language ... will have the opportunity to develop and use their

27 At 1429.

28 Catharine A MacKinnon *Toward a Feminist Theory of the State* (Harvard University Press, Cambridge (Mass), 1989) at 191.

29 McCaffery and McFall-McCaffery, above n 3, at 91.

30 At 91.

31 At 91.

32 Komiti Pasifika, above n 6, at 3.

own language as an integral part of their schooling”.³³ However, the current Curriculum values learning an additional language, such as French or Japanese, instead of improving students’ knowledge of their home languages.³⁴

This absence of support means that over 90 per cent of Pasifika students do not learn a Pacific language while at school.³⁵ While inverting this statistic would be a logical way to prevent the rapid decline in the number of speakers of Pacific languages, New Zealand’s current education curriculum remains a clear example of how the protection of minority languages is not widely recognised as a matter for the public domain.

(3) Public sphere: workplaces

Workplaces are another example of a public domain where the English language is dominant. The Human Rights Commission is frequently asked whether workplaces can legally have an “English language only” policy.³⁶ This suggests that many workplaces currently have such a policy—whether explicit or de facto.

Most employees can attest to the dominance of the English language in the workforce. Other languages are sometimes acknowledged through, for example, singing a waiata or ending emails with a sign-off in a different language. However, this can appear tokenistic and the language used for everyday communication remains predominantly English.

The reluctance to use languages other than English in the workforce was illustrated by Dame Naida Glavish (the “kia ora lady”), who garnered publicity when her supervisor prohibited her from using the greeting “kia ora” over the phone because it was a “non-standard expression”.³⁷ This serves as an exemplar of how English is seen as the standard language in the workplace.

(4) Public sphere: courts

The language that is used in the courts is crucial, as this is where justice is seen to be done. Theoretically, languages other than English are not banned from being used in the courts. However, the use of other languages often receives negative feedback—recently, a lawyer was asked whether she was making a “political point” by speaking te reo Māori.³⁸ The inability to use one’s own language, or the feeling that one’s language is unwelcome, increases the power imbalance that is inherent in the courts. Furthermore, while there is a right to an interpreter in a criminal trial,³⁹ various barriers to justice mean that this service is not always utilised by people who need it.

This relegation of Pacific languages to the private sphere clearly occurs in practice, but the question remains whether this divide is legal. If protections in the law were to exist, this could force the New Zealand Government to take action and shift the issue of language

33 Ministry of Education *New Zealand Curriculum* (Learning Media, 1993) at 10.

34 Ministry of Education *New Zealand Curriculum* (Learning Media, 2007) at 24.

35 McCaffery and McFall-McCaffery, above n 3, at 92.

36 Human Rights Commission “Frequently Asked Questions – English only in the workplace” <www.hrc.co.nz>.

37 Anthony Hubbard “‘Kia ora lady’ still an agent for change” *The Dominion Post* (online ed, Wellington, 20 July 2013).

38 Vincent Olsen-Reeder “Opinion: Judge’s takedown of te reo Māori-speaking lawyer was about power” (13 November 2018) Newshub <www.newshub.co.nz>.

39 New Zealand Bill of Rights Act 1990, s 24(g).

maintenance to the public sphere. The next Part will outline the right to use and speak one's own language in the domestic law of New Zealand and in international law.

IV The Law

A *Domestic law*

The New Zealand Bill of Rights Act 1990 (NZBORA) includes a right to speak one's own language, and provides that:⁴⁰

[a] person who belongs to an ethnic ... or linguistic minority shall not be denied the right, in community with other members of that minority, to enjoy the culture ... or to use the language, of that minority.

Variations of this right can also be found in legislation and regulations covering more specific situations. For example, people in New Zealand have the right to speak Māori or use New Zealand Sign Language in legal proceedings.⁴¹

B *International law*

The right to use and speak one's own language is also recognised under international law. Article 27 of the International Covenant on Civil and Political Rights (ICCPR), ratified by New Zealand on 28 December 1978, states that persons belonging to "ethnic ... or linguistic minorities ... shall not be denied the right, in community with the other members of their group, ... to use their own language."⁴² Section 20 of the NZBORA is identically worded to this article. Moreover, art 14 of the ICCPR guarantees the right to the free assistance of an interpreter in court.

Similar provisions exist in the United Nations Convention on the Rights of the Child (UNCRC), which New Zealand ratified on 6 April 1993. Article 30 states that children of a linguistic minority "shall not be denied the right" to use their own language in community with others in their group.⁴³ Article 40 provides the right to free assistance of an interpreter in court.⁴⁴ There is also a specific reference to education, which provides that education of a child shall be directed to the development of respect for a child's language and values.⁴⁵

The United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (Declaration on Rights of Minorities) provides that people belonging to minority groups have the right "to use their own language, in private and in public, freely and without interference or any form of discrimination".⁴⁶

40 Section 20.

41 Section 24(g); *Te Ture mō Te Reo Māori* 2016, wehenga 7 (*Māori Language Act* 2016, s 7); and *New Zealand Sign Language Act* 2006, s 7.

42 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), art 27.

43 United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990), art 30.

44 Article 40(2)(vi).

45 Article 29(1)(c).

46 *United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* GA Res 47/135 (1992), art 2(1).

However, the Declaration on Rights of Minorities does not have official status in New Zealand law as it has not been incorporated into domestic legislation. Unlike the ICCPR and UNCRC, which are instruments that individual countries are parties to, the Declaration on Rights of Minorities was adopted without a vote and has a different status—it cannot be signed or ratified.

V Critique of the Law

This Part will apply a critical lens to the right to use and speak one's own language, and identify three issues with this right. The right to use one's own language does not withstand a Critical Race Theory (CRT) analysis. By applying a CRT lens to the law, it becomes clear that the law upholds the relegation of language to the private sphere, reinforcing racial inequalities.

CRT is a body of scholarship committed to the fight against racism, especially institutionalised racism and racism embedded in the law.⁴⁷ The movement originated in the United States, with early eminent scholars including Derrick Bell, Richard Delgado, Kimberlé Crenshaw and Mari Matsuda.⁴⁸ CRT is not widely used by Pasifika scholars; however, academics such as Dr Claire Charters and Khylee Quince incorporate CRT themes into their scholarship.⁴⁹ Recently, Dylan Asafo, a Pasifika scholar and lecturer in the University of Auckland Faculty of Law who specialises in Pacific legal issues, completed a Masters of Laws at Harvard University, specialising in CRT and minority rights. He was “inspired to try to build a blueprint for Pacific Island scholars to develop a Pacific critical legal theory movement”.⁵⁰

CRT scholars “uncover the overt and covert ways that racist ideologies, structures, and institutions create and maintain racial inequality”.⁵¹ The law surrounding the use of language in New Zealand is not overtly racist. However, the wording of the aforementioned provisions uncovers a reluctance to put any real effort into maintaining Pacific languages. Consequently, relying on these rights is an ineffective means of persuading the State to support the retention of Pacific languages.

A *Negative right*

The first problem with the right to use and speak one's own language is that it is a negative right. Negative rights entitle the right-holder to non-interference, whereas positive rights

47 Derrick A Bell “Who’s Afraid of Critical Race Theory?” [1995] U Ill L Rev 893 at 898.

48 See for example Bell, above n 47; Richard Delgado and Jean Stefancic *Critical Race Theory: An Introduction* (3rd ed, New York University Press, New York, 2017); Kimberlé Crenshaw and others (eds) *Critical Race Theory: The Key Writings That Formed the Movement* (The New Press, New York, 1995); and Mari J Matsuda and others *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (Routledge, New York, 2018).

49 See, for example, Claire Charters “Nin, and a Critique of the Supreme Court’s Approach in Takamore” (2017) 5 Te Tai Haruru 63; and Khylee Quince “Teaching indigenous and minority students and perspectives in criminal law” in Kris Gledhill and Ben Livings (eds) *The Teaching of Criminal Law: The pedagogical imperatives* (Routledge, 2017).

50 Audrey Kunycky “Dylan Asafo LLM ‘20: ‘I knew that I wanted to do something to transform society for marginalized groups in New Zealand’” (20 May 2020) Harvard Law Today <<http://today.law.harvard.edu>>.

51 Paula Groves Price “Critical Race Theory” [2016] Oxford Research Encyclopedia of Education.

entitle the right-holder to the provision of a good or service.⁵² Upholding negative rights requires only non-interference from the State—it must not prevent somebody from exercising that right. In contrast, positive rights require positive action from the State, usually in the form of the provision of resources.⁵³

The wording of the right to use one's own language in New Zealand legislation and ratified international instruments clearly shows that this is intended to be a negative right. Each provision (with the exception of the Declaration on Rights of Minorities) states that members of a minority "shall not be denied the right" to use or speak their own language.⁵⁴ All the State must do to respect this right is refrain from preventing minority groups from speaking their languages in the private sphere.⁵⁵ There are no protections that might exist if this was worded as a positive right, such as the right to use one's language in the public sphere and to be educated in one's language.⁵⁶

Positive rights often give rise to what is termed "special measures" or "affirmative action".⁵⁷ Section 19 of the NZBORA provides that positive measures for disadvantaged minority groups do not constitute discrimination. Section 73 of the Human Rights Act 1993 also permits special measures to achieve equality. These may include quotas in workplaces or universities, targeted recruitment, or scholarships specifically for particular groups.⁵⁸

However, these two pieces of legislation do not mandate the implementation of special measures—they only render them permissible. As the right to use and speak one's own language has been framed as a negative right in New Zealand law, there is no obligation on the government to enact any special measures to protect Pacific languages.

Therefore, relying on these rights is not an effective way of compelling New Zealand's government to actively maintain Pacific languages. The State is not required to take any positive action or expend resources to maintain Pacific languages—all it must do is refrain from preventing Pasifika people speaking Pacific languages in their communities.

B *In community with other members*

The second problem regarding the provisions on the right to use one's own language, is that they all contain an express qualification limiting the right to instances when one is in community with other members of his or her group or minority who also speak that language. This means that there is no right to use one's language in the public domain with members of other groups. In other words, the right does not extend to the ability to

52 Leif Wenar "Rights" (19 December 2005) Stanford Encyclopedia of Philosophy <www.plato.stanford.edu> at 2.1.8.

53 At 2.1.8.

54 New Zealand Bill of Rights Act, s 20. See also International Covenant on Civil and Political Rights, art 27 and United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, art 2(1).

55 Sue Wright "The Right to Speak One's Own Language: Reflections on Theory and Practice" (2007) 6 Language Policy 203 at 203.

56 At 203.

57 See, for example, Robert Fullinwider "Affirmative Action" (28 December 2001) Stanford Encyclopedia of Philosophy <www.plato.stanford.edu>.

58 See Paul Callister *Special Measures to Reduce Ethnic Disadvantage in New Zealand: An Examination of Their Role* (Institute of Policy Studies Victoria University of Wellington, Wellington, 2007).

use Pacific languages in public areas where there are others who speak other languages (namely English). This includes the previously mentioned areas—education, workplaces and the courts. This absolves the government of any obligation to actively support Pacific languages and prevent further language loss.

C General critique of human rights

Some proponents of CRT have long been suspicious of the value of human rights in attaining gains for minority groups.⁵⁹ The existence of rights does not always result in substantive change.⁶⁰

One major drawback with using human rights as a tool to maintain Pacific languages is that rights are a Western invention and arguably cannot be used to gain advances for minority groups.⁶¹ Human rights are the tools of the West, and “the master’s tools will never dismantle the master’s house”.⁶² From a CRT perspective, the maintenance of Pacific languages should not have to rely merely on the right to use one’s own language, as this is a Western invention that will never truly achieve the desired outcome of full language recovery. Instead, CRT scholars favour an approach that relies more on political organising than rights-based remedies.⁶³

The genesis of CRT stems from Bell’s dissatisfaction with previous modes of advancing the rights of people of colour, including reliance on civil rights.⁶⁴ At the time of his scholarship, civil rights gains were being reversed as certain states in the United States repealed or limited these rights.⁶⁵ This is an inherent danger with the rights-based approach—governments can change the law and remove such protections. In New Zealand, the NZBORA is an ordinary statute with no special status—other legislation can be enacted that is inconsistent with the rights contained within it.⁶⁶ The right to use one’s language could easily be removed, and thus offers no secure protection.

The need for protection is clear from the declining use of Pacific languages. The argument that the State has a duty to assist with this need is strengthened by studying the history of overt and institutionalised racism in New Zealand. The next Part of this article will explore this history of subjugation and the banning of Pacific languages in Pacific nations, including in New Zealand.

59 Bell, above n 47, at 900.

60 Makau Mutua “Critical Race Theory and International Law: The View of an Insider-Outsider” (2000) 45 Vill L Rev 841 at 848.

61 Audre Lorde “The Master’s Tools Will Never Dismantle the Master’s House” in Cherríe Moraga and Gloria Anzaldúa (eds) *This Bridge Called My Back: Writings by Radical Women of Color* (Persephone Press, Massachusetts, 1981) 98 at 99.

62 At 99.

63 Richard Delgado and Jean Stefancic “Critical Race Theory: An Annotated Bibliography” (1993) 79 Va L Rev 461 at 462 as cited in Drew Palmer *Research Methods in Social Science* (ED-Tech Press, Waltham Abbey Essex, 2019) at 173.

64 Richard Delgado and Jean Stefancic “Critical Race Theory: Past, Present, and Future” (1998) 51 CLP 467 at 467.

65 At 467.

66 Section 4.

VI History of Subjugation

CRT scholars emphasise how laws and law-making must be viewed within their historical context.⁶⁷ It is impossible to disregard the history of banning languages and the effect this has had on the relegation of Pacific languages to the private sphere. Pacific students were often forbidden from and punished for using their own language—up until 1996 in Samoa and until at least 2000 in Tonga.⁶⁸ In Vanuatu there was a stringent ban of Bislama in formal education after colonists assumed control of schooling.⁶⁹ This history of banning languages in education has led to the view that Pacific languages are only fit to use in the private sphere.

There is also a historically constructed narrative around the value and use of Pacific languages. There is an overarching “societal deficit construction” of Pacific languages in New Zealand and “internalisation” of English, which has meant that the English language continues to dominate the public sphere.⁷⁰ Pasifika have been continually subjected to the narrative that Pacific languages are less valuable than English and that their use will not lead to success in education, economics or society.⁷¹ This has created a legacy of uncertainty and shame about the inadequacy of Pacific languages in New Zealand.⁷²

The discourse that English is the language for success is not only prevalent in this country, but has travelled with Pasifika migrants to New Zealand. In many Pacific Islands, English is more than just a language—it represents wealth, security and success. In particular, there is a tendency for parents to encourage their children to speak English, rather than their home language, because English proficiency is perceived as the “key to academic success”.⁷³ Some visas to New Zealand, such as the Skilled Migrant Category Resident Visa, require that migrants and their families are able to speak the English language.⁷⁴ This feeds the narrative for those migrating to New Zealand that Pacific Languages are not conducive to succeeding, or being “skilled”.

The laws relating to language have undoubtedly been influenced by this history of subjugation—whether intentionally or unconsciously. Pacific languages are no longer explicitly banned from use, and there is less overt racism in law and policy. However, the racist structures stemming from this history remain. There has been little strong and specific attempt to recover Pasifika languages from the damage they suffered over the past one hundred or more years. The nature of the laws and rights related to language demonstrate the unwillingness of the State to make any positive commitment to rectify this history of racism. CRT recognises that laws can be racist through inaction, or even by

67 Ruben J Garcia “Critical Race Theory and Proposition 187: The Racial Politics of Immigration Law” (1995) 17 *Chicano-Latino L Rev* 118 at 122.

68 McCaffery and McFall-McCaffery, above n 3, at 90.

69 John Lynch “The Banned National Language: Bislama and Formal Education in Vanuatu” in France Mugler and John Lynch (eds) *Pacific Languages in Education* (Institute of Pacific Studies, Suva, 1996) 245 at 248.

70 McCaffery and McFall-McCaffery, above n 3, at 88.

71 At 89.

72 At 89.

73 Eve Coxon and others “Literature Review on Pacific Education Issues: Final Report” (Ministry of Education, January 2002) at 87.

74 Immigration New Zealand “Information about Skilled Migrant Category Resident Visa” <www.immigration.govt.nz>.

the lack of laws in itself.⁷⁵ Through this lens, the absence of room for Pacific languages in New Zealand's public sphere, and the scarcity of policies making room for language, is racist in and of itself.

The history of subjugation also strengthens the argument that New Zealand has a commitment to protect Pacific languages based on its relationship with Pacific nations. New Zealand is a major state in the Pacific with significant land and power compared to its island neighbours. New Zealand has special relationships with particular Pacific Islands, including former colony states. For example, Cook Islanders and Niueans are New Zealand citizens under "free association" agreements.⁷⁶ New Zealand's relationship with Pacific nations is important for two reasons. First, it shows that New Zealand was complicit in the oppression of languages in Pacific nations, such as the aforementioned banning of Samoan and Tongan in schools. There is a duty to rectify this through the protection of Pacific languages in New Zealand. Second, with power comes responsibility. As a powerful nation in the Pacific, New Zealand is arguably under an obligation to protect Pacific languages—especially for those countries with which they have ongoing special relationships.

VII Conclusion

The loss of Pacific languages is more than simply the loss of language—it is the loss of knowledge, world views, relationships and cultures. To stop this seemingly irreversible decline, New Zealand's government needs to take positive action and increase the support of Pacific languages in the public domain. What the necessary support entails and how it should be delivered requires input from, and consultation with, Pasifika communities. A logical starting point for the government would be to use Pacific languages in education, as this feeds into all areas of life. It is crucial that Pasifika voices are the loudest in this conversation; otherwise, their voices and language risk being lost altogether.

75 Camara Phyllis Jones "Confronting Institutionalized Racism" (2002) 50 *Phylon* 7 at 10.

76 Jon Fraenkel "Pacific Islands and New Zealand" (20 June 2012) *Te Ara: The Encyclopedia of New Zealand* <<http://teara.govt.nz>>.