# Law, Language and the Multilingual State

## Proceedings of the 12th International Conference of the International Academy of Linguistic Law

Conference Proceedings

Claudine Brohy
Theodorus du Plessis
Joseph-G. Turi
José Woehrling

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***1-3 November 2010, Black Mountain, Thaba 'Nchu, South Africa***


Department of Language
Management and
Language Practice

INTERNATIONAL ACADEMY OF LINGUISTIC LAW
ACADÉMIE INTERNATIONALE DE DROIT LINGUISTIQUE

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Editors

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# INTRODUCTION

This publication is a selection of the papers[1] presented at the twelfth international conference of the International Academy of Linguistic Law (IALL) that took place 1-3 November 2010 at Thaba 'Nchu, South Africa. It was co-presented by the International Academy of Linguistic Law and the Department of Language Practice and Language Management, University of the Free State. The theme of the conference, *Language, Law and the Multilingual State*, was determined to investigate the state-juridical challenges facing multilingual societies. Several related issues were addressed, such as Minority and indigenous languages, Globalisation and diversity, Language rights, Language ideology and Language legislation.

Given the location of the conference, special attention was paid to the South African context by means of a colloquium. The South African society is in a state of socio-political transformation and faces many challenges on state-juridical level, complicated by the linguistics obligations and rights embedded in the eleven-language policy. The colloquium, entitled *Language legislation and litigation*, was partly sponsored by the Afrikaanse Taalraad (Afrikaans Language Board) and the Vereniging van Regslui vir Afrikaans (Association of Lawyers for Afrikaans). Prominent role-players participated, such as Fernand de Varennes (leading legal expert on language rights), Christo van der Rheede (CEO of the Stigting vir Bemagtiging deur Afrikaans (Foundation for Empowerment through Afrikaans)), Koos Malan (South African expert on constitutional theory), Theodorus du Plessis (professor in Language Management) and Cornelus Lourens (attorney and applicant in the Languages Bill case).

This selection of papers delivered at the conference reflects the assortment of challenges facing multilingual states on so many levels, whether in Africa, Europe, the UK or Canada.

Following a survey on language policies and legislation in Africa, **Chumbow** proposes a comprehensive legal framework to guide member states of the African Union. The main obstacles to the establishment of a truly multilingual South African state are identified by **Strydom**. **Williams** compares the roles of the Language Commissioner in Canada, Ireland and Wales, and provides an

evaluation of the Welsh model. **Turi** explores official intervention in resolving linguistic problems.

**Agresti and Pallini** contribute to the model of protection and promotion of minority languages in Italy. Citizens' attitudes towards bilingualism are investigated by **Brohy**, who presents the results of the Language Barometer carried out in Switzerland. **Chapdelaine** explores the legislative co-drafting practiced in Canada as a new mode of legal communication. An analysis of how the interaction of the state's language policy as opposed the linguistic reality relates to language rights is provided by **De Varennes**. **Doucet** investigates the possibility of substantive (as opposed to symbolic) linguistic equality in New Brunswick.

In order to provide a critique of French linguistic politics, Éloy performs discourse analysis on language policies. **Foucher** explores the desirability of autonomy for national minorities, focusing on the Canadian context. The Africanisation of education language policies in Mozambique is reflected by **Lafon**. **Lourens** considers South Africa's multilingual language dispensation in terms of constitutional and other legislative measures. The role of the Language Commissioner in Ireland is assessed by **Williams and Ó Flatharta. Woehrling** explores linguistic freedoms and rights in the case law of the Supreme Court of Canada.

In conclusion, this publication provides a thorough analysis of the legislative and institutional challenges involved in creating a truly multilingual society, including the drafting and implementation of legislation, the degree and forms state intervention and the functioning of support structures. Creating a truly multilingual society seems to be a juggling act of balancing rights and obligations, freedoms and protective measures. The emphasis through this whole publication seems to be that a truly multilingual state requires linguistic equality and substantive language rights.

In keeping with environmental-friendly trends the volume is published in electronic format.

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Bloemfontein
20 June 2012

# FOREWORD

## International Academy of Linguistic Law

The International Academy of Linguistic Law, the **IALL-AIDL**, an international multidisciplinary organisation established in Montreal and Paris, in September 1984, by 100 founding members, brings together jurists, linguists, social scientists and all those worldwide who are interested, scientifically or professionally, in ***phenomena and problems pertaining to the world linguistic diversity as well as to law and language***, especially to ***comparative linguistic law*** (or *language law*). C*omparative linguistic law* refers to the different legal and linguistic norms pertinent to the law of language, the language of law and the *linguistic rights* (or *language rights*) *as fundamental rights* all over the world.

Either alone or in collaboration with other organisations, the Academy organises **every two years a great International Conference on Law and Language**, which takes also place as the General Assembly of the members. The decisions of the Academy are taken on a consensus basis. The working languages of the Academy are English, French and the language(s) of the countries or of the regions where the international conferences take place and any other language proposed by the majority of the participants in the conferences. The Academy promotes pertinent linguistic and legal research, publications of scientific interest, appropriate academic and professional activities (**regional, national and international lectures, seminars, courses and conferences**). The Academy gives also legal and linguistic consultations to all concerned persons and organisations.

The Academy includes at present more than 500 members from all over the world. **One becomes member of the academy by co-optation**, on recommendation of the Secretary-General and of at least ten members of the Academy. Those who presented in one of the International Conferences of the Academy a communication accepted by the Scientific Committee are **members ex officio** of the Academy.

Members resident in a country or in a region can create national or regional chapters. Chapters are recognised as far as they respect the objects of the Academy and the

directives of the Head Office. Every chapter includes at least 25 members. Chapters meet and make report to the Head Office at least once a year.

**The First International Conference ("Law and Language")** was held in Montreal, Canada, in April 1988, in cooperation with the Quebec University in Montreal. The Proceedings were published in 1989.

**The Second International Conference ("Law and Language in Multilingual Settings")** was held in Hong Kong, in February 1990, in cooperation with the City Polytechnic University. A selection of papers presented at the Conference was published in 1994.

**The Third International Conference ("Law, Language and Equality")** was held in Pretoria, South Africa, in April 1992, in cooperation with the Human Science Research Council and the University of Pretoria. The Proceedings were published in 1993.

**The Fourth International Conference ("Law and Language(s) of Teaching")** was held in Fribourg, Switzerland, in September 1994, in cooperation with the University and the Institute of Federalism of Fribourg. The Proceedings were published in 2001.

**The Fifth International Conference ("Law, Language and Autochthony")** was held in Havana, in April 1996, in cooperation with the Centro de Traducciones y Terminologia Especializada, at the CTTE-Capitolio Nacional Capitol of Havana, Cuba. The Proceedings are available on CD at the Cuban Section of the Academy.

**The Sixth International Conference ("Law, Language and Multilingual Cities")** was held in Vaasa-Vasa, Finland, in September 1998, in cooperation with the Vaasa and Åbo Akademi Universities. The Proceedings were published in 1999.

**In October, 1999,** The Academy was among the organising institutions of **the International Conference of Pretoria (South Africa)** on "Multilingual Cities and Towns in South Africa – Challenges and Prospects". The First Version of the Summaries was published at the beginning of the year 2000.

**The Seventh International Conference ("Law and Language – Language of the People and Language of the State")** was held in San Juan, Puerto Rico, in June 2000, in cooperation with the Ateneo Puertorriqueňo and the national universities of the Island. The proceedings were published in 2002.

**The Eighth International Conference ("Law and Language: The theory and the practise of linguistic policies")** was held in May 2002 in Iaşi, Romania, in May 2002, in cooperation with the "Mihail Kogalniceanu" University. The proceedings were published in 2003.

**The Ninth International Conference ("Law, language and the Linguistic Diversity")** was held in Beijing, China, in September 2004, in cooperation with the China University of Political Science and Law and the Institute of Applied Linguistics of the Chinese Ministry of Education. The Proceedings were published in 2006.

**The Tenth International Conference ("Language Law and Language Rights: the challenges of enactment and implementation")** was held in Galway, Ireland, in June 2006, in cooperation with the Academy for Irish-Medium Studies, the Irish Center for Human Rights, the National University of Ireland in Galway and the Irish Department of Community, Rural and Gaeltacht Affairs. The Conference has adopted unanimously the "***Call to UNESCO for an International Convention on Linguistic Diversity – Galway, june 2006***".

**The Eleventh International Conference ("Law, Language and Global Citizenship")** was held, in Lisbon, Portugal, at the Gulbenkian Foundation, in July 2008, in cooperation with the APP (Association of Teachers of Portuguese Language). The Proceedings were published in 2009.

**Since 2009**, The International Academy of Linguistic Law is an Institutional Partner of the International Days on Linguistic Rights which take place every year, in May, at the University of Teramo, Teramo, Italy.

**The Twelfth International Conference ("Law, Language and the Multilingual State")** was held at the Black Mountain Center (Bloemfontein), South Africa, in November 2010, in cooperation with the University of the Free State.

**The Thirteenth International Conference** will take place at the beginning of December 2012, in Chiang Mai, Thailand, in cooperation with the Chiang Mai University.

The International Academy is happy and proud to present the Proceedings of the 12th International Conference. The Proceedings include a selection of 16 papers which were submitted during the Bloemfontein international conference. The 12th International Conference was a great scientific success. This book is a milestone in the field of promotion and protection of the linguistic diversity of our word. On behalf of the IALL, I would like to thank the local organising committee, and particularly our friend and colleague Theo du Plessis and his team, for their remarkable work on this matter.

Joseph-G.Turi
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# OVERVIEW OF THE CONFERENCE

## Conclusion de la 12e Conférence de L'Académie internationale de droit linguistique

Talking of language and human rights in multilingual contexts where English is more and more used as a common language, the terms linguicism, language discrimination, or even language imperialism and linguicide are frequently put forward, English being seen as a killer language like an invasive species in a given linguistic environment which gradually replaces weaker varieties, sometimes until their complete extinction. This is certainly not the whole truth, however, I am going to switch to one of my native languages, French, which is also one of the official languages of the Academy and of our Conference.

La 12e Conférence internationale de l'Académie de droit linguistique sur le thème « Droit, langue et états multilingues » vient de s'achever ici au Black Mountain Center près de Bloemfontein. Comme toujours lors de fin de conférence, nous éprouvons une certaine nostalgie, un blues post-conférence, après avoir vécu dans cet hôtel pendant cinq jours, dans une bulle scientifique et en autarcie sociale. Loin de moi l'idée de vouloir faire une synthèse des communications, à vous d'en tirer les conclusions et la substantifique moelle. Nous avons été un petit groupe, comparé à d'autres de nos conférences, mais cela nous a sans doute permis de resserrer les liens et d'avoir des échanges d'autant plus intéressants sur les sujets de notre rencontre et bien d'autres encore, d'étendre nos réseaux, de préparer d'autres rencontres et conférences. Il faut dire que, comme d'habitude, notre thématique est suffisamment large pour permettre des points d'attaque variés et des perspectives diverses. Je ne ferai pas long, j'aimerais juste aborder cinq sujets, triés de manière très subjective : quelques statistiques, la dimension comparative de nos approches, la qualité des présentations, la façon d'aborder les thèmes, et, last but not least, nos remerciements.

### *Statistiques*

Nous avons entendu collectivement 36 présentations et cinq plénières, en trois langues (afrikaans, français et anglais), toutefois, des centaines de langues ont été

citées lors de nos plénières, exposés et discussions, langues que nous avons appelées tour à tour langues indigènes, autochtones, allochtones, maternelles, premières, partenaires, secondes, étrangères, officielles, co-officielles, nationales, régionales, locales, minoritaires, majoritaires, migrantes, standard, sub-standard, centrales, périphériques, internationales, grandes, fortes, petites, en voie d'extinction, disparues, etc. Les notions de plurilinguisme et multilinguisme nous permettent d'intégrer les différentes langues avec des statuts fort disparates et de parfois les réconcilier. Nous faisons preuve d'un beau bilinguisme scientifique, en combinant et mariant nos langages et cultures juridique et linguistique, et même économique, nos différentes approches, méthodes, modèles théoriques s'inspirent et se fécondent mutuellement, nous mettons donc en quelque sorte en œuvre une intercompréhension scientifique.

### *Dimension comparative*

***« L'herbe du plurilinguisme est toujours plus verte dans le jardin du voisin ».*** Nous ne pouvons pas nous empêcher de comparer nos contextes linguistiques respectifs, nos constitutions, nos lois, nos histoires, nos pratiques, nos conflits, nos solutions, nos espoirs, ce qui et normal dans un milieu aussi international. On cite souvent le Canada, parfois aussi la Suisse, des pays qui exportent leur plurilinguisme comme le sirop d'érable et le Gruyère, mais les contributions de ces pays montrent aussi que la cohabitation linguistique ne tombe pas du ciel et qu'elle exige des efforts tant collectifs qu'individuels. Comme toujours, nous pouvons considérer le verre à moitié plein ou à moitié vide. Nous avons aussi beaucoup entendu au sujet des langues de notre pays hôte, cette jeune démocratie avec ses onze langues officielles et ses innombrables langues parlées, une richesse qu'il faudra sauvegarder.

### *Thèmes*

Les thèmes abordés sont issus de toutes les strates traditionnelles de la société. Au niveau macro, nous avons parlé de chartes, conventions, constitutions, lois, conditions-cadres, principes généraux, pays ; au niveau *méso* de régions, villes, universités, entreprises, et, finalement, au niveau *micro* de peuple, utilisateurs, locuteurs, citoyennes, patients, prévenus, employées, élèves, étudiantes, immigrées, public, clients, passagers, habitants. Nous avons évoqué le multilinguisme top-down, et le « Multilingualism from below », et nous avons à nouveau fait connaissance du principe tout orwellien que si toutes les langues sont en principes égales – certaines sont plus égales que d'autres.

### *Qualité des présentations*

Nous pouvons souligner la qualité des présentations, la richesse des échanges qu'elles ont permis d'établir. Au-delà des discussions autour des droits et obligations linguistiques, nos échanges ont également traduit la créativité, le plaisir et la convivialité. Que toutes les personnes qui ont présenté des contributions et participé aux discussions soient remerciées de leur rigueur scientifique et leur faculté de transmettre leur savoir.

### *Remerciements*

Au nom du comité scientifique de l'Académie et de notre secrétaire général, il me reste l'agréable devoir de remercier Theo et Chrismi, ainsi que toute l'équipe de l'Université du Free State, de leur engagement et de leur énergie. Ils ont toujours été à l'écoute de nos demandes et de nos besoins, avec le sourire et une attitude décontractée durant toute la Conférence, au point que nous n'avons pas eu l'impression qu'ils étaient en train de travailler ! Mais nous savons tous ce que l'organisation d'une rencontre scientifique internationale implique comme temps, énergie et don d'improvisation. Je me réjouis donc de lire vos contributions dans les actes et de vous revoir lors de la prochaine conférence. Entre-temps, je souhaite à toutes et tous un bon voyage de retour.

## Conclusion of the 12th Conference of the International Academy of Linguistic Law

Pour parler des langues et des droits de l'homme dans des contextes multilingues où, de plus en plus, l'anglais est utilisé comme langue commune, on avance souvent des termes tels que 'linguicisme', 'discrimination linguistique' ou même 'impérialisme linguistique' et 'linguicide'. L'anglais est considéré comme un tueur de langues, comme une espèce qui gagne du terrain dans un milieu linguistique donné et qui replace graduellement les variétés plus faibles, parfois jusqu'à leur extinction totale. Néanmoins, ceci ne représente pas toute la vérité. Je vais changer de langue et continuer en français, une de mes langues maternelles, qui est aussi une des langues officielles de l'Académie et de notre Conférence.

The 12th International Conference of the Academy of Linguistic Law, the theme of which was "Law, language and the multilingual state", has just been concluded here at the Black Mountain Centre near Bloemfontein, South Africa. As always at the end of a conference, we experience feelings of nostalgia or post-conference blues after having been guests at this hotel for the past five days, inside our scientific bubble and within a social autarky. Far be it from me to summarise the various conference papers; it is up to you to draw your own conclusions

and extract their very substance. We were a small group compared to some of our previous conferences, but on the other hand this allowed us to strengthen the ties that bind us and to exchange truly interesting ideas on subjects related to this meeting of this minds and many others as well, in addition to extending our networks and preparing other meetings and conferences. It should be added that, as is usually the case, the various themes were broad enough to accommodate a variety of approaches as well as diverse perspectives. I will very brief, as I have only five points to address, the selection of which was done in a very subjective way. I will start with a few statistics, followed by the comparative dimension of our approaches, the quality of the presentations, the manner in which the themes were treated, and last but not least I will express our thanks.

### *Statistics*

In total, we listened to 36 presentations and attended five plenary sessions in three languages (Afrikaans, French and English). However, hundreds of languages were mentioned in the course of the plenary sessions, presentations and discussions, languages which we referred to in turn as indigenous, autochthonous, mother tongue, first, partner, second, foreign, official, co-official, national, regional, local, minority, majority, migrant, standard, sub-standard, central, peripheral, international, important, strong, small, endangered, extinct, etc. The notions of pluri- and multilingualism enable us to integrate different languages with rather disparate status and to reconcile them at times. We proved ourselves capable of scientific bilingualism by combining and merging our languages and our legal, linguistic and even economic cultures; our different approaches, methods and theoretical models draw their inspiration from one another and mutually enrich one another. In a way we are thus implementing a form of scientific intercomprehension.

### *Comparative dimension*

"The grass of plurilingualism is always greener on the other side." We cannot help comparing our respective linguistic contexts, constitutions, laws, histories, practices, conflicts, solutions and hopes, something which is normal in such an international environment as this one. Canada, and sometimes Switzerland as well, are often quoted as countries which export their plurilingualism in the same way as their maple syrup and Gruyère cheese. However, the contributions from these countries also illustrated that linguistic cohabitation does not fall from the sky and that it requires a collective as well as an individual effort. As always, we may consider the glass to be half full or half empty. We also heard much about the languages of our host country, this young democracy with its eleven official languages and its countless spoken languages, the richness of which has to be preserved.

### *Themes*

The themes which were dealt with came from all the traditional strata of society. On a macro level, we spoke about charters, conventions, constitutions, laws, management conditions, general principles and countries; on a meso-level, we discussed regions, cities, universities and companies, and finally, on a micro level, the topics were people, users, speakers, citizens, patients, defendants, employees, learners, students, immigrants, the public, clients, passengers and inhabitants. We spoke about top-down multilingualism and about multilingualism from the bottom up, and once again encountered that very Orwellian principle according to which all languages may be equal in principle, but some are more equal than others.

### *The quality of the presentations*

One can stress the quality of the presentations and the richness of the exchanges which took place as a result. Our exchanges went beyond discussions about rights and language commitments; they were also an expression of creativity, pleasure and conviviality. Our thanks to everyone who presented a paper and participated in the discussions, for their scientific precision and their ability to pass on their knowledge.

### *A word of thanks*

On behalf of the Academy's scientific committee as well as our Secretary General, I have the pleasant duty of thanking Theo and Chrismi and the entire Free State University team for their energy and commitment. They were always attentive to our requests and needs, and did so with a smile and a relaxed attitude during the entire Conference, to such an extent that we did not have the impression that they were actually working! But we all know that the organisation of an international scientific meeting involves time, energy and the gift of improvisation. I am looking forward to reading your contributions in the proceedings and to seeing you again at the next conference. Meanwhile, I would like to wish one and all a safe return trip.

Claudine Brohy

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# PROGRAMME

## 12th International IALL Conference: "Law, Language, and the Multilingual State"

La douzième Conférence internationale de l'Académie internationale de droit linguistique sur le droit et la langue, "**DROIT, LANGUE ET ÉTATS MULTILINGUES**"12de Internasionale IALL- kongres: "Wetgewing, Taal en die Meertalige Staat"
**1-3 November 2010**

| 31 OCTOBER (SUNDAY/DIMANCHE/SONDAG) | |
|---|---|
| 15:00 – 18:00 | Registration/inscription/registrasie |
| 18:00 | Welcoming/accueil/Verwelkoming<br>Prof. L. Botes (UFS: Dean of Faculty of Humanities/Doyen: Faculté des sciences humaines/Dekaan: Fakulteit Geesteswetenskappe)<br>(light dinner and wine/dîner léger et le vin/ligte ete en wyn) |

| 1 NOVEMBER (MONDAY/LUNDI/MAANDAG) | | |
|---|---|---|
| 08:30 - 09:00 | Registration/inscription/registrasie | |
| 09:00 - 09:30 | Plenary session: Opening address / discours en séance plénière : discours d'ouverture/Volle sessie: Openingstoespraak)<br>Hon. Judge Louis Harms (Deputy President: Supreme Court of Appeal/Le président adjoint : Cour de Cassation d'Afrique du Sud/Adjukpresident: Hoogste Hof van Appél van Suid-Afrika) | |
| 09:30 - 10:00 | Plenary session/discours en séance plénière/Volle sessie: Prof. J-G. Turi (IALL: Secretary-General/Secrétaire general/Sekretaris-Generaal) | |
| 10:00 - 10:30 | Tea-break/pause-thé/teebreuk | |
| | Theme: Minority & indigenous languages<br>Thème: minoritaires et les langues autochtones<br>Tema: Minderhede en inheemse tale<br>Chairperson/président/ voorsitter: Claudine Brohy | Theme: Globalisation & Diversity<br>Thème: mondialisation et la diversité<br>Tema: Globalisasie en diversiteite<br>Chairperson/président/voorsitter : Miriam Shlesinger |

| | | |
|---|---|---|
| 10:30 – 11:00 | Grin, Francois<br>The "tolerability" of minority language rights: from theoretical | Musehane, Nelson<br>Language Shift: A Case Of The Department Of Safety And Security (Police Service) In The Limpopo Province, SA |
| 11:00 - 11:30 | Agresti, Giovanni & Pallini, Sylvia<br>L'Italie, pays multilingue : de la protection des minorités linguistiques historiques aux enjeux des nouvelles minorités | Romy-Masliah, Daphné<br>Teaching English in Geneva, Switzerland and Sidi Bel Abbès, |
| 11:30 - 12:00 | Monteyne, André<br>Les langues nationales menacées par l'anglais : l'exemple du Néerlandais | Meeuwis, Michael<br>Adapting to the subaltern: Colonial Management of Linguistic Diversity in the Belgian Congo (1880-1960) |
| 12:00 - 12:30 | Lombard, Ellen & Carney, Terrence<br>The expediency of Afrikaans for law students | Battarbee , Keith<br>Expectations mismatch in multiple-language polities |
| 12:30 - 14:00 | Lunch/le déjeuner/middagete | |
| 14:00 - 14:30 | Lafon, Michel<br>Mozambique bilingual education program: a first dent in the enduring practice of assimilation? | Pommer, Sieglinde<br>Multilingual EU Law: On the Significance of Translation for the "Ever Closer" Union |
| 14:30 - 15:00 | Romy, Daphné & Abid-Houcine, Samira<br>Indigenous Languages: a Revival or a Survival? | Webb, Vic<br>African languages in education: The non-effectuation of South Africa's language-in-education policy |
| 15:00 - 15:30 | Stephens, Màmari<br>"Lost in translation? Speaking Màori in the New Zealand Parliament, and the Màori Language Act 1987 | Vandekerckhove, Reinhild<br>Deregulation and glocalisation in the chat language of Flemish teenagers |
| 15:30 - 16:00 | Coffee break/pause-café/koffiebreuk | |
| 16:00 - 17:00 | Keynote address/conférencier d'honneur/hoofspreker): Prof. H. Strydom (University/université/Universiteit Johannesburg, RSA) | |
| 19:00 | Dinner/le diner/aandete (Spitbraai) | |

| 2 NOVEMBER (TUESDAY/MARDI/DINSDAG) | | |
|---|---|---|
| | Theme: Language Rights<br>Thème: droits linguistiques<br>Tema: Taalregte<br>Chairperson/ président/voorsitter: Nelson Musehane | Theme: Globalisation & Diversity<br>Thème: mondialisation et la diversité<br>Tema: Globalisasie en diversiteite<br>Chairperson/président/voorsitter: Miriam Shlesinger |

| | | |
|---|---|---|
| 09:00 - 09:30 | Eloy, Jean-Michel<br>Aménagement, politique, droit linguistiques: de la pertinence de ces notions dans le cas de la France. | Brohy, Claudine & Herberts, Kjell<br>Symposium "Language policies and language surveys in bilingual municipalities" (Bilingualism and the city: Measuring the quality of linguistic cohabitation in two bilingual towns in Switzerland AND Finnish bilingualism like Heinz ketchup – at least 57 varieties!") |
| 09:30 - 10:00 | Doucet, Michel<br>Language Rights in New Brunswick: The Search for Substantial Equality | |
| 10:00 - 10:30 | Foucher, Pierre<br>Les droits linguistiques et la jurisprudence canadienne | Chairperson/président/voorsitter: Paulo Feytor Pinto<br>Chinese delegation/délégation chinoise/Chinese afvaardiging |
| 10:30 - 11:00 | Woehrling, José<br>La Cour suprême du Canada et la réflexion sur la nature et les fondements des droits linguistiques | Chinese delegation/délégation chinoise/Chinese afvaardiging |
| 11:00 - 11:30 | Tea-break/pause-thé/teebreuk | |
| | Theme: Language Ideology<br>Thème: l'idéologie du langage<br>Tema: Taalideologie<br>Chairperson/ président/voorsitter: Kjell Herberts | |
| 11:30 - 12:00 | Kotze, Chrismi-Rinda<br>Regulating the linguistic landscape: agency and locality as variables | Chinese delegation/délégation chinoise/Chinese afvaardiging |
| 12:00 - 12:30 | Cuvelier, Pol<br>Shifting ideologies in Flemish university language management | Chinese delegation/délégation chinoise/Chinese afvaardiging |
| 12:30 - 14:00 | Lunch/le déjeuner/middagete | |
| 14:00 - 14:30 | Hnizdo, Borivoj<br>Changing roles of minority languages in Czech Republic | |
| 14:30 - 15:00 | Paulo, Feydor Pinto<br>A Mass for James Dean. Regulating Proper Names in Portugal | |
| 15:00 - 15:30 | Coffee break/pause-café/koffiebreuk | |
| 15:30 - 16:30 | Keynote address/conférencier d'honneur/hoofspreker): Prof. S. Chumbow (University/université/Universiteit of Yoaundé, Cameroon) | |
| 19:00 | Dinner/le diner/aandete | |

| 3 NOVEMBER (WEDNESDAY/MERCREDI/WOENSDAG) | | |
|---|---|---|
| | Theme: Language legislation<br>Thème: législation sur les langues<br>Teme : Taalwetgewing<br>Chairperson/ président/voorsitter: José Woehrling | |
| 09:00 - 09:30 | Brezigar, Bojan<br>From Maastricht to Lisbon - Development of language legislation in the EU Treaties | |
| 09:30 - 10:00 | Chapdelaine, Jean-Paul<br>La corédaction des textes législatifs comme laboratoire de la culture juridique et linguistique au Canada | |
| 10:00 - 10:30 | Lakshmanan, V.<br>Metaphors as Problematizer in Legal Language Translation:<br>A Case-Study of the Kushboo Case | |
| 10:30 - 11:00 | Williams, Colin & O Flatharta, Peadar<br>The Office of The Language Commissioner, Ireland – Impact of the Commission on the Irish language policy and official strategy | |
| 11:00 - 11:30 | Tea-break/pause-thé/teebreuk | |
| | Colloquium:<br>Language legislation and litigation in RSA<br>Chairperson/ président/voorsitter: Karel Prinsloo | |
| 11:30 - 12:00 | De Varennes, Fernand<br>Un peuple, une langue ?<br>La réponse du Droit International à l'Etat Plurilingue | |
| 12:00 - 12:30 | Van der Rheede, Christo<br>'n Kritiese analise van die uitspraak in die Beheerliggaam Hoërskool Ermelo *v* Departement van Onderwys Mpumalanga – hofsaak | |
| 12:30 - 14:00 | Lunch/le déjeuner/middagete | |
| 14:00 - 14:30 | Malan, Koos<br>Engelse eentaligheid en die diskresionêre aard van die amptelike taalklousule in die Grondwet van die Republiek van Suid-Afrika | |
| 14:30 - 15:00 | Du Plessis, Theodorus<br>'n Taalwet vir Suid-Afrika? Die rol van sosiolinguistiese beginsels by die analise van taalwetgewing | |
| 15:00 - 15:30 | Lourens, Cornelus<br>Hoe kan taalregte binne-om die grondwetlike raamwerk afgedwing word? | |

| | |
|---|---|
| 15:30 - 16:00 | Plenary session/discours en séance plénière/Volle sessie: Prof. J. Henning (UFS Dean: Law)<br><br>Prof. J. Henning (UFS: Dean of Faculty of Law/ Doyen: Faculté du droit/ Dekaan: Regsfakulteit) |
| 16:00 - 16:30 | Coffee break/pause-café/koffiebreuk |
| 16:30 - 17:30 | Keynote address/conférencier d'honneur/hoofspreker): Prof. C. Williams (Cardiff University/Université/Universiteite, UK) |
| 20:00 | Conference dinner/dîner officiel/kongresdinee (Mangaung String Programme) |

| 4 November (Thursday/jeudi/Donderdag) |
|---|
| Leave for airport OR attend optional cultural tour<br><br>Congé pour participer à l'aéroport ou en option visite culturelle<br><br>Vertrek na lughawe of woon opsionele kulturele toer by |

# BOODSKAP VAN DIE DEKAAN

Geagte Deelnemers aan hierdie 12de *International Academy of Linguistic Law*-kongres (IALL)

Namens die Fakulteit Geesteswetenskappe en die Departement Taalbestuur en Taalpraktyk aan die Universiteit van die Vrystaat, 'n warm verwelkoming in die Suid-Afrikaanse hartland. Ek hoop dat u 'n wonderlike paar dae hier in Thaba Nchu (Black Mountain) sal hê. Ek weet dat die veld van Taalreg grootliks met kwessies rondom diversiteit en veeltaligheid en die wyse waarop aspekte van taalregte en taalgebruik in 'n regverdige en gelyke wyse georden word gemoeid is. Dit herinner my aan die wonderlike boek deur Jonathan Sachs, getiteld *Dignity of Difference*, waarin hy skryf dat hoop die wete is dat mens kan kies; my eie parafrase volg dat moedeloosheid die toestand is waarin daar geen opsies beskikbaar is nie. Ek hoop dat hierdie kongres ons meer keuses en meer hoop in die veld van Taalreg en Taallitigering sal gee.

Ons weet dat verskeie SA akademici navorsing doen in die velde van Taal en Reg, soos Proff Koos Malan en Hennie Strydom. Ons eie Dept. Taalpraktyk en Taalbestuur 9met die leierskap van Prof Theo du Plessis) speel ook 'n belangrike rol in die fasilitering van Akademiese aktiwiteit (navorsing en onderrig), d.w.s in die veld van Taal en Reg.

In die boek van Alexander en Bush – *Literacy and Linguistic Diversity in a Global Perspective* (2007) – skryf Ndumbe die volgende in 'n hoofstuk:

> A people that loses its language is a people that loses its words, and when a people loses its words it loses its soul and vision of the world. When this happens the community in question become lodged in dependence that lasts until it recovers its words and begins to articulate its past, present and future.

Ek hoop van harte dat hierdie paar dae van referaatlewerings en kajuitraad 4 dinge sal verrig:

- Bydra tot die versterking van die intellektuele kapitaal rondom Taal en Reg.

- Help om respek te kweek vir verskille en verskaf ruimte vir verkillende kulture en tale om vreedsaam met mekaar saam te leef.
- Ons hoop gee ten opsigte van Taal- en Regskwessies, d.w.s. die keusemoontlikhede vermeerder en daardeur bydra tot meer hoop in die Taalbestuurdomein.
- Dalk 'n kongresbundel/-boek ontwikkel wat die stemme en woorde van die kongres sal artikuleer.

Geniet die Kongres!

## MESSAGE DU DOYEN

Chers participants à cette 12e conférence de l'Académie Internationale de Droit Linguistique,

Au nom de la Faculté des Lettres et du Département de Pratique et de Gestion des Langues et du Langage de l'Université du Free State, je tiens à vous accueillir chaleureusement au cœur de l'Afrique du Sud. J'espère que votre court séjour, ici, à Thaba Nchu (Black Mountain), sera des plus agréables.

Je sais que le domaine du Droit Linguistique traite essentiellement des questions de diversité et de multilinguisme, mais il traite également de la façon dont sont organisés, de manière juste et équitable, certains aspects de ce droit linguistique et l'utilisation de la langue.

Cela me rappelle le superbe livre de Jonathan Sachs, *Dignity of difference* (La dignité de la différence, en version française) dans lequel il affirme que l'espoir est la connaissance que l'on peut choisir. Je me permets alors de le paraphraser en disant que le désespoir est l'état qui ne laisse aucune option possible.

J'espère que cette conférence nous donnera plus de choix et plus d'espoir dans le domaine du Droit Linguistique mais aussi des litiges linguistiques.

Nous savons que plusieurs universitaires sud-africains poursuivent des recherches dans les domaines de la langue et du droit comme le Professeur Koos Malan ou bien encore Hennie Strydom. Notre département de Pratique et de Gestion des Langues et du Langage jouent également un rôle important, en facilitant les activités universitaires (recherches et enseignement) dans ces domaines.

Dans le livre de Neville Alexander et Brigitta Busch, *Literacy and Linguistic Diversity in a Global Perspective* (*Alphabétisation et diversité linguistique dans*

*une perspective globale: échange interculturel avec des pays africains, en version française)*, Ndumbe écrit ceci dans un des chapitres:

> « Un peuple qui perd sa ou ses langues est un peuple qui perd ses mots, et quand un peuple perd ses mots, il perd son âme et sa vision du monde. Ce peuple alors s'enlise dans la dépendance durable, jusqu'au jour où il récupère ses mots et commence à articuler son histoire, son présent et son devenir au sein de lui-même et dans le concert des nations. »

J'espère sincèrement que ces quelques jours de présentations et de débats permettront d'atteindre 4 buts:

- Contribuer au renforcement du capital intellectuel dans les domaines de la langue et du droit ;
- Aider au développement du respect des différences et assurer un espace à la co/inter-existence pacifique des différentes langues et cultures ;
- Donner de l'espoir en matière de langues et de droit ; à savoir accroître les possibilités de choix, contribuant ainsi à donner de l'espoir dans le domaine de la gestion des langues ;
- Élaborer, peut-être, des actes de conférences ou un ouvrage qui articuleraient les voix et les mots de cette conférence.

Très bonne conférence à tous !

## MESSAGE FROM THE DEAN

Dear Participants of this 12th International Academy of Linguistic Law Conference (IALL)

On behalf of the Faculty of Humanities and the Department of Language Practice and Language Management at the UFS, a warm welcome in the heartland of South Africa. I hope that you will have a wonderful few days here in Thaba Nchu (Black Mountain). I know that the field of Language Law deals largely with issues around diversity and multilingualism and how to arrange aspects of language rights and language use in a fair and equitable way. This reminds me of the wonderful book of Jonathan Sachs with the title the *Dignity of Difference* in which he states that hope is the knowledge that one can choose, so my own paraphrasing is that despair is the condition where no options are available. I hope that this conference will give us more choices and more hope in the field of Language Law and Language litigation.

We know that several SA academics are pursuing research in the fields of Language and Law such as Proff Koos Malan and Hennie Strydom. Our own Dept. of Language Practice and Language Management also plays an important role in facilitating academic activity i.e. (research and teaching) in the field of Language and Law.

In the book of Alexander and Bush – Literacy and Linguistic Diversity in a Global Perspective – Ndumbe writes the following in a chapter:

> A people that loses its language is a people that loses its words, and when a people loses its words it loses its soul and vision of the world. When this happens the community in question become lodged in dependence that lasts until it recovers its words and begins to articulate its past, present and future.

It is my sincere hope that these few days of paper presentations and deliberations will achieve 4 things:

- Contribute towards strengthening the intellectual capital around language and law.
- Help to grow respect for difference and providing space for different cultures and languages to peacefully co- and inter-exist with each other.
- Give us hope regarding Languages and Law issues i.e. increasing the choice possibilities and thus contribute to giving hope in the Language Management domain.
- Perhaps develop a conference proceedings/book which will articulate the voices and words of the conference.

Enjoy the conference!

**Lucius Botes**

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# OPENING ADDRESS

Mr Chairman,

I am honoured to be able to attend the opening of your Congress and by the invitation to deliver an introductory paper.

Terence McKenna once said that he did not believe that the world is made of quarks or electro-magnetic waves, or stars, or planets, or of any such things. 'I believe' he said, 'the world is made of language.' It would have been more correct to have said that the world is made of languages, many of them.

The subject of your conference, Law and Language in a Multilingual Society, raises critical issues, not only for us in this country but also for others. The reason is fairly simple. Language is part – the greater part – of one's culture. A people without a culture is said to be like a zebra without stripes. Culture determines one's identity. As one of the founding fathers of the Afrikaans language, Rev SJ du Toit, wrote in 1891 that language is a portrait of the soul and life of a nation; and it mirrors the character and intellectual development of a people (my translation).

Unfortunately, language tends to divide any multilingual society. And it is used to deepen divisions. Law is supposed to close the divide but more often than not widens it. This is because the ruler determines the law and, consequently, the language of the law.

I have before been described as schizophrenic for reasons not now germane. Let me admit that my father tongue is German, my mother tongue is English, and Afrikaans is my preferred language. This means that, in the present context, I suffer an identity crisis.

My next difficulty is that I am not an expert on the subject of your conference. What I have so say will be the result of a knee-jerk reaction, some experience and a smattering of emotion, and will be personal. Some will be legalistic and the rest anecdotal.

After the Norman conquest of Britain the court language and the language of the law became Norman-French. It is only after the Normans became Anglicized and the people homogenized that English made a comeback as the language of the law.

Likewise, after the rise of Afrikaner nationalism Afrikaans became an important legal language. This occurred in spite of the fact that Afrikaans is not a 'White' language or a language of Whites. It is a language that does not and never did belong to a particular racial group. But since the demise of Afrikaner nationalism Afrikaans as a language of law is in retreat.

Namibia provides an interesting case. The lingua franca of South-West Africa was Afrikaans. English was used by but a small group of persons, primarily as a second or third language. Upon independence, Afrikaans perceived as the language of the conquered conqueror, was replaced with English as the only official language.

This says something about Africa. Africa presents a strange phenomenon. It is often seen from the outside not only as dark but also homogeneous. It is neither. It is, ironically, divided for international political reasons into Arabic, English, French, Portuguese and Spanish speaking countries. This division is symbolic of Africa: it is a divided Continent and its official languages and legal systems are by and large those of its erstwhile colonial masters, and not of its people.

One would, with the rise of African nationalism and the search for an African Renaissance, have expected that Africa would have sought to give preference to its own languages. But that has not happened. Not even in mono-lingual African countries. The colonial language becomes the language of the elite, and it is used it is used to reserve privileges for the new elite – quite like the position in Britain after the Norman invasion. As Mosibudi Mangena has said in an article that post-dates my draft (*Sunday Times* of 15 August 2010):

> The language of debate in parliament and of doing state business must be colonial, and the fact that the majority of the people understand neither the language nor the colonial way of conducting business does not matter ... The languages of the colonisers ... are a mark of success, class, civilisation and a vehicle to access resources.

I doubt whether any university south of the Sahara teaches law in a local language. The result is that African languages have failed to develop a modern scientific legal vocabulary.

This could be compared to the problem of Russia after the fall of the Berlin wall. Russia had since 1917 no commercial law simply because it had no private law commerce. Legal relations were defined in terms of public or criminal law. It

did not even have a company law. During the 1990s there was a scramble to adopt Continental codifications to fill the lacunae. Countries such as the Baltic States were more fortunate. They could fall back to onto their pre-war laws, which were civil-law based. Russia could not because its pre-revolution law was feudal.

The one African exception is Afrikaans, one of three major languages that developed during the 20th Century. Afrikaans was able to create a legal language of its own because of its close relationship to Dutch and German in particular and because the common law of the country is by a quirk of history Roman-Dutch and not English. This language has terms such as 'wederregtelikheidsbewussyn and 'opset by moontlikheidsbewussyn' – descriptive but untranslatable, at least not into English.

It might be argued that because we have eleven official languages since our interim Constitution of 1994 that the picture that I have presented of the language of the law in Africa is skewed, if not untrue, at least as far as South Africa is concerned.

The constitutional provisions about language are often hailed as something wonderful but that is only because they have had a good press agent. They were the result of a political compromise. Compromises seldom satisfy. Unrealistic compromises fail.

Permit me, in the interest our foreign guests, to give you a short history of the law of language in this country.

South Africa, as a political entity, is a century old. It was a consequence of the Anglo-Boer War. Another and earlier consequence of the war was the Milner language policy: the language of the country had to be English in spite of the fact that the official language of the Transvaal and the Orange Free State had been Dutch and the unofficial language embryonic Afrikaans. The policy did not succeed. Maybe it is a pity that it did not.

The Union of SA was created on 31 May 1910. Its Constitution, locally devised but an Act of the Westminster Parliament, had a language provision in terms of which the official languages of the country were to be English and Dutch, each with an equal standing. Afrikaans, as a language, had not yet been formalized and was not recognised. The African languages, like the rights of the indigenous peoples, were ignored.

Afrikaans grew and during 1925 the Constitution was amended to equate Afrikaans with Dutch. In other words, Afrikaans was introduced as an alternative to Dutch and very soon Afrikaans replaced Dutch in practical terms.

Statutes were always published in both languages. They were signed in either the one or the other although the two texts, which had to be approved by Parliament, had equal status. In the event of an irreconcilable conflict the signed text took precedence.

Published judgments of the high courts and the Appellate Division did not reflect the intention of the 1910 Constitution. There are no reported judgments in Dutch. A few inconsequential Afrikaans judgments were delivered in the AD after the 1930s. Except for judgments by the likes of Van den Heever J, who was also a poet, there were prior to 1947 hardly any published high court judgments in Afrikaans. Judge Neville Holmes was proud of the fact that he had delivered the first high court judgment in Afrikaans in Natal; it was during 1958 (half a century after unification). Even in the randomly selected 1948 (2) SA Law Reports, 3 pages (one judgment) are in Afrikaans and 1293 pages in English.

A case between what was then an Afrikaans university, the University of Pretoria, and the Minister of Education, Mr Jan Hofmeyr, who was Afrikaans, was argued in 1947. Counsel for the University, Oswald Pirow and Frans Rumpff (the former had been a Minister of Justice and the latter became Chief Justice) argued in Afrikaans. Counsel for the Minister, although conversant in Afrikaans, argued in English. The University lost. The judgment by Malan J was in English. He was Afrikaans speaking.

Things changed during the late 1950s. Many judges adopted a rule of thumb. Judgments were to be in the language of the parties. If their language differed, the judgment was in the language of the loser on the basis that a winner is satisfied with the result and has less interest in the reasoning.

I exclude the indigenous languages because they had no legal status. If someone spoke in one of them the proceedings were interpreted from and into one of the official languages.

At the time it was statutorily required that someone who applied to be admitted as an advocate had to have completed university courses in Afrikaans, English and Latin.

Matters were, however, since the 1970s different in the so-called independent homelands. These chose as official language their own language (isiXhosa for

Transkei for instance) and English. However, all court proceedings were still conducted in English as before.

Then came the 'constitutional' era with its 11 languages. The first victim (some would say 'triumph') of the language clause was the Latin requirement for advocates, which was abolished in 1994. And the abolition of all language requirements for advocates followed in 1995. Universities now have a free hand in determining their degree requirements. Lawyers without language? I thought, apparently wrongly, that language is the lawyer's tool.

The re-incorporation of the homelands into mainstream South Africa also had its effect. Judicial officers and practitioners from those areas did not know Afrikaans and are unable to conduct cases in that language.

Statutes are since then prepared in one language only and pass Parliament in that language. It is the official text. The language is English, often as she is not usually spoken. As a sop to the Constitution, each statute is translated in one of the other ten languages but the translation has no value because it has no official status. The translations are not even published by commercial law publishers. And since nine of them do not have their own legal terminology, the task to translate is enormous, wasteful and unnecessary. It is not possible to see what is the value of the Companies Act in, say, a language understood by one or two per cent of the inhabitants but not by others.

Courts, too, pay lip service to the equality of languages. The Black languages retained their status as second class languages, ie, languages that have to be translated or interpreted into English or (to a limited extent) Afrikaans, save for a small scale experiment that is being conducted by the Department of Justice. Court languages, accordingly, remained English and Afrikaans save for the fact that Afrikaans is losing ground rapidly.

The Constitutional Court rules have two language provisions. The first is that if any document is not in an official language 'understood by all the judges' it has to be translated into that language. The only language understood by all is English. The second is that counsel may argue in any official language but if the oral argument is to be in a language other than that of the brief, notice has to be given, presumably in order to find an interpreter.

One CC judge only, who has retired, has on one or two occasions written a judgment in Afrikaans. No judgment has been written in any other official language save in English.

Importantly, the judgments are not translated into the language of the parties or into a second official language. Canada's 'bijuralism' as practiced in the Supreme Court ought to have served as an example. There is even a private member's bill before the Canadian Parliament which requires of all judges to be bilingual. I am told that it is highly controversial and may not make much sense on the prairies.

There is a knock-on effect. We recently had an important case raising matters of principle and possibly constitutional issues. The parties were Afrikaans. The evidence and argument was, too. So was the high court judgment. When it came to writing the judgment I had to make a choice: if I write in Afrikaans, the judgment would have no precedential value because not all our students, lawyers or judges would be able read it or to understand it fully. The CC would have had to judge a translated judgment – a translation that I would not have seen and would not have known whether it was correct. The result of all this is that the practice has arisen in our court that judgments are to be in English unless the author is comfortable in Afrikaans, the parties and proceedings are in Afrikaans, and the case has no precedential value.

I would like to interpose to relate an amusing incident in our court. Counsel argued in Afrikaans. A judge asked him a question in Afrikaans. On the incorrect assumption that the judge, because he was Black, was not fully conversant in Afrikaans, counsel answered in English. The judge, in Afrikaans, asked counsel whether he had not understood his question, and he repeated it. The penny dropped.

The question arises immediately how all this is compatible with the Constitution. The answer is that, although the Constitution declared eleven languages to be official languages, it did not give them equal rights or guarantee them equal protection. All it does is to state that all official languages must enjoy parity of esteem and must be treated equitably. This creates nothing more than something akin to a natural obligation in Roman and civil law where the obligation flows from the conscience of the debtor: 'Le véritable base de l'obligation est toujours dans la conscience des contractants.'

In any event, the provision is subject to an overriding proviso:

> The national government and provincial governments may use any particular official languages for the purposes of government, taking into account usage, practicality, expense, regional circumstances and the balance of the needs and preferences of the population as a whole or in the province concerned; but the national government and each provincial government must use at least two official languages.

A similar toothless provision in the Bill of Rights relates to education. Everyone has the right to receive education in the official language or

languages of their choice in public educational institutions. However, it must be reasonably practicable. And every decision must take into account (a) equity; (b) practicability; and (c) the need to redress the results of past racially discriminatory laws and practices.

The fact that we have the right to use one's language of choice is also meaningless if the court cannot understand that language or if what is said or written therein is ignored. Few Black accused are tried in a language they understand and less Afrikaans-speaking accused are. Translated evidence remains suspect.

The huge legal academic contribution in Afrikaans has become as inaccessible as Latin texts have become. One sees this in the contributions to law journals. The first and foremost Afrikaans law journal, *Tydskrif vir Hedendaagse Romeins-Hollandse Reg*, was established in 1938. The contributions were nearly exclusively in Dutch and Afrikaans. Today, in spite of its object of nurturing the Afrikaans legal language, contributions in Afrikaans fell from 39 per cent in 2005 to 12 per cent in 2010. The others are in English.

An article in the Beeld newspaper of 5 August 2010 reported as follows:

> Prof van der Elst 'het die tydskrif *Acta Academica*, wat by die Universiteit van die Vrystaat gesetel is, as voorbeeld gebruik. Die jongste uitgawe bevat nege artikels in Engels en net een in Afrikaans, en dít handel oor Afrikaans se plek in 'n veeltalige Suid-Afrika. Hy het gesê die tydskrif *Koers*, wat by die Noordwes-Universiteit in Potchefstroom gesetel is, volg in *Acta Academica se spoor. Sewe van die artikels in die jongste uitgawe is in Engels. Nog 'n voorbeeld is die Tydskrif vir Letterkunde*, waarvan wyle prof. Elize Botha vroeër redakteur was. In 2007 was daar 'n uitgawe oor Burkino Faso met 14 Engelse artikels.'

In other words, as George Orwell would have said, 'all languages are equal but English is more equal than others.' The simple fact is that languages in a multi-cultural society are not equal as any visitor to Brussels soon perceives.

What I have said thus far may have sounded as a call for special recognition of Afrikaans. That was not my intention. I merely used Afrikaans to illustrate a problem. African languages are in a far worse position. They are simply ignored.

The English author, GK Chesterton, wrote a futuristic novel, *The Napoleon of Notting Hill,* at the beginning of the 20th C. It was set at the beginning of this century. It includes a story about the President of Nicaragua whose country had disappeared through the 'brute powers of modernity'.

There were only a few mega-countries left, Britain being the foremost. The President, lonely in London, was lamenting the loss of his country. The Englishman to whom he spoke explained that the loss was inevitable. He said:

> We do not discourage small nationalities because we wish large nationalities to have all their smallness, all their uniformity of outlook, all their exaggeration of spirit. If I differ with the greatest respect from your Nicaraguan enthusiasm ... it is because civilization was against you. We moderns believe in a great cosmopolitan civilization ...

Chesterton may have been wrong on the future greatness of Britain. But he was right with the last sentence, which identifies the problem. The 'great cosmopolitan civilization'. Disneyland culture. Cultural colonialism. The global village. Google gobbling. Even the recent French entry at the Eurosong competition was sung in English. A world soon divided between Mandarin and English. And because I cannot speak Mandarin, I chose to speak today in English. Most of you, if not all, understand me. There is a second reason. During 1910 the Pretoria Bar held a welcoming dinner for the appointees to the Appellate Division, including the future Chief Justice Innes. The speech was made by NJ de Wet, who later also became a Chief Justice. But he spoke Dutch. This annoyed some English speaking guests who felt that it was inappropriate. I have taken note of their concern. By the way, De Wet's son became a Judge President in the 1960s. I always thought he was English speaking.

The role of the law is limited. A love for culture cannot be imposed. Culture comes from the heart, from the gut. If Afrikaans is becoming irrelevant it is not because of the law only – it is because the Afrikaans speaking population is losing heart or losing its heart. To illustrate: Some years ago a new law library was opened at a former Afrikaans university. All the speakers, from Principal to Dean were Afrikaans. They spoke English. The only speaker who used Afrikaans was Mr Mbeki, then the President. He hardly qualifies as Afrikaans.

The poet NP van Wyk Louw wrote in 1959: 'Dit wat ons taal sal word, of oor wat van hom sal word, kan ons nie praat nie – behalwe met hartstogtelike verlange' (Van Wyk Louw "Laat ons nie roem nie" in *Versamelde Prosa* II p181). (We cannot speak about what our language will become; and we cannot speak about what will become of our language – except with a passionate yearning. My translation.)

Before I become too despondent, I have just received a new publication, a book on Contract in Afrikaans. And the publisher is the Oxford University Press.

Many are passionate about their language. Wikipedia tells us that the Bengali language is native to the region that comprises present day Bangladesh,

the Indian state of West Bengal, and parts of Tripura and Assam. It is written with the Bengali script. With nearly 230 million speakers, Bengali is one of the most spoken languages (ranking sixth). Bengali was the focus, in 1951–52, of the Bengali Language Movement in what was then East Pakistan. Although the Bengali language was spoken by the majority of Bangladesh's population, Urdu was legislated as the sole national language for Pakistan. This led to a bloody uprising that was brutally quelled.

When Bangladesh won its war of independence from Pakistan, Bengali was proclaimed as the only official language, and English abolished as a school subject. The country is poor, very poor, one of the least developed countries in the world. It is surrounded by India. India's economy is growing. That of Bangladesh is not. The main reason for the discrepancy, I was told, is because of the language policy of the government. It isolated the country.

By the way, Bengali is one of the 23 official languages recognised by the Republic of India and is the official language of the states of West Bengal and Tripura. And I thought that we in South Africa have language issues! At least we use Roman script, although that is not constitutionally protected. This brings me to a final anecdote. Our Department of Justice, historically and linguistically challenged, refers to Roman script on its website as English script. My adaptation of George Orwell was not off the mark.

And this leads to my final idea. Maybe we should, in a multilingual context, adopt a script similar to Sinograms (or Han characters) for legal purposes. Logograms can be used by a plurality of languages because they represent words and not sound.

Best wishes for a successful conference and may you find the answers that elude me.

**Hon. Judge Louis Harms**

Deputy President: Supreme Court of Appeal

# TOWARDS A LEGAL FRAMEWORK FOR LANGUAGE CHARTERS IN AFRICA

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## Abstract

The African Union's Language Plan of Action for Africa (AU 2006) requires that members of the Union should have language policies that envisage the use of African languages for national development in conjunction with the official languages of the colonial legacy (English, French, Portuguese, Spanish, etc.) as *partner languages*. Such policies should be explicitly articulated in a framework that has the force of law.

A survey that was conducted by us on the existence and nature of language policies in Africa revealed that language policies are non-existent in some countries, or exist only in the form of vague, implicit principles that are not articulated. In some other countries, language policy statements are vaguely and briefly formulated, and merely comprise one or two articles of the constitution. Moreover, in many other countries where *language acts* or *language laws* do exist, they are often inadequate, defective or incomplete. Glaring omissions include, *inter alia,* the absence of provisions on language rights for education, the courts and governance, as well as provisions for the implementation of national development objectives, etc.

The problematisation of this state of affairs, as presented in this paper, underscores the need for a legal framework to serve as a *model and guide* for the formulation of a comprehensive language policy. Specifically, we aim to provide a proposal for a legal framework for the conceptualisation and framing of a language charter, a language act, or a language bill for Africa, on the basis of an analysis of the AU's Language Plan of Action for Africa, the United Nation's Human Rights provisions, and – in particular – the acclaimed "advocacy for Language Rights", either in the form of Linguistic Human Rights (Skutnabb-Kangas 1998, 2000) or Linguistic Citizenship (Stroud 2001).

The model also takes account of thorny issues such as the usual gap between policy and implementation, the lack of provision for the protection of linguistic human rights under the law, as well as issues of enforcement, impunity, allocation of resources, etc.

In short, we aim to motivate and justify a proposed legal structure that would provide statutory articulations and elements of language policy at the levels of status planning (*policy formulation*) and corpus and acquisition planning (*policy implementation*), in terms of language-related and language-dependent provisions that are crucially relevant to the social, economic and political transformation of African nations, with a view to national development.

**Résumé**

Dans son *Plan d'Action Linguistique pour l'Afrique* (AU 2006), l'Union Africaine exige de ces membres, l'adoption d'une politique linguistique dument garantie par un cadre juridique mettant en exergue l'utilisation des langues nationales pour le développement de la nation en partenariat avec les langues officielles issues de la colonisation (comme le français, l'anglais, le portugais, etc.)

Or, il ressort d'une étude que nous avons menée sur les politiques linguistiques en Afrique, qu'il existe des pays africains sans politique linguistique ou éventuellement envisagée comme un principe vague, inarticulé et implicite. Dans d'autres cas, la politique linguistique est réalisée comme des énoncés sommairement parsemés dans un ou deux articles de la constitution. Dans le meilleur des cas, des lois et décrets existent mais ils sont tous simplement défectueux, déficients ou incomplets. Les omissions les plus évidentes comprennent, entre autres, l'absence de dispositions concernant les droits linguistiques dans l'enseignement, les tribunaux et en matière de gouvernance, etc.

La problématisation de ce phénomène nous amène à souligner et faire valoir le besoin qui se fait sentir d'un cadre juridique pour servir de modèle et de guide à la mise en place d'une politique linguistique qui se veut complète et efficace En effet, nous relevons le défi et proposons un cadre juridique qui facilite la conceptualisation et l'articulation de dispositions d'une loi, ou d'une charte des langues sur la base d'une analyse du *Plan d'Action Linguistique d'Afrique*, et la *Charte des Nations Unies* sur les Droits de l'Homme envisagé sous forme de droits linguistiques par Skutnabb-Kangas (1998, 2000) ou sous forme de citoyenneté linguistique par Stroud (2001).

Notre modèle tient également compte des problématiques souvent constatées en Afrique comme le décalage entre une politique et sa mise en œuvre, l'absence de dispositions en vertu de la loi, les questions d'exécution de la loi, l'impunité, et l'allocation des ressources pour la mise en œuvre de la politique linguistique.

En somme, le modèle présente et justifie un cadre juridique qui comprend les articulations statutaires et les éléments fondamentaux d'une politique linguistique et les dispositifs d'un aménagement linguistique. Ainsi le cadre tient compte de toutes les dispositions qui, de loin ou de près, touchent aux questions de langues et leur développement dans l'entreprise de transformation sociale, économique et politique des pays (africains) en voie de développement.

**Key words:** legal framework, status planning and corpus planning laws, mother-tongue-based multilingual education, linguistic human rights, economic valorising functions, social engineering provisions, impunity, protection under the law

# **PART ONE:** GENERAL BACKGROUND CONSIDERATIONS

## 1. INTRODUCTION

### 1.1 The African Union's requirement of a language law

As mentioned above, the African Union's *Language Plan of Action for Africa* (AU 2006) requires that member states should formulate language policies that envisage the use of African languages for national development in conjunction with the current official languages of the colonial legacy (English, French, Portuguese, etc.) as *partner languages*. Such a policy should be explicitly articulated in a framework that is statutorily endorsed.

The objectives and principles of the Language Plan of Action for Africa, as articulated in Section 1.7, include the following, *inter alia*:

a) To encourage each member state to have a well-defined language policy.

b) [To ensure] that African languages …, by means of … appropriate *legislation* and effective promotion, assume their legitimate role as official medium[s] of communication in official matters of each member state along with the European languages that [have] hitherto assumed this function.

## 1.2 Overview of the current situation in respect of language charters in Africa

A survey of African countries in respect of their language policies revealed that each of these countries can be classified under one of three categories:

### *1.2.1 Category A: Countries with no language policy*

These are countries with no visible policy in the form of a clear pronouncement on language policy. In some cases, the existence of a policy can only be inferred on the basis of a vague and inarticulate implicit principle or tradition. For example, in Mauritius, there is a tradition in terms of which English is used as the language of administration and French as the language of official interaction, while Creole – the mother tongue of about 75% of the population, and spoken by 95% of the population (some as a second language) – enjoys no recognition at all. There is no *official policy statement* that consolidates this state of affairs. Despite the fact that an increasing dissatisfaction with the marginalisation of Creole has arisen amongst many speakers of the language, led by the non-governmental organisation, *Ledikasyon pur Travaye,* no official policy is available to redress the situation (as in June 2011). Of course, the lack of a policy might actually in itself comprise an intentional and well-calculated "policy of no policy", geared towards the maintenance of the *status quo.*

### *1.2.2 Category B: Countries with some form of policy statement regarding language and language use, limited to one or two articles in state laws*

Policy intentions may be explicitly expressed and recorded, for instance, in the constitution (the fundamental law of the land), or as articles in an education law or act, where the language(s) to serve as medium(s) of instruction in the school system at the various levels may be mentioned. However, in these countries, there is no distinct law on language and language issues that spells out the various considerations in the policy formulation or status planning decisions – and indeed, there are no details in terms of policy implementation procedures specifying obligations and responsibilities. Cameroon and most francophone African countries fall into this category.

### *1.2.3 Category C: Countries with language laws or language bills*

In these countries, an attempt has been made to introduce a comprehensive provision for language policy, with the inclusion of responsibilities, rights and obligations. The few countries in this category, such as Nigeria, Ethiopia and

South Africa (where the language bill is yet to become a law), have different conceptions of an appropriate legal framework for language policy, reflecting their different concerns in the matter. In most cases, they do not take account of all the concerns and desired objectives of the African Union and its *Language Plan of Action for Africa* (LAPA).

### 1.3 Advantages and merits of a language law

Given the African Union's requirement that not only should every member country have a language policy that clearly provides for the development of indigenous African languages to be used for national development along with the official languages of the colonial legacy, but that such a policy should also have statutory legal status, the need for a legal framework for language acts or language charters is obvious.

Such a legal framework putatively has enduring advantages, including the following, amongst others:

- It can serve as a *policy guideline* to facilitate the endeavour of framing language laws across the continent.
- It ensures the comparability of language laws and language charters on the continent, without the obligation of uniformity, since language situations and the ethno-linguistic composition of societies and general linguistic landscapes vary and may warrant different policy details.
- It aims to ensure that all language laws will be sensitive to and compatible with the essential basic cardinal and universal concerns that underlie such laws, such as human rights, language rights, responsibilities, obligations and protection under the law.
- It ensures effective conformity by African nations with common ideological positions, since the proposed framework is determined by overall ideological positions and concerns of the United Nations and the African Union, to which individual members of the Union are legally committed *ipso facto,* i.e. by virtue of their position as member states.

## 2. LINGUISTIC HUMAN RIGHTS

One of the weaknesses of the language policy instruments of African nations (where policies exist), is that they are either silent or very vague on the issue of *linguistic human rights* – as envisaged in the United Nations Charter on Human Rights and in various UN conventions, as articulated by many scholars, for

instance, Tove Skutnabb-Kangas (2000) – or what Stroud (2001) prefers to call *linguistic citizenship*.

A great deal has been said and done in respect of linguistic human rights in the last two decades. Much of the action taken in favour of linguistic human rights arose from the United Nations Charter (UN 1945). In fact, the UN Charter refers to protection against discrimination on the basis of language in articles 13(6), 55(c) and 76(c).

Since this important advancement, language has been included on a regular basis in international human rights documents. In 1948, the *Universal Declaration of Human Rights* guaranteed the right to freedom from discrimination on the basis of language, in Article 2. Article 2(2) of the *International Covenant of Economic, Social and Cultural Rights* of 1966 provides the same guarantee.

The United Nations Declaration of the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, issued in 1992, stipulates in Article 2.2 that member states should, *inter alia,*

> … take measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs, except where specific practices are in violation of national and contrary to international standards (Quoted in Skutnabb Kangas 2000. See also Perry 2004).

Amongst its obvious conclusions, this covenant acknowledges that the survival of cultural and linguistic minorities within the nation-state and within the community of nations is dependent on the use of their language in education and in self-actualisation and development. A number of international conventions and declarations of linguistic human rights have subsequently extolled the virtues and merits of positive linguistic rights and acknowledged the consequent need for affirmative action to ensure compliance.

## 3. CONTENT OF THE LANGUAGE CHARTER

Legal instruments are naturally concerned with both the *form* and *content* of legal provisions. However, in this contribution the focus will fall on the content of the language act or language charter, rather than on the form thereof (since the latter is the domain of jurists, who are competent in such matters).

In this regard, we have demonstrated (in Chumbow 2010a, 2011a) that the African Union's language plan of action actually encapsulates four strategic language planning and language engineering activities indispensable for the

cultural, social and economic transformation of Africa, namely the *revitalisation*, *revalorisation*, *instrumentalisation* and *intellectualisation* of African languages for the purposes of national development endeavours.

*Revitalisation* refers to all measures and actions necessary to ensure linguistic *vitality* and *language maintenance*, leading to the preservation of the remarkable quality and degree of cultural and linguistic diversity that characterises the rich heritage of African nations. This is envisaged in terms of, and in consonance with the recommendations of UNESCO (2003a).

*Revalorisation* pertains to all those provisions in the action plan that are geared towards ensuring *added value* for African languages, beyond their basic communication and identity functions within the ethno-linguistic group. This is achieved, for instance, by giving such a language *supplementary*, *economically valorising functions* as a language of education, a language of official or public affairs in the local government councils, a language of mass communication, etc. (Chumbow 2009, 2010a).

*Instrumentalisation* refers to those *language engineering* measures and activities envisaged in the plan that lead to the standardisation of languages by providing them with efficient norms and codes (norms of orthography, norms of grammar, etc.) to empower them to assume their new supplementary functions in education and other areas of development-related needs; in a nutshell, all measures taken to make the language an effective instrument of empowerment for education and economic development.

*Intellectualisation* complements both *revalorisation* and *instrumentalisation* in that it concerns all measures necessary to ensure the use of African languages in all academic and intellectual spheres, including the development of appropriate terminology for communication and the appropriation of new knowledge in science and technology. For more on the African Union's language policy in the context of continental development, see Chumbow (2010a, 2011a).

# **PART TWO:** ARCHITECTURE OF LEGAL FRAMEWORKS FOR NATIONAL LANGUAGE LAWS/CHARTERS/ACTS IN AFRICA

## 1. INTRODUCTION

The architectural design and structure of legal instruments cannot be identical and uniform from one country to the next, owing to the inherent diversity of the institutional and linguistic situations of countries. Therefore we shall

not attempt to propose a unique and definitive structural design for a legal framework, but rather a suggested general framework that incorporates some essential components of a framework which can be regarded, on the one hand, as compatible with the African Union's LAPA, and on the other, as being in keeping with the United Nations' Linguistic and Human Rights objectives for member nations. See, for instance, UNESCO's *Education in a Multilingual World* (UNESCO 2003b).

## 1.1 Preamble

A preamble is a preliminary statement, in the form of an introduction to a formal document such as a *statute* or *constitution*, which serves to explain the purpose of the document. The language charter or language law should start with a *preamble* which recalls the preamble of the constitution, as well as the articles therein that refer to the languages of the nation and language use, or to the unanimous commitment of the nation to certain *lofty ideals* to be cherished, upheld and preserved. The preamble of South Africa's 1996 constitution is quoted below *in extenso* to illustrate this:

> The preamble of the Constitution of South Africa
>
> We, the people of South Africa,
>
> Recognise the injustices of our past;
>
> Honour those who suffered for justice and freedom in our land;
>
> Respect those who have worked to build and develop our country; and believe that South Africa belongs to all who live in it, united in our diversity. We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to:
>
> - Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;
> - Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;
> - Improve the quality of life of all citizens and free the potential of each person; and
> - Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.
>
> May God protect our people.

In this preamble, it is acknowledged that post-apartheid South Africa has emerged from a past which it would prefer to leave behind in order to embrace a future of hope predicated on "democratic values, social justice and

fundamental human rights" and the construction of a society *united in diversity,* a society where "every citizen is equally protected under the law". These are aspirations that can be exploited (and have been exploited) to inform the spirit and objectives of a language policy/law for a multilingual, multicultural, and multiracial community *par excellence*, aptly described as a "rainbow nation" by the president. Not surprisingly, the language policy that is provided for in the constitution is one that, *inter alia*, embraces all eleven South African languages as *official languages*. This is in keeping with the aspirations expressed in the preamble.

Most preambles refer to either a common origin of the nation's people, or a common destiny of a people brought together by a conjuncture of historical circumstances, or both. The preamble of the 1996 constitution of the Republic of Cameroon, quoted below, aptly illustrates this general trend.

> *Le peuple Camerounais,*
>
> *Fière de sa diversité linguistique et culturelle, élément de sa personnalité nationale qu'elle contribue à enrichir, mais profondément conscient de la nécessité impérieuse de parfaire son unité, proclame solennellement qu'il constitue une seule et même nation engagée dans le même destin et affirme sa volonté inébranlable de construire la patrie camerounaise sur la base de l'idéale de fraternité, de justice et de progrès.*
>
> *We the people of Cameroon,*
>
> *Proud of our linguistic and cultural diversity, elements of our national character which we strive to enrich, but profoundly aware of the imperious necessity to consolidate our unity, do solemnly proclaim that we constitute a single and indivisible nation engaged in the same cause by a common destiny and affirm our unshakeable will to build a Cameroon fatherland on the foundation of the ideals of fraternity, justice and progress* (Unofficial translation from French by author).

When it is realised that Cameroon as a country is arguably the most multilingual (and most multi-cultural) nation in Africa, with about 279 languages (Ethnologue 2009) amongst a population of only about 19 million in 2010 (as against Nigeria's approximately 500 languages amongst a population of close to 200 million); and when it is considered that the Cameroonian nation is exceptional in Africa in view of its double colonial heritage (English and French), it is clear that the enterprise of nation-building presents challenges of a considerable magnitude. However, the preamble's positive stance towards these challenges – as evidenced by such phrases as "proud of our linguistic and cultural diversity", "aware of the necessity to consolidate our unity", "constitute a single and indivisible nation" – is an eloquent testimony of commitment to the lofty ideal of the construction of a pluralistic nation in which ethno-

linguistic diversity is a central value that comprises a crucial component of the nation's strength.

It is therefore feasible to refer to this preamble as a warrant for a language policy or law that seeks to strengthen the ideals therein. The notion of a language policy or language charter that aims to ensure a "place in the sun" for each of the nation's languages (including the languages of the colonial heritage), is directly linked to the aspiration of a people who are "proud and jealous" of their linguistic diversity and "unshakeable" in their will to "build a Cameroon fatherland founded on values of unity, peace and prosperity", etc.

Given the power and value of the constitution as the *fundamental law* of the country, it is also logical that subsequent laws should emanate and be derived from provisions of the constitution.

## 1.2 Goal of the law

What does the language policy, framed in the form of a language act or law, seek to achieve or to accomplish, in broad terms? Some sample goals are provided below, as examples:

- To enable the nation to promote and safeguard its linguistic diversity.
- To ensure freedom of language use in individual and national development.
- To ensure that the languages of the nation are maximally developed and used to achieve social and economic transformation in the enterprise of national development, etc.

## 1.3 Objectives/purpose of the law /act/charter

### *1.3.1 General objectives*

What (measurable) objectives must be attained in order to accomplish the goal of the law, as set out above? *Objectives are determined by the vision and mission that the nation has embraced for the purposes of its cultural and socio-economic development (as reflected in its constitution, for instance)*.

Examples (which may not be relevant to all situations):

- Preservation of cultural pluralism as a foundation of nation-building.
- Use of all languages as a factor of national integration and national cohesion.

- Ensuring peaceful co-existence and harmony among the ethno-linguistic communities.
- Preservation of linguistic and cultural diversity.
- Promotion of multilingual development.
- Promotion of equal opportunities for access to official languages.
- Revitalisation of endangered languages, etc.

### *1.3.2 Objectives relating to the mother tongue (MT)*

The following objectives can be cited as examples in this regard:

- Encouraging the use of the mother tongue, especially in order to ensure the intergenerational transmission of the MT, even in cases where the parents in a household have different mother tongues (UNESCO 2003a).
- Promoting the revalorisation of the indigenous languages (by assigning economically valorising functions to them) (Chumbow 2009, 2012a).
- Ensuring the use of the mother tongue in education as far up the ladder of education as possible, by means of a mother-tongue-based bi- or multilingual education system UNESCO 2003b; Cummins 1984; Alexander 2005).
- Promotion of mother-tongue-based multilingual development (Cuvelier 2007; Chumbow 2012a).
- Instrumentalisation and intellectualisation of the mother tongue, enabling it to assume additional/new functions in national development, etc.

### *1.3.3 Objectives pertaining to the protection of language rights*

Examples of such objectives are as follows:

- Ensuring equal protection in respect of linguistic rights (Skutnabb-Kangas and Philipson 1995; Coulmas 1998; Skutnabb-Kangas 2000).
- Regulation of protection in cases of unfair discrimination, and the putting in place of anti-discriminatory measures (May 2001).
- Ensuring affirmative action as an integral component of equality, etc.

### 1.4 Definition of terms

Another important aspect of a legal framework for a national language charter/law pertains to the definition of terms which are crucially relevant in this context. A section with definitions of key terms of the legal instruments is of critical importance to ensure a transparent understanding of key issues, thereby avoiding any opacity that could hamper the process of implementation of the legal intent and compliance with the law (which in turn could lead to unfortunate legal consequences). Examples of such terms include: national language, official language, home language, mother-tongue-based multilingual education.

## 2. POLICY FORMULATION OR STATUS PLANNING LAWS

This section of the legal framework should comprise a compilation of legal provisions governing the status and functions of the languages of the nation, so that objectives set out in previous sections can be clearly fulfilled.

### 2.1 Status and function of languages

Sociolinguistic fact-finding: Ideally, a judicious enterprise of policy formulation in respect of the assignment of functions to the languages of the nation should be informed by sociolinguistic fact-finding in the form of a rapid appraisal survey that seeks to record, *inter alia*, the following pertinent information:

- Identification of languages (number).
- Demography (population of speakers).
- Geographical spread.
- Dialectal information, etc.

Sociolinguistic information is relevant to decision-making in respect of policy formulation and implementation, and must therefore (in our view) be provided for in the legal instrument (Chumbow 1987; Cooper 1989).

### 2.2 Determination of functions and domains

The functions that languages of the nation are expected to fulfil, and/or the domains in which various languages must be used in national development, are best specified by means of the law. Such functions and domains may include the following, for example:

- Cultural and ethnic identity.
- National language.

- Official language or language of administration at various levels (national/ state/provincial or regional/local government, etc.).
- Language of the legislature (parliament, councils).
- Language of education (basic, secondary and tertiary levels).
- Language of commercial interaction, etc.

(The list provided above is not exhaustive. See for instance, Cooper 1989.)

### 2.3 Allocation of functions

The identification of key functions and domains of language usage within the context of social communication for national development, is normally effectuated (at the policy-formulation level) by means of the allocation of functions to the various categories of languages in accordance with the provisions of the constitution. The allocation of functions in the language policy and the language law should be guided by the following principles:

1. All languages have an inherent basic function of identity (cultural, ethnic or group identity) and communication within the group.

2. The principle of *complementarity of functions* (Chumbow 2009): This principle refers to the allocation of valorising functions to minority languages. It endows the indigenous languages with economically valorising functions, such as that of a language of administration, education, or community development, or a language used by the NGOs, a language of local governments in decentralised governance systems, etc.

3. The principle of mother-tongue-based multilingual education (MT-MLE): This principle is based on the finding that psychological and educational advantages result when education is provided in the mother tongue "as far up the ladder of education as possible" (Cummins 1984; Heugh 2002; Alexander 2005). There is a growing consensus that the use of the mother tongue as the language of learning and teaching (LoLT), at least for the duration of the primary education period (six years), along with other languages added to varying degrees in accordance with the national language policy objectives, will enhance the consolidation of the learning process and outcomes (Cummins 1984; Alidou *et al.* 2006; Chumbow 2010c; Ouane and Glanz 2010). This is particularly pertinent within the context of the implementation of UNESCO's principle of *universal primary education* (UPE) or *education for all* (EFA), which comprises one of the targets of the millennium development goals. The MT-MLE is arguably the

most reasonable language-in-education policy, and is compatible both with UNESCO's prescriptions in respect of "Education in a Multilingual World" (UNESCO 2003b), and with the African Union's Language Action Plan for Africa (LAPA).

4. Ensuring the assignment of administrative functions to some African languages in accordance with the African Union's LAPA (AU 2006): Amongst other possibilities, this could be effectuated by following recommendations in the "*tiers stratification model*" of language planning in a multilingual setting (Chumbow 2009, 2012a), where the public sphere is bifurcated into private and public domains (following Habermas 1966), and where the administrative units such as the state and the provincial or local governments may have the option of using a local language for administration in addition to the national or official languages, where necessary and feasible.

5. Making legal provisions for other language planning endeavours at the level of policy formulation, as the need arises.

### 2.4 Protection of languages and language communities under the law

This section should set out legal provisions that guarantee the protection of all languages and the linguistic communities who speak the languages, by specifying *individual* and *group rights* as envisaged, for instance, by Coulmas (1998). (See also Skutnabb-Kangas 1998, 2000; Stroud 2001 and May 2001 for some detailed aspects of individual and group rights that can be articulated in this section of the charter).

## 3. POLICY IMPLEMENTATION PROVISIONS

This section sets out laws or legal provisions that govern the implementation of the language policy provisions as set out in 2 above. Such laws involve provisions on the nature and structure of the official language(s), as well as the other languages of the nation. Where the number of languages is not prohibitive, they may all become official languages, as in the case of South Africa (see the South African Constitution (RSA 1996), as well as Du Plessis and Pretorius 2000; Mwaniki 2010).

### 3.1 Social engineering provisions

Social engineering principles are geared towards ensuring a "change of mind-set" in order to cultivate an attitude that is congruent with and favourable to the

language policy formulated in the present language act/law or language charter (see Chumbow 2012b for more on social engineering).

In this regard, the following examples can be cited:

- Awareness campaigns entailing the dissemination of information on the new policy and its advantages, etc.
- "Beyond-awareness" activities, e.g. the "attitude engineering principle" (Chumbow 2009). Such activities are geared towards the conversion of negative attitudes to positive attitudes.
- "Attitude-change-inducing measures" (appropriation process – cf. Chumbow 2010b, 2012b).
- "Behaviour-change-inducing' measures (behaviour change is the primary indicator of the appropriation or adoption of new ideas compatible with the provisions of the language law).
- Provision(s) for the implementation of a dual initiative action (i.e., an action that is neither top-down nor bottom-up, but both. Action is initiated either from above or below; but in either case, the beneficiaries are motivated and actively involved in all phases of the conception and implementation process, particularly by means of "attitude engineering" mechanisms (Chumbow 2009).
- Provisions that recognise the need for "psychological warfare" against neo-liberalism in favour of the well-known traditional African communitarian spirit of enterprise.

It is well-known that throughout the continent of Africa, language planning is beset by challenges arising from the persistent gap between adopted policy and policy implementation. The social engineering process envisaged here is a response to these challenges. It is based on the knowledge that, as indicated in Chumbow (2010b, 2012b), the adoption or appropriation of a new idea (or a new technology) is not an event but a process that passes through different phases, each with specific indicators. Legal provisions that lead to a "change of attitude" and "change of behaviour" consistent with the purpose of the language charter are salutary, because changes in attitude and behaviour are indicators of the adoption or appropriation of innovation, and signify a change of mind-set.

This process of social engineering will hopefully lead the stake-holders to a greater level of commitment to the implementation process.

### 3.2 Mother-tongue revalorisation

This section is devoted to the setting out of laws that:

- Provide a set of values in favour of the mother tongue.
- Promote the inter-generational transmission of the mother tongue (MT) by means of measures to enhance awareness and use of the MT at home, even in cases where parents do not both speak the same language as their MT.
- Postulate the MT as the foundation of the language-in-education policy (LiEP).
- Stipulate and require a mother-tongue-based multilingual education (MT-MLE) system that accommodates the other languages in the constellation of languages proposed at the policy level. This can be done by ensuring that the MT is the language of learning and teaching (LoLT), at least throughout the primary school system, along with the official/national language(s). This provision is in consonance with, and takes due cognisance of Cummins's (1984) theory that the *basic interpersonal communication skills* (BICS) and *cognitive academic language proficiency* (CALP) must be properly developed in the MT, in order to ensure that the multilingual educational experience will be effective (Heugh 2002; Chumbow 2010c).

### 3.3 MT and adult literacy

In his book, *Why poor people remain poor*, Ajaga Nji feasibly demonstrates that poverty in the rural communities of Africa is the result of *ignorance* (Ajaga 2004). It has also been argued that rural ignorance essentially stems from a lack of *literacy skills* – a condition which is nothing short of tragic in this age of information and knowledge economy (Chumbow 1996, 2011b; Bamgbose 2000; Ouane and Glanz 2010). There are over 800 million illiterates in the world, most of whom reside in Africa (UNESCO 2008). There is a need to ensure the education of adults in the language they know best – their mother tongue – in order to facilitate the literacy process and access to new knowledge, and particularly the knowledge that they need for their own development (in order to ensure food security, reduction of infant and maternal mortality, etc.). Such knowledge is currently *available* in English, French or Portuguese, but it is not *accessible* to the rural community who speak a community language. This leaves the vast majority of the rural population in ignorance, poverty and want. Hence our assertion that "ignorance is a disease which only knowledge can cure" (Chumbow 2005, 2010c).

The use of the MT in education, especially adult education, will lead to the democratisation of access to knowledge. In this age of the knowledge economy, this will enable the masses of the rural population to become more effective agents of change in the fight for poverty reduction. The use of the MT in literacy programmes should therefore be appropriately addressed and guaranteed in the language law, to avoid the institutionalisation of a "multilingualism of exclusion" (Cuvelier *et al.* 2007).

### 3.4 Challenges of MT-MLE and solutions

The law should anticipate and make provision for issues that arise as *obstacles*, such as the "high number of languages, and the cost of producing language materials and implementing teaching in so many languages", etc., which are usually cited by opponents of MT-MLE. In order to deal with such opposition, the strategy of the legal provisions in this section should be to consider all of these putative obstacles as mere *challenges* that must be faced by means of positive action by the state and the population, given that ultimately, the advantages of the implementation of MT-MLE outweigh the disadvantages. As observed in Chumbow (1987), "no valuable cause has ever been achieved without a cost". Some factors that should feature among the legal provisions in this section are listed below:

- Multilingualism is to be viewed as an asset, not a handicap; a resource, not a burden.
- Language standardisation of every language that still has only an oral tradition should be envisaged, encouraged and ultimately provided for.
- Language materials: the development of primers, readers, textbooks, etc., should be envisaged and provided for at certain levels of the administrative unit.
- Design and production of literacy and numeracy materials should also receive attention.
- Provision should be made for experimentation and for the adoption of the appropriate MT-MLE methodology for various constellations of languages, as envisaged or prescribed (in the status planning articles of the law, as mentioned above).
- Teacher-training provisions are important, especially regarding training in MT-MLE methodology.
- The training of language-material developers, as well as other agents of change, as partners in the language policy implementation process,

should receive attention, etc. (Any other relevant issues, as warranted by the circumstances of the particular country, should also be provided for).

### 3.5 Promotion and use of the MT in the media

In this age of information and communication technology (ICT), the state should provide for the development and use of the mass media, in order to make information accessible and transform attitudes and behaviour in a direction congruent with the desired national language policy. Therefore, the following factors (among others) may be considered in the legal provisions of this subsection:

- Development of media networks (newsletters, newspapers, rural community radio stations, audiovisual media, etc.).
- Training of media practitioners and other agents of change in the use of the standardised local language so as to serve as models in the process of diffusion and dissemination. This will involve legal provisions for the training of specialists in mass media and development communication. Development communication entails specialisation in language use for the purposes of initiating, implementing and sustaining development projects and innovations, so that communication can be geared, *inter alia*, towards behaviour change, social change and social mobilisation (see, for instance Mwaniki 2010).

### 3.6 Research

This subsection deals with legal provisions on research for the development of the languages and language materials. Legal provisions should be made for the following relevant research activities, amongst others:

- Research on the descriptive or structural aspects of language.
- Applied linguistic research geared towards solving identified language-related or language-determined problems.
- Research on the methodology of language teaching, especially the nature and efficacy of the MT-MLE methodology and models in different language constellations and contexts, with particular reference to those that are envisaged by the language policy provisions in this law (discussed above).
- Research on teacher training for local MT-MLE models.
- Research on any other issues, in congruence with the letter and spirit of the language law.

## 4. LINGUISTIC HUMAN RIGHTS

This section deals with the legal provisions that must be in place, and which must be put into effect, in the implementation of the linguistic human rights envisaged in section 2, subsection 2.5 above.

### 4.1 Domains of linguistic human rights

The objective here is to make provision for the promotion of linguistic human rights (LHRs) in order to ensure equal protection in respect of language use under the law. The relevant provisions should achieve the objectives of non-discrimination, affirmative action, social rights, affirmative state obligations, participatory governance, multiculturalism, multilingualism, pluralism, etc. Thus, specific provisions should be made for individual and group rights in various domains, including the following:

- LHRs in the education/school system.
- LHRs in the administrative domain.
- LHRs in the judiciary (the courts).
- LHRs in respect of health care, including the hospital context (doctor-patient interaction), etc.

Rights and obligations under the law should be clearly stipulated in respect of the above. In official, formal and semi-official situations (administration, courts, hospitals, etc.), it is important that the law should ensure that the individual is able to express himself clearly, by speaking a language he knows well, and that adequate arrangements are made for translation and interpretation.

(In the long run, the implementation of MT-MLE will reduce the burden of translation considerably.)

State, regional and local (council) administrations are expected to use the language(s) designated as the official language(s) at the respective levels; and the specified language(s) should be used in documents and proceedings at the various levels.

### 4.2 Measures for the protection of LHRs

Measures must be taken to ensure that the rights and liberties of citizens are respected – both in a general sense, and also with regard to language in particular. The laws, in their content and form, should be guided by concerns

relating to the enforceability and justifiability of language policies – otherwise the policy may amount to nothing more than "dead wood" in the arsenal of legal instruments. Thus, this section should clearly indicate the sanctions that will be put into effect in the case of any violation of the provisions in respect of the LHRs discussed under 4.1. Provisions for protection under the law, and for dealing with issues relating to punitive measures and the enforcement of relevant laws, should also be set out here.

### 4.3 Some considerations regarding the scope of LHRs

Concerning the scope of linguistic human rights in a language charter, an examination of the South African Constitution – in our considered view, one of the finest in Africa – is instructive.

The South African Constitution boasts a number of articles that guarantee a panoply of rights within a liberal framework, including a number of language rights, such as:

- The right to non-discrimination on the basis of language.
- The right to information in a language one can understand.
- The right to develop one's own language.

Other rights that should be included in a language charter are:

- The right to receive education in one's mother tongue.
- Linguistic human rights (Skutnabb-Kangas 1998).
- Rights in respect of the mother tongue.
- The right of any person to identify with his or her mother tongue, and to have this identification accepted and respected by others.
- The right to learn one's mother tongue (orally and in writing).
- The right to use one's mother tongue in most official situations, including schools (Skutnabb-Kangas 1998: 22).

As Perry (2004) rightly observes, these mother-tongue rights derive from the relevance of the mother tongue as an integral part of human identity – and one's personal human identity is an inalienable human right, and therefore also a fundamental human right.

## 5. FINANCING THE LANGUAGE POLICY

To bridge the gap between language policy and implementation, the language act or charter should also make provision for a principle of financial allocation for language policy implementation. A financial provision, in the form of a revenue allocation formula, can be linked to the national budget. The law may provide that a percentage (approximately 0.05% or more) of the national budget should be reserved for the implementation of the language policy. Thus, the finance law (or national budget) should oblige all Ministers to make budgetary provisions for the implementation of the provisions of the language act in terms of recurrent expenditure and language-related investment projects.

A *national language action plan* (NALAP) should be designed as part of the (five-year or seven-year) national economic development plan (since every African nation has a national development plan). The national language action plan would thus naturally be based on the language charter or language law, and should contain objectively implementable specifications of language planning actions to be undertaken during each period of the national development plan. Thus, given the fundamental importance of language for national development, the language planning measures and actions should be included in the national development plan (NADEP) as an integral part of the plan (Chumbow 1987). The requirement of financial provision for the NALAP and its inclusion in the national development plan should be enshrined in the language charter in order to reduce the potential gap between (language) policy and its implementation, which is so characteristic of most African countries.

## 6. INSTITUTIONS AND PARTNERS

To ensure the effective implementation of a robust language industry, as envisaged by the language charter or law, there is a need to identify potential partner institutions and organisations that would enter into a commitment to become actively involved at various levels of the implementation process.

### 6.1 The national language centre/institute/board

There is a need to set up a central agency (of the type envisaged in Chumbow 1987), commissioned with the implementation of the provisions of the law, and sufficiently equipped and instrumentalised to co-ordinate all language planning actions and initiatives.

- The central language planning authority may be called by any name, and the names given here are merely intended as useful suggestions.
- This institution, armed with a set of terms of reference, must collaborate with other partner institutions in order to provide leadership in the process of policy formulation and implementation. The terms of reference should include at least the following three objectives:
  - To co-ordinate the implementation and evaluation process of the language planning activities.
  - To serve as a watchdog for the implementation of linguistic human rights provided for in the language law or language charter.
  - To advise government on policy and legislation on language issues, etc.

The central agency may be created by an independent act or law in which its organigram, structure and function are spelled out; but it must also be envisaged, with clearly designated functions and competencies, in the language law/charter.

Some countries have, in fact, set up institutions of this type. Examples include the National Language Centre in Nigeria and the Pan-South African Language Board (PanSALB) in South Africa. The statutes of the African Academy of Languages (ACALAN) – the apex organisation in Africa commissioned by the African Union with the coordination of language policy activities at the continental level – envisage the participation of some members of national language structures (centres/institutes, boards) in the Academy's Governing Board and in the Scientific Council as representatives of any one of the five economic regions of Africa. Articles 22 and 23 of the statutes of ACALAN recognise the national language structures as the foundation and building blocks of the Academy. They will thus potentially be able to contribute to policy decisions pertaining to language matters at the continental level (Chumbow 2011a). Although some functional inadequacies have been observed concerning some national language structures, such as the PAN-South African Language Board (see Perry 2004), the relevance and *raison d'être* of these structures has not been questioned. The language charters should benefit from these points of criticism in order to provide better terms of reference to national language structures, to enable them to perform their statutory co-ordination and watchdog (and "guide-dog") functions adequately and efficiently.

Major institutional partners in the process of dissemination and application of the innovations (implementation of the policy) should include the following, amongst others:

### 6.2 Language research institutes

These include university institutes/centres and Departments of Linguistics and African Languages, and/or Departments of Language Education. Given that research is one of the cardinal missions of universities, these institutions are well placed to advance the cause of research relating to language policy formulation and policy implementation, as articulated above.

### 6.3 Voluntary language research and development agencies

Non-governmental organisations involved in language research and literacy deserve to be encouraged in their endeavours, given the enormity of the problem and its multifaceted dimensions, requiring "all (well-meaning) hands on deck". In some African countries, these NGOs and CSOs will include such well-known organisations as the "Summer Institute of Linguistics" (SIL), the Bible Society, and various religious or non-profit national organisations. Although their primary focus and ultimate aim may be evangelisation by means of the translation of the Bible, the fact that they undertake language standardisation and literacy makes their work an invaluable contribution to national development endeavours, in that when one learns to read the Bible or Koran in one's mother tongue, the literacy skills that one acquires in this way become available to access development information in the areas of health, food security, etc., in one's mother tongue. The realisation of this fact has led some African governments (such as that of Cameroon) to enrol such institutions as partners in development endeavours in the area of mother-tongue education. Thus, the language law would certainly benefit from making provisions for partnership with language NGOs.

### 6.4 Language planning committees

These may comprise planning committees for each language, or the language planning committees of national, regional or state organisations. The work of such a committee, as a private initiative, needs to be co-ordinated by the national central language structure in order to ensure cohesion in the language development process.

### 6.5 Cultural and development associations

It often happens, in many countries, that cultural and development organisations, as well as the descendants' unions of individual ethno-linguistic communities, become committed to the establishment and funding of the cultural and development projects of their various communities. Given that language is an element of culture – in fact, *the* element of culture *par excellence* – these associations need to be included as potential partners in sponsoring language development initiatives.

**6.6 Any other structure(s)** whose objectives are congruent with the goals and objectives of this language charter.

### 6.7 Co-ordination of the activities of partners

The work of language development partners and their relationship with the central language agency need to be legalised and codified in order to ensure proper mutual understanding, as well as the collaboration that is needed to ensure the success of the language policy implementation process.

## CONCLUSION

To conclude, some comments about linguistic human rights are appropriate at this point.

Perry (2004), following De Varennes (1999), points out that human rights in general and linguistic human rights in particular, are *mere moral or political principles*. In other words, they may only be regarded as "positive obligations" in the sense of *moral obligations*, and do not necessarily have the force of law.

According to de Varenne, "[m]oral or political principles, even if they are sometimes described as human rights, are not necessarily part of international law. They are things that governments 'should' do, if they are nice, not something they 'must' do..." (De Varennes 1999: 117, quoted by Perry 2004).

One would have thought that, in any moral society, a *moral obligation* would be more compelling than any other form of obligation!

But then, over the years, morality has increasingly – and even constitutionally – been emptied of its universal content, and has now succumbed to extreme forms of relativism. An example in this regard can be found in the relativisation of moral norms in the domain of sexual behaviour to include advocacy for rights

pertaining to homosexuality – i.e., the right to engage in behaviour considered deviant and unacceptable (and thus *immoral*) in former years.

The implication of what I will call "the De Varenne paradox" is that *morality* and *moral principles* are no longer binding nowadays, since moral obligations can be – and often are – contravened with impunity.

Linguistic *human rights* are too important to be lumped together with moral obligations that can be violated with impunity. If human rights as moral obligations are "things that governments 'should' do if they are nice, and not something they 'must' do", then we have no option but to insist that linguistic human rights should be brought under the ambit of the law. They must be governed by the law, so that the enforcement of LHRs will no longer be merely optional.

In the era of increasing advocacy for a variety of "freedoms" that challenge the oneness and supremacy of a societal moral code of conduct for the nation, the logical conclusion is that, since linguistic human rights are of fundamental importance, they must (like all other fundamental human rights) be enshrined in the constitution of all nation-states and/or incorporated in laws and decrees, or other legal instruments, in order to be enforceable. The rightful place of linguistic human rights that protect the rights of minorities to use their language in schools, in the courts, and in hospitals, etc., for the purposes of self-actualisation and personal development, is therefore in the constitution and in the laws of the land.

The constitution is accepted as the fundamental law of the land, in that all laws must be congruent with the provisions of the constitution. It is in this sense that laws and subsequent decisions and actions of the executive arm of government that are at variance with the constitution can be challenged in any court of law as *unconstitutional.* In the same vein, rights enshrined in the constitution and in legal instruments are – *ipso facto* – *guaranteed rights,* because they are enforceable as *constitutional rights*.

It is in this sense that the African Union's concern and advocacy for the guaranteeing of language policies by means of constitutional provisions, which then give rise to language *laws* that constitute language policy, is justifiable.

The language law is usually an act of parliament. That the language policy should be enacted by an act of parliament is desirable, because parliament is an assembly of the people's representatives in any democracy (in its classical definition of "the government of the people by the people for the people").

The architecture of the legal framework proposed here is not perfect or complete; nor is it intended to be. It is a proposal for a much-needed document that should undergo constructive modifications as necessary, to ensure the emergence of a functionally adequate and ideologically efficient framework for language acts across the continent.

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# OBSTACLES IN THE WAY OF A MULTILINGUAL SOUTH AFRICAN STATE

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## Abstract

South Africa is one of the few countries in the world that have made provision, on a constitutional basis, for the promotion of multilingualism at all levels of government, in addition to fundamental rights guarantees for cultural, religious and linguistic communities. At the international level, the country has also co-sponsored UN General Assembly resolution 63/306 (2009), in recognition of the UN's pursuit of multilingualism, and has ratified the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005). However, despite these positive gestures, multilingualism in government business has not progressed beyond paper promises; and after eighteen years – i.e., since the first democratic elections – the government has still not succeeded in passing the legislation necessary for putting the constitutional provisions into effect. The purpose of this contribution is to highlight the main obstacles preventing multilingualism from becoming a reality in South Africa. Three obstacles are identified: the prevailing influence of the ideological legacy of state-formation since the 19th century, the political transformation agenda of the ruling party, and the incapacity of state organs, especially at local government level, to understand and fulfill their constitutional obligations in respect of multilingualism.

## Opsomming

Suid-Afrika is een van die min lande in die wêreld wat grondwetlik voorsiening maak vir die bevordering van meertaligheid op alle vlakke van regering, bykomend tot fundamentele waarborge vir die beskerming van kulturele, religieuse en taalgemeenskappe. Op internasionale vlak het die regering ook meegewerk aan die VN se Algemene Vergaderingresolusie 63/306 (2009) in erkenning van die VN se nastreef van meertaligheid en het UNESCO se Konvensie Insake die Beskerming en Bevordering van Diversiteit en Kulturele

Uitdrukking (2005) geratifiseer. Ten spyte van hierdie positiewe tekens het meertaligheid in die owerheid se werksaamhede nie verder as papierbeloftes gevorder nie en agtien jaar na die eerste demokratiese verkiesings is die vereiste wetgewing vir die implementering van die grondwetlike bepalings oor meertaligheid steeds nie verorden nie. Die oogmerk van hierdie bydrae is om die aandag te vestig op die belangrikste hindernisse wat meertaligheid in die weg staan. Hoofsaaklik drie hindernisse word aangespreek: die hardnekkige invloed van die ideologiese nalatenskap van staatsvorming sedert die 19de eeu; die transformasie-agenda van die regerende party, en die onvermoë van staatsorgane, veral op plaaslike owerheidsvlak, om uitvoering te gee aan die grondwetlike verpligtinge insake meertaligheid.

**Key words:** South Africa, ideology, language legislation, multilingualism, transformation

## 1. INTRODUCTION

On paper, the post-apartheid South African state accommodates the needs and aspirations of linguistic communities. This optimistic assessment can be justified with reference to domestic law, as well as the country's actions at the international level. Domestically, section 6 of the Constitution has laid the foundation for the monitoring and developmental functions of the Pan-South African Language Board, and for the measures incumbent upon the state for promoting the use of South Africa's eleven official languages. Additionally, in section 31, the Constitution provides further hope in the form of an entrenched human right, in terms of which members of a linguistic community may not be denied the right to use their language in their interaction with other members of that community.

At the international level, South Africa has co-sponsored General Assembly resolution 63/306 (30 September 2009), recognising the United Nations' pursuit of multilingualism as a means of promoting, protecting and preserving the diversity of languages and cultures globally. Moreover, on 21 December 2006, it ratified the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005). The interesting factor regarding this Convention is that it proclaims cultural diversity – of which linguistic diversity is a fundamental element – as part of the common heritage of mankind; and the preservation of this diversity is regarded as indispensable for peace and security at the local, national and international levels, and as a strategic element in national and international development policies. In article 6 of the Convention's operative part, the protection, promotion and maintenance of cultural diversity are even listed as essential requirements for sustainable development for the benefit of present and future generations.

It is not difficult to explain South Africa's eager ratification of this Convention. In Part IV of the Convention's text, in which the rights and obligations of the state parties are spelled out, it is apparent that the parties committed themselves to take the necessary measures and adopt the necessary policies as part of their "sovereign right" – as opposed to a "sovereign duty" – when pursuing the objectives of the Convention. This distinction is significant. Once something is formulated in international instruments as a "sovereign right", it means that the claimant of the right has a wide discretion on what to do, if anything at all. The only consolation, and a slight one at that, is that state parties may be urged to take visible and effective measures through the enforcement mechanism of the Convention. For instance, provision is made for an obligation to report on measures taken to protect and promote the diversity of cultural expressions (Article 9). These reports will then be assessed and commented on by an Intergovernmental Committee, which must transmit such reports and recommendations to the Conference of the Parties, which is the supreme plenary body of the Convention (Article 22). Enforcement therefore takes place through diplomatic interaction and peer reviews.

Against the background of this brief introduction outlining the legal framework that South Africa has embraced with a view to accommodating and promoting the interests of its multilingual and multicultural population, this paper will focus on the obstacles encountered in moving from paper commitments to reality.

## 2. STATE-FORMATION SINCE THE 19TH CENTURY: THE FUSION OF STATE AND NATION

One of the outstanding features of state-formation in the 19th century and beyond was the fusion between the act of political organisation and a cultural-linguistic community, the archetypal and metaphysical norm for the creation of a world community of sovereign states. Through different stages, the reciprocal dependence of political and cultural communities culminated in the formation of the nation-state, characterised by a coincidence of the cultural and the political, and hence by an interdependency of political and cultural membership, rights and obligations. Once the state is perceived as the political organisation of a homogeneous cultural-linguistic community, monolingualism invariably becomes an unquestioned precondition for national unity, which the state is then expected to uphold through voluntary or coerced assimilation. This tendency towards the nationalisation of language was the first step towards the political marginalisation of the so-called "non-national" or "alien" cultures and languages, which provided the script for some frightful political experiments in the twentieth century in the form of the holocaust, Bolshevist oppression, apartheid and ethnic cleansing.[2]

The historical dominance of the political ideology in terms of which the boundaries of the cultural community and the body politic must coincide had two notorious consequences in South Africa. First, it had a colonising effect on society, in the sense that all societal institutions, whether economic, educational, legal, political or social, had to display the characteristics, interests and desires of the communal and national will. Second, cultural groups were perceived as political groups. Consequently, the state as the political form and organisation of an ethno-national community had to assume the function of the political precondition for cultural survival. Once this point had been reached, the logical next step was the instrumentalisation of the state and of state power in the interest of the cultural community. This was the ideological underpinning of the colossal social engineering experiment under apartheid.

The experience with state-formation in post-colonial Africa is not dissimilar. While African countries jubilantly danced their first dance of freedom, they did not have the vaguest notion of how to accommodate the socio-cultural and linguistic diversity of their citizenry.[3] For many, the solution lay in the rejection of African languages, which were seen as divisive factors in multi-ethnic and multilingual African states, and their replacement with one official language – which invariably was the language of the departing colonial power. This policy was anchored in the notion that monolingualism was a precondition for national integration and national unity.[4] Thus, the building of a new political identity coincided with the mastery of the language chosen by the state for its official communication with the citizenry.

## 3. THE UNFORTUNATE LEGACY OF MARX AND ENGELS

The Dutch scholar, Van Eikema Hommes, once described the Marxist-Leninist prophecy of the imminent classless communist society, in which human freedom and self-development would secure the happiness of all, as a secularised, eschatological faith in the final liberation of mankind. In terms of this scheme, the proletariat assumed the role of the Great Redeemer who would undo man's fall into sin, i.e. the state of alienation brought about by the capitalist exploitation of man.[5]

This delusion has not lost its allure for the proponents of a certain political reading of the reconstruction of the post-apartheid state, and is constantly gaining ground in various forms, as can be seen when the "national question" or the "national democratic revolution" becomes a rallying point for debates on the future of the country. A few examples will suffice.

In 1988 a collection of essays, many of which were authored by prominent members of the current ruling party, was published under the title *The National*

*Question in South Africa*.[6] As the title hinted, and as the introduction confirmed at the time, the curious reader was treated to a Marxist-Leninist analysis of the situation in South Africa. The main message of this orthodoxy, which – at least in other parts of the world – came to a dramatic end a year later, was that liberation must ultimately aim at a socialist reconstruction of South Africa.

The class earmarked for this messianic task was that of the black workers, through whom we would not only arrive at our socialist future, but also experience the deepening of national unity in economic, political and cultural life. This, we were told, was the only way in which we could become one nation, since nation-building, in this sense, means a unification of the working class, whose culture, aspirations and economic interests must increasingly become those of the majority in South Africa.[7]

Almost a decade later, in 1996, two members of Parliament – both leading figures in the South African Communist Party, one of the ANC's alliance partners – raised the issue of how to deal with the emergence and apparent resilience of ethnic, racial and other identities in post-apartheid South Africa, from a Marxist perspective on nationalism and national unity or identity.[8] The challenge, these members argued, was to advance the national democratic revolution beyond its current limited aspirations, such as democratisation, non-racialism and national self-determination, to a more complete stage which would see the realisation of a socialist society and a new South African nation based on the cultures, values and interests of the African working class. The promised result in this regard is that, once the national identity of the new nation becomes imbued with the hegemonial working class and its economic interests, the divisions will be obliterated, because the working class will tolerate only the "cultures, values and interests of classes and strata outside this alliance that are reconcilable with it".[9] All areas, even voluntary associations, are "terrains of contestation which the working class must occupy".[10] This "deepened sense of transition" will even change our understanding of concepts, such as non-racialism, which will be given a more specific (hegemonial) cultural and class content. Moreover, the new bill of rights and constitutional recognition of diversity apparently must obey this imperative and assume a new function to assist in the construction of a national working class identity.[11] Thus, it is not surprising to learn that one of the honourable members of Parliament at the time asserted that the "particular flavour given to the concept of nationhood in South Africa as influenced by the notion of reconciliation seems to represent a potential threat to a progressive definition of a South African identity".[12]

It is doubtful whether this extreme and rather crude version of Marxism represents mainstream political thinking in South Africa today. However, I am of the view that the Marxist understanding of the formation of modern nations,

based on Marx's observation of the process in Western Europe and especially in revolutionary France, still has a determinative influence in South Africa as far as national development and national unification are concerned. This also lies at the heart of what is called the "national democratic revolution" in South Africa.

What lives on in the thinking of the ruling elite is the idea that every form of nationalist ideology and activity is aimed towards the formation and consolidation of national states. Hence, national movements and national communities are always defined in terms of their functionality, i.e. in terms of the roles they play in bringing about the unified national state. The process of national assimilation, which Marx regarded not only as highly desirable but also as an inexorable process that cannot be opposed, accounts for his impatience with ethnic minorities and other "reactionary relics of the past" which must disappear to make way for social progress and national unification.[13] I suspect that this understanding still explains, at a deeper level, the reluctance of the ruling elite in South Africa to accommodate the diverse aspirations of linguistic and other communities.

## 4. REPRESENTATIVITY AND ITS HOMOGENISING EFFECT

During apartheid, social and political imperatives were often subsumed under the conceptual domination and controlling influence of a few master codes such as "state security", the "national interest", separate development, and the "preservation of a Christian-national identity". In post-apartheid South Africa, new rhetorical devices and formal as well as informal policies have given birth to a new set of master codes around which the new order must be constructed. Of principal importance are the concepts of *transformation* and *representativity.*

In terms of the transformation rhetoric, it is apparent that what the transformers have in mind is a process by means of which the character and appearance of the state will be completely altered. What we do not know – if we leave political platitudes aside – is what the new transformed state would be like. Seemingly, this is an aspect that we must entrust to the national democratic revolution. What we do know, however, is that the composition of institutions, state as well as non-state, in accordance with the "principle" of representativity, is one of the main instruments for bringing about the desired transformation. In a recent, well-researched article, Malan[14] has explained the issue as follows:

> Representativity is the norm in terms of which institutions and organized spheres of people are required to be composed in such a manner that they reflect the national population profile, particularly the racial profile of the national population. … Proportional representation in the legislature and representativity are premised on the same principle. The former applies to elected legislatures and

> the latter to other state institutions and organized spheres of civil society. The difference between the two is that proportional presentation reflects the electoral strength of political parties in legislatures, while national representativity requires the national population profile to be mirrored in the composition of other state institutions and organized spheres of civil society.

In his article, Malan lists 50 pieces of legislation passed since 1997, which regulate a multitude of activities, and in which representativity is a defining norm for the composition of public and other bodies, including cultural institutions. Referring to this formidable and wide-ranging legislative programme, Malan observes that there is "in all probability no other legal principle that is so virulently and unrelentingly pursued".[15] This assessment finds support, *inter alia*, in a public speech delivered in 2009 by a former constitutional court judge, Johan Kriegler, who made the following observation: "But from where I look at the judiciary today, and the way I have been watching the Judicial Service Commission, this ethnic/gender balance in section 174 of the Constitution has become the be-all and end-all when the JSC makes its selections. And if it is not the be-all and end-all, at the very least it has been elevated to the overriding fundamental requirement".[16]

The utilitarian composition of the representativity model disallows the development of a public legal order with sufficient sophistication and scope for accommodating multiple identities and aspirations associated with multi-communal societies, and facilitates assimilation into the national whole. I will end this section by quoting a few lines from Malan's article:

None of the communities to which we belong reflect the national population composition or national interests. On the contrary, communities are identifiable and distinguishable as communities precisely because they differ from (the rest of) the national population and from other communities that make up the national population.[17]

## 5. ISSUES REGARDING SECTION 6 OF THE CONSTITUTION

Section 6(4) of the Constitution places an obligation on the national and provincial governments to take legislative and other measures to *regulate* and *monitor* their use of official languages. This section also determines that all official languages must enjoy parity of esteem and must be treated equitably by the national and provincial governments. The local governments, in their turn, must take into account the language usage and preferences of their residents.[18]

These provisions must be analysed against the background of the legal meaning of the "official status" of a language. In the first instance, the principle of

constitutionalism prohibits the type of dismissive approach to section 6 that would reduce its function to a mere symbolic declaration without any legal content. It is therefore submitted that conferring official status on a language in a constitutional state is meaningless *unless* it results in such a measure of state usage of that language that its position as an official medium of state expression is *constantly affirmed*. This has implications for both the domains and the frequency of the official use of a language. Consequently, officialising a language would be meaningless unless the language in question were, in principle, used in all or most of the primary domains of official government business, i.e. in the legislative, judicial and executive contexts. This does not mean that all official languages should be used in every conceivable form of government interaction with its citizens. But at the very least, an official language policy needs to identify core specific aspects of "government business" in the broad fields of legislation, justice and administration in which the official status of all eleven languages is recognised as a matter of course.[19]

Secondly, the use of the official languages must be a matter of some regularity and frequency, and not so exceptional that it is not perceived to be a credible part of the identifiable linguistic complexion of the state. It seems obvious that the exclusion of a particular official language from the most basic aspects of official government business (or even its infrequent use) would render the official status of that language illusory. Other, less important aspects of the communicative interaction between government and individuals may be addressed on a different basis, for example in terms of a fair rotation system. Whatever the case might be, the implementation of such an approach would require that official language policy should develop a regulatory scheme based on a differentiated classification of all particular aspects of the official domains, indicating which are to be considered core aspects and which are more peripheral in nature.

The fact that organs of state experience difficulty in understanding the scope of their obligations in terms of section 6 of the Constitution has become clear, over the years, on the basis of a number of cases, which will be addressed by commentators in the course of this conference. I shall limit myself to a brief reference to the most recent case in this regard, namely the case of *Lourens v. President of the Republic of South Africa*, which was decided by the High Court in Pretoria on 16 March 2010.[20] In this matter, the applicant approached the Court for an order instructing the government to adopt, *inter alia*, the necessary legislative and other measures, as required by section 6(4) of the Constitution, to regulate and monitor the use of the official languages.

The government was quite satisfied that it had, in fact, complied with its obligations in terms of section 6(4), by (a) adopting a national language policy framework, which

was never implemented; (b) establishing a language practitioners' board with the aim of giving language practitioners some kind of professional status; (c) introducing a translation service; and (d) coordinating terminologies in various technical domains, etc. All of these factors were rejected by the court as steps that would attest to government compliance with section 6 of the Constitution. The remedy decided upon by the court was a declaratory order specifying that the government had failed to comply with its obligations in terms of section 6(4) of the Constitution, coupled with a mandatory order instructing the government to comply with its obligations within a period of two years.[21]

A second example relates to the way in which local governments understand their obligations in terms of section 6 of the Constitution. In 1998, we conducted a survey amongst local governments in the Free State province to establish how they handle multilingualism in oral and written communication in terms of section 6 of the Constitution. Without going into detail regarding the responses, it should suffice to mention some of the most prominent indicators that emerged from the survey.[22]

On the level of municipalities' understanding of the constituent elements of the official language clause, what became clear at the time was a general tendency not to interpret this clause as an integrated whole. Especially with regard to municipalities' inactiveness regarding the development of indigenous languages, practical factors are allowed to dictate decisions to an extent that completely undermines the constitutional obligation of increasing the usage and promoting the status of such languages. In particular instances, this also happened in decisions regarding the official use of Afrikaans or English.

There does not seem to be any unequivocal awareness of and commitment to the intent of the official language clause as a binding directive for the promotion of multilingualism. A natural outcome of such an awareness and commitment should have been a formal official language policy, providing some regulatory system for the use of official languages in the normal business of municipalities. The survey revealed that the vast majority of municipalities had not, at the time, adopted an official language policy, and neither were any such policies in the planning phase. Also, only in a small minority of cases had any steps been taken by municipalities to determine the language usage and preference of their residents. Most notable in this regard, however, was the almost complete disregard by local governments of the constitutional directive of promoting the usage and status of the indigenous languages. In fact, almost half of the respondents indicated that this was not a matter to which they had given any thought at all. The low status of official language policies in the range of priorities of local governments was further underscored by the fact that, of

those local governments that had adopted a formal policy, almost 70% did not deem it necessary to communicate its contents to the public at all.

It is therefore not surprising that the *de facto* use of official languages by local governments is not so much the result of a considered application of the Constitution, as of pre-existing socio-linguistic patterns informally transplanted into official local government business. This form of informal accommodation of language preferences, with some notable exceptions, seems to have provided a reasonably successful format for addressing language conflicts. The survey indicated that language complaints comprise only a small percentage of the total number of complaints received by municipalities. The vast majority of respondents also stated that language had not been experienced as a problem during council meetings. The present approach clearly harbours inherent dangers. Its extent of language accommodation relies largely on personalities, relationships and the strength and persistence of historical patterns of inter-personal language use. Should these informal mechanisms become dysfunctional and fail to prevent or address language conflict, there is no solution to fall back on that could provide an acceptable basis for its resolution. A great many factors have the potential to undermine the effectiveness of the present pattern of informal accommodation of language needs. For instance, any significant change in the demographics of council membership or the municipal workforce might radically alter the standing of a particular language in the internal and external communication of a municipality; present language accommodation might be the outcome of political compromise or expediency, and could be wiped out by a different constellation of events in the future, etc. A legal framework for official language use, based on the Constitution, remains an essential ingredient in the resolution of language conflict.

Information available at the time suggested that the situation was not restricted to the province under survey, and that it was actually more of a national phenomenon. Experience since then has shown that the situation has remained unchanged.

## 6. CONCLUSION

In 1993, the Council of Europe published an explanatory report on the European Charter for Regional or Minority Languages (1992). Of particular significance is the following observation:[23]

The provisions are mainly designed to improve communication between public authorities and those who use regional or minority languages. It is true that social and cultural situations have evolved in such a way that the very great

majority of the people speaking these languages are bilingual and able to use an official language in order to communicate with the public authorities. However, allowing the use of regional or minority languages in relations with those authorities is fundamental to the status of these languages and their development and also from a subjective standpoint. Clearly, if a language were to be completely barred from relations with the authorities, it would in fact be negated as such, for language is a means of public communication and cannot be reduced to the sphere of private relations alone. Furthermore, if a language is not given access to the political, legal or administrative sphere, it will gradually lose all its terminological potential in that field and become a "handicapped" language, incapable of expressing every aspect of community life.

In similar vein, the High Commissioner on National Minorities, in a 1999 report on linguistic rights within countries forming part of the Organization of Security and Cooperation in Europe (OSCE), classified the ability of citizens to communicate with government officials in their own language as an "essential linguistic right", apart from the fact that such language use permits citizens to become actively involved in civil life and creates a pluralistic and open society in which all communities feel integrated without having to sacrifice their respective identities.[24]

It is this aspect of language use which has suffered the most, despite the high ideals of the new constitutional dispensation to accommodate linguistic and cultural diversity in the post-apartheid era. The reason for this state of affairs is mainly ideological. Over time, the all-assuming importance of the ruling party in all institutions of government, along with the party's ideological preoccupation with the national democratic revolution, has eroded the Rule of Law, which the new constitution has ordained as a founding value of the Republic of South Africa,[25] and replaced it with the rule of the ruling party. As a consequence, party interests and state interests have become indistinguishable. This state of affairs is further reinforced by the dominant populist political culture which is essentially assimilationist, in the sense that everybody is fused into an institutional reality, "the people", which functions as an organic whole that not only lords it over racial, ethnic and cultural identities, but also finds its highest organisational expression in institutions of government. From the perspective of the collectivist interests of "the people", the accommodation of diversity is deemed to have an antagonistic or reactionary quality.

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## ENDNOTES

1 This selection of conference papers is based on a standard reviewing process by a scientific committee (at least two reviewers per chapter).

2 Cf. Münkler (1994: 367); Habermas (1996: 17). See also the following remark by Schieder (1992: 80): "Sprachenkampfgegen Andersnationale war fast immer der Anfangeiner Politik, die allmählichauchmitanderen Mittelndaranging, nationale Homogenität in Mationalstaatmit Zwang und Gewaltherbeizuführen. Glaubte das 19. Jahrhundertmit der Sprachemanipulieren, siezueinem instrument der Macht miβbrauchenzukönnen, so manipulierte das 20. Jahrhundertmit den Menschen selbst".

3 Kashoki (1982: 282-288).

4 Kashoki (1982: 285-286).

5 Van Eikema Hommes (1979: 276).

6 Van Diepen (1988).

7 For a more detailed discussion of this collection of essays, see Strydom (1991/1992: 104-108).

8 See Carrim (1996: 49) and Dexter (1996: 59).

9 Carrim (1996: 51).

10 Dexter (1996: 62-63).

11 Carrim (1996: 55-56).

12 Dexter (1996: 59).

13 Nimni (1995: 57 *et seq*.).

14 Malan (2010: 427).

15 Malan (2010: 432).

16 Malan (2010: 432).

17 Malan (2010: 434).

18 Section 6(3)(b) of the Constitution.

19 See also Strydom and Pretorius (1999: 24-40).

20 [2010] ZAGPPHC 19.

21 In 2011, the government published a draft bill in an abortive attempt to comply with the court order. The draft was so flawed that parliament was forced to withdraw the bill and reopen the legislative process. At the time of finalising this contribution, the outcome of the parliamentary process was still inconclusive.

22 Strydom and Pretorius (1999: 31 *et seq*.).

23 Council of Europe European Charter for Regional or Minority Languages: Explanatory Report (1993) par. 101.

24 See Report on the Linguistic Rights of Persons Belonging to National Minorities in the OSCE Area, accessible at www.osce.org/documents/hcnm/1999/03/239_en.pdf at 12; accessed on 20 May 2011.

25 Constitution of the Republic of South Africa, Act 108 of 1996, section 1(c).

# IN DEFENCE OF LANGUAGE RIGHTS: LANGUAGE COMMISSIONERS IN CANADA, IRELAND AND WALES

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**Abstract**

Wales established a Language Commissioner in April 2012. This presentation will examine the strengths of the Language Commissioner model in Canada and Ireland as a precedent for Welsh development, and offer a detailed critique of the current Welsh model. It will focus on the growing tension between the promotion and regulation aspects of official language policy.

**Résumé**

Le Pays de Galles a 'établi un Commissaire aux Langues en avril 2012. Cette présentation examinera les points forts du modèle du Commissaire aux Langues au Canada et en Irlande comme précédent pour le développement gallois et offrira une critique détaillée du modèle gallois actuel. Ellel mettra l'accent sur la tension croissante entre la promotion et la réglementation d' aspects de la politique des langues officielles.

**Key words:** language commissioners, language rights, Canada, Ireland, Wales

## 1. IN DEFENCE OF LANGUAGE RIGHTS

This contribution is concerned with the defence of language rights in two respects.[1] First, it links the constitutional protection of official language rights with the statutory role of a dedicated agency of the state, the Official Language Commissioner. Secondly, it argues that this normative pattern, in terms of which the Language Commissioner's responsibility is interpreted in relation to the principle of respect for, and protection and/or promotion of language rights, does not come clearly to the fore in the legislative arrangements regarding the establishment of the office of the Welsh Language Commissioner, which became operational in April 2012. Although constitutional law provides guidance as to

the meaning and remit of a Language Commissioner, the Welsh model relies less on international precedent, such as is available in Canada and Ireland, and has veered more towards a unique, rather pragmatic amalgam of earlier statutory regulations, together with the experience of, for example, longer-established Commissioners dealing with the interests of Children and Older People. A key feature of the Welsh Language (Wales) Measure (2011), which created a Welsh Language Commissioner and inaugurated a new language regime based on Language Standards rather than on Language Schemes, is that it has shunned the opportunity to specify, in any detail, the individual rights of Welsh residents in respect of the Welsh language. My view is that this decision relates far more to political will and policy continuity than it does to legal competences. It is also a reflection of the UK devolution settlement, in terms of which the National Assembly for Wales is mindful of the fact that, despite its gaining greater authority in 2011 to pass primary legislation within 20 designated subject fields, there is a certain logic in not "testing" the UK legal system by extending the scope of official language rights beyond that which is currently defensible.[2]

The abiding challenge faced by many societies in Europe and North America is that of finding a way to turn language recognition and regulation into a resource asset – a public good, shared by the whole of society – which will not be perceived as an indulgence or a sop to a constituent minority. However, a not inconsiderable consequence of treating a language as a regulated public good has been the inconsistent application of official language policy, along with the perception that, in contrast to other aspects of legislation, language-related ordinances are somehow not as binding on the relevant public bodies, and that they do not constitute a particularly robust element within Public Law.

My argument is that, despite the greater specification of the role of law, of language rights and of the statutory obligations placed on public bodies in particular, there remains a tension between the promotional and the regulatory aspects of language policy. Given the current fiscal pressures, I further contend that such tensions will become more manifest as central government and regional authorities seek to reduce public expenditure on a range of official language activities, so assiduously built up via stealth politics over the past two generations. Providing an opportunity to use a target language within the affairs of the central or local state is one thing; regulating its application is quite another.

Among the array of models of official language regulation, the most relevant for my discussion are those which obtain in Canada at federal and provincial level (i.e. the Canadian Federation's Office of the Commissioner of Official Languages, together with the provincial variant in New Brunswick, as well

as that in Ontario, which has established an Office of the French Language Services Commissioner); the Irish office of An Coimisinéir Teanga, and the recently established Welsh Language Commissioner.[3] My aim is to reflect on the merits of the Canadian and Irish models before providing a critique of the new system in Wales. Three features are worthy of note in making such a comparison. All three cases derive a significant part of their legislative culture and practice from a common historical British source. Canada and Ireland have written constitutions which make the specification of official language rights more feasible than in Wales. In contrast to Ireland and Wales, where all Irish and Welsh speakers have a full command of English, Canada has a considerable proportion of French speakers who are not fully bilingual speakers of both French and English, making services and information in the official language the normal default practice for those public authorities charged with delivering a bilingual service. Finally, all three language regimes reflect a political system which guarantees co-equality to both target official languages, covered by a raft of legislation and policy pronouncements.

## 2. THE CONSTITUTIONAL PROTECTION OF OFFICIAL LANGUAGES AND THE OFFICE OF THE COMMISSIONER OF OFFICIAL LANGUAGES

The Canadian state's founding *Constitution Act of 1867* grants the right to use English or French in the courts and Legislative Assemblies of the Federal government and the province of Quebec. However, this firm foundation was eroded in practice by increased attempts at assimilation in the late nineteenth century, such that the French language was not used by the state. Functionally, it was relegated to second place in Parliament and government. However, a century later, Prime Minister Trudeau, animated by a desire to respect the unique character of a bilingual state and to thwart the resurgent attempts of Quebec separatists, established a Royal Commission on Bilingualism and Biculturalism which delivered a report in 1969 (RCBB 1969). The Commission set out a blueprint for the establishment of a long-term and wide-ranging language policy. Key to this policy was a strengthening of the legislative basis of Canada's bilingual character; and the fundamental objectives and underlying principles of an official languages policy were clearly set out and duly legislated by the *Official Languages Act*, introduced in Parliament in October 1968 and adopted the following year.

The 1969 Act included provisions to establish the status of English and French as the official languages of Canada, and set out for the first time the language rights of citizens in their dealings with Parliament, the federal government,

and federal institutions, as well as the duties of those institutions toward the citizens in matters of language. A second major advance toward the equality of the two languages came with the proclamation of the *Canadian Charter of Rights and Freedoms* in 1982, which accompanied the patriation of the Canadian constitution from the UK.

Greater specification of the nature and functions of official language rights as contained within the *Canadian Charter of Rights and Freedoms* of 1988 has provided a firm reaffirmation of the core principle of linguistic duality; and such clarity of purpose in legislation has proved to be fundamental to the Charter's successful implementation.

The most pertinent sections confirm:

- **Section 16** – English and French as the official languages of Canada
- **Section 17** – The right to use English and French in debates and proceedings of Parliament and of the Legislature of New Brunswick
- **Section 18** – That laws of the Parliament of Canada and of the Legislature of New Brunswick must be published in both languages
- **Section 19** – That English and French can be used in any courts established by the Parliament of Canada and by the Legislature of New Brunswick
- **Section 20 –** That the services and communications of the Federal Government and the Government of New Brunswick must be provided in both official languages
- **Section 23** – Minority language educational rights
- **Section 24** – The right to go to court for a remedy.

An improved *Official Languages Act of Canada* was enacted by Parliament in 1988. The Act implements the language rights granted by the Charter and reasserts the centrality of language equality in Parliament, and within the Government of Canada, the federal administration and all institutions subject to the Act. Henceforth the equality of French and English in federal institutions was deeply embedded in the constitution, whereas the principles contained in the *Official Languages Act* were still viewed by many as generous ideals rather than legal requirements.

However, the formal recognition and implementation of language rights which began in the late 1960s rested on several untested instruments, according to Dyane Adam

(2007: 51). One of these was her own Office of the Commissioner of Official Languages (OCOL), created by the 1969 Act, with the following mandate:

> To take all actions and measures within the authority of the Commissioner with a view to ensuring recognition of the status of each of the official languages and compliance with the spirit and intent of this Act in the administration of the affairs of federal institutions, including any of their activities relating to the advancement of English and French in Canadian society.

In its early years, OCOL was primarily concerned with rooting the conception of linguistic duality within a more robust institutional bilingualism, which would be better able to offer federal services through either official language.[4] More recently, partly as a result of court decisions, the implementation of linguistic duality has been extended to a wider range of social situations and takes greater cognisance of infrastructure developments, community vitality and capacity-building, so as to realise, in actual practice, the titular rights and obligations placed on public authorities by the OLA.[5]

While the form and structure of the OCOL has changed as a result of its development and experience as an instrument for upholding a range of rights and duties, it has also been influenced by the priorities which each Commissioner has brought to the office.[6] I will confine myself to the mandates of the last two Commissioners, Dyane Adam and Graham Fraser. Like her four predecessors, when Adam was appointed in 1999, she regarded her first duty as that of responding to specific violations of language rights within her stated mandate. Under the current Commissioner, Graham Fraser, appointed in 2006, this remains an important part of the mandate. However, Mr Fraser also recognises the salience of a changing context, and thus acknowledges that investigation and redress of individual complaints cannot be carried out in a narrow, isolated manner when one is entrusted with such a broad mandate.

Adam's strategy was to use the hundreds of complaints filed each year to create a momentum for change. While the investigations into violations of language rights should address the very root of the violations in order to achieve lasting solutions, and to resolve particularly complex problems, a comprehensive study of their causes and ramifications was essential in her attempt to effect structural changes so as to improve the application of the law. In the case of recurring complaints, she maintained that consultations should be held among interested parties, to explore the possibility of using new methods and of adapting the Office to the constantly changing socio-legal landscape.

Adam's priority was to fulfil the Commissioner's traditional role as an ombudsman with vigilance; but she reformulated the Commissioner's role

so as to also include the goals of serving as an educator; to ensure that the Canadian people were better informed of their rights; and consolidating the place of linguistic duality at the heart of Canadian identity (Adam 2007). Only by effectively acting as both an agent of change and an ombudsman could the Commissioner of Official Languages fully address the three main objectives of the *Official Languages Act*, namely: a) the equality of English and French in Parliament, within the Government of Canada, the federal administration and institutions subject to the Act; b) the preservation and development of official language communities in Canada; and c) the equality of English and French in Canadian society.

Adam believed that linguistic duality calls for a major commitment that also involves enhancing the quality of services offered to the public in English and French, employees' ability to work in their preferred language in the public service, the equitable participation of both language groups in the public service, development of minority official language communities, and access to health and education services in both official languages.

Adam argues that since so many factors influence the growth and vitality of minority official language communities – such as education, immigration, municipal services, health services and broadcasting – it follows that the government must necessarily adopt a coordinated approach. The Department of Canadian Heritage oversees a broad programme involving all government departments and agencies to encourage the development of the official language minority communities: Francophones outside Quebec and Anglophones in Quebec.[7] All federal departments are included in this programme, and all activities that fall under the priorities of the official language minority communities are eligible. These may include activities in arts and culture, economic development and tourism, human resource development, new technologies, and health and social services.

In assessing the achievements of the Canadian approach, Norman Moyer (2007), Deputy Minister, Department of Canadian Heritage, has argued that the evolution of the official languages policy can be understood as follows:

- a *progressive expansion of scope* from … policies and rights *within* government seeking institutional bilingualism to policies and programmes designed to effect change *outside* government and across society as a whole, with a broad involvement of various segments of civic society;
- *support for clarification of constitutional and linguistic rights* … the Court Challenges programme has permitted OLMCs to clarify and expand their rights through court action since 1978; in the crucial case of school

governance, it is not clear that the current level of progress would have been possible without the support of the Court Challenges Programme;

- *expansion of the nature of intergovernmental cooperation* beyond the education sector into other sectors crucial to the interests of official-language minorities … the pursuit of intergovernmental agreements in other sectors has underlined the importance of a comprehensive approach and the joint declaration of principles;
- *empowering of official-language minority communities* … the creation of the 'social action programme' in 1969 and its continuation through to the Official Languages Communities Support programmes of today has provided nearly 35 years of annual funding to more than 350 community-based organizations; the Canada-Community Agreement approach challenges community leaders to develop a longer-term vision for community development, including the articulation of priority developmental areas;
- *broadening of the base for [a] federal government-wide response to the challenges* of supporting OLMC development and recognition of the benefits of linguistic duality through the encouragement and coordination of a broad range of federal departments and agencies in contrast to the pre-1988 period when virtually all community development aspirations were laid at the door of [the] Secretary of State (Canadian Heritage), an expectation that was neither commensurate with its resource capacity nor with its jurisdictional scope (Moyer 2007: 369).

According to its contemporary mandate, the OCOL:

- ensures that federal institutions and other organizations subject to the Official Languages Act administer their affairs according to the spirit and the letter of the Act;
- receives complaints;
- investigates complaints related to official languages that are brought against federal institutions and other organizations;
- recommends appropriate corrective measures;
- appeals to the Federal Court on the complainant's behalf when all other avenues have been exhausted;
- conducts audits, evaluations, studies, research and analysis to better understand the evolution of the status and use of English and French in the country;

- responds to requests for information and other communications from the public;
- monitors the advancement of English and French in the federal government and Canadian society;
- helps federal institutions implement the *Official Languages Act* more effectively;
- contributes to the development and vitality of official language minority communities; and
- submits an annual report on its activities to Parliament, along with recommendations.

**Source:** OCOL http://www.clo-ocol.gc.ca/html/mission_e.php

Graham Fraser has maintained the concern which Dr Adam displayed in relation to securing a coordinated government approach, but has laid greater emphasis on his role as an educator and mediator.

The Commissioner seeks to take all necessary measures to ensure that the OLA's (1988) three key objectives are achieved. OCOL's mandate is implemented through four instruments and strategies, namely 1) the entrenched constitutional rights afforded to the linguistic minority; 2) the robust statutory mechanisms (Ombudsman and Court Remedy Programme) to ensure that the language rights of citizens are respected; 3) education in the other official language; and 4) the OCOL's advocacy and promotional work, ensuring that the public are aware of their statutory rights. These instruments and strategies could also be regarded as the principal strengths of the Canadian model; and were they to be fully adopted elsewhere, such as in Wales, they would provide a stronger framework for official language policy.

However, I would like to draw attention to another strength, which I regard as crucial to the due fulfilment of the Commissioner's role, namely his (or her) accountability and independence. Along with other Canadian Commissioners, the OCOL is obliged to submit an Annual Report to Parliament (and to the respective committee), and must provide an outline of its plans and priorities to the Treasury Board. Note that the OCOL is directly accountable to the Canadian Parliament itself – an aspect which does not comprise a central feature of the Irish and Welsh models discussed below. If accountability is one side of the coin, credibility is the other. Dr Adam believed that it was important that the Commissioner should not fear responsibility or criticism. She argued that "you must be impermeable to outside influences: the federal government, minority groups, lobby groups, even the Prime Minister himself". Commissioner Adam

held that her power and influence lay in her credibility and in the respect and support she received from Parliament and the public. According to her, "if [you] lose these, whether it be with government, government institutions or [the] public, [you lose your] effectiveness… you need credibility in order to pass judgement [and for] this Office to be able to stand up for what [it believes] in". (Source: interview with Kuryolo, May 10 2000.)

Mr Fraser has consciously sought to extend the OCOL's independence, and is convinced that this has contributed to the evolution of his mandate and activities.[8] He has publicly declared that the letter of the Act is easy to define; it consists of what is written section by section. But he has also referred to the spirit of the Act, the concept of Canada's linguistic duality and the importance it holds for society. As a result, the COL has changed his mandate in order to address society's needs. It is his position as an Officer of Parliament that has given him the freedom to direct his activities as he sees fit. This is not novel, as Kuryolo (2000) identified such issues in relation to Dr Adams's tenure. What *has* changed more than ten years on, however, is the need to guard against lethargy and normalisation. Thus, Mr Fraser has reenergised and upscaled the public profile of the office, so as to make it fit to serve its purpose in an evolving demolingusitic and political context.

The cardinal principles of the Canadian Federal model are the independence of the OCOL from Ministerial interference, its accountability to the Federal Parliament and the Commissioner's public credibility as an advocate for both official languages. Since the OCOL is one of eight Agents General of Parliament, there is a constant cross-referencing to the relationship between the Commissioner, Parliament, the Courts and the citizens. This is a great strength, since, as a consequence, the OCOL is neither unique nor unduly exposed to the ill winds of political change, in contrast to the situation that recently arose in Ireland, for instance. The layer of public protection, advocacy and accountability gives meaning to the implementation of language policy and the upholding of both the original individual rights, and more recent collective rights. The latter extension is an important addition to the original 1969 Act, and its interpretation for the purposes of the relevant court cases has influenced the OCOL's mandate, in terms of which both "individual rights" and "community vitality" now fall within the COL's remit. This coupling of individual and community rights has been consciously articulated in several court cases, on the grounds that granting an individual the right to communicate and receive services in a language of his/her choice presupposes the existence of a community able to deliver such services and to uphold the constitutionally enshrined co-equality of official languages. Magnet (2006) has outlined the

means by which several court decisions have secured a new understanding of the vitality of official language communities.[9] He argues that

> ... these principles are likely to be fundamental to the next generation. Official language communities should be protected against the assimilating forces of linguistic demography and their immersion in a culture not completely their own which grinds their communities down. The means for doing this is building institutions through which minority language and culture may be propagated. Through the understanding our activists have forged, courts can now reach into the institutional framework through which official minority culture and communities are propagated and stimulate their development so as to promote the advancement and equality of the official language communities of Canada. The courts are newly armed with a mandate to prescribe positive measures to ensure community survival, specific to different stages of development. Courts have jurisdiction to superintend these measures to ensure that they are followed. Courts can set out a vision and doctrine that will send a strong message to governments to act positively to actualize the promise of linguistic and cultural survival, community development and equality so many have worked so hard to achieve (Magnet 2006: 273-274).

Successive OCOL Annual Reports note that the language of service has improved in all regions, but that there is room for further improvement. In contrast, progress is uneven in relation to the language of work, while there continues to be much room for improvement at the provincial, territorial and municipal levels. Echoing Magnet's evaluation, it is evident that the intervention of courts is still required to ensure mutual respect for language rights.

The official government stance is that the linguistic duality promoted by the OCOL reflects the fundamental democratic values held by Canadians, which entail promoting community spirit and dialogue, encouraging discussion and the exchange of views, relying on the consultative process, cooperation and good will, and seeking partnership on various levels. Independent commentators are not as sanguine, arguing that such achievements may be a necessary, but not a sufficient response by government to the continuing decline in the number of French speakers and the atrophying of Francophone communities outside of Quebec.

## 3. THE IRISH MODEL OF LANGUAGE COMMISSIONER

A second relevant model is that of the Irish Language Commissioner.[10] Language-related legislation has characterised the Irish socio-legal system since the foundation of Saorstát Eireann in 1922. At that stage, the Irish language acquired an official status under the Constitution Act of 1922. The revised Constitution of Ireland of 1937 recognised the Irish language as the native language of Ireland

and also as the country's first official language, while English was recognised as another official language.

The functions of the Language Commissioner are set out in Part 4, section 21 of the Official Language Act of 2003, as follows:

- to monitor the compliance by public bodies with the provisions of the Act;
- to take all necessary measures within his or her authority to ensure compliance by public bodies with the provisions of the Act;
- to carry out investigations, whether on his or her own initiative, on request by the Minister or pursuant to a complaint made to him or her by any person, into any failure by a public body to comply with the provisions of the Act that he or she or, as appropriate, the Minister, considers may have occurred;
- to provide advice or other assistance to public bodies regarding their obligations under the Act;
- to carry out an investigation, whether on his or her own initiative, on request by the Minister or pursuant to a complaint made to him or her by any person, to ascertain whether any provision of any other enactment relating to the status or use of an official language was not or is not being complied with.

The general powers of the Commissioner are detailed in section 22 of the Act, in which it is stipulated, *inter alia*, that:

- the Commissioner may require any person who has, in the opinion of the Commissioner, relevant information for his or her functions under the Act to attend before him or her for that purpose and the person shall comply with the requirement (this does not apply to information relating to decisions or proceedings of the Government or information or records subject to legal privilege);
- a person to whom a requirement is addressed under this section shall be entitled to the same immunities and privileges as if he or she were a witness before the High Court;
- a person who fails or refuses to comply with this requirement under this section or hinders or obstructs the Commissioner in the performance of his or her functions shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding €2000 or to imprisonment for a term not exceeding 6 months or both;

- where an offence has been committed by a body corporate and is proved to have been committed with the consent or connivance of, or by neglect on the part of any director, manager, secretary or other similar officer, that person as well as the public body shall be guilty of the offence and liable to be proceeded against and punished;
- proceedings for an offence under this section may be brought and prosecuted by the Commissioner;
- the Commissioner may pay travel and subsistence costs to a person attending before him or her;
- a statement of admission made by a person shall not be admissible as evidence against that person in any criminal proceedings.

These functions and duties of the Commissioner are threefold and have been summarised by Williams and Ó Flatharta (2012) as follows: (i) Compliance Agency; (ii) Ombudsman Service; (iii) Advisor on rights and obligations. In terms of its role as a Compliance Agency, the Office of the Commissioner has the duty to monitor and ensure compliance by public bodies with the provisions of the Act. Complaints are received by email, telephonically or by post, and they are frequently resolved by advising the complainant. Between 2004 and 2009, the office handled approximately 3 000 complaints from members of the public.[11] Many complaints arise from misunderstandings as to what is, and what is not covered by the legislation in the Act. In other cases, the complaint warrants investigation, but can be resolved by reaching an agreement without following the formal investigation route. However, where such an agreement cannot be reached, the Commissioner can proceed to institute a formal investigation.

The Irish model has five principal strengths, namely the independence of the Commissioner, the separation of duties between the promotion and regulation of language rights and policy, the monitoring function of the Office, the multi-year review and audit function and the option to investigate in cases of non-compliance. Of these, the most vital is the system's guarantee of the independence of the office-holder from influence or perceived influence from Government, Ministers, state departments, language organisations or other stakeholders. The Commissioner's independence is underpinned by a provision in the Act in terms of which he or she may only be removed from office in the gravest of defined circumstances, and then only by the President of Ireland.

The Act separates the functions and duties of language promotion from monitoring and compliance issues (Williams 2009). This separation seems to be a positive development, giving the Office a clear remit and releasing it from the obligation to negotiate or bargain with the public bodies. However, it

would be beneficial if the office had the competence, through the Act, to provide commentary and to formally advise the government on important language issues as they arise. The reporting duties of the Office make it possible for the citizens to know what key issues are under consideration at any given time, and put the workings of the Office into the public domain. This is to be welcomed. All documents relating to the Office, all financial accounts and details of all travels undertaken, as well as all expenditure incurred by the post holder, are also freely available on the Office website.

The Office's competency and authority to carry out investigations into possible language rights infringements is a great strength of the model. To date, the Commissioner has completed 57 detailed investigations, carefully examining specific complaints concerning language rights, institutional obligations and language status. While the findings of these investigations can be challenged in the High Court on a point of law within a specific time frame, this has not happened yet. The findings arising from the investigations offer valuable insights into the working of the Act, and also into the way in which the public service has approached the spirit and the letter of the law. They also highlight the importance of the independence of the Office of the Commissioner.

The model is a work in progress; and thus, there are some weaknesses, as identified by Williams and Ó Flatharta (2012). One of these concerns the fact that the power to initiate language schemes rests within the political system. This provision is open to interpretation, and could result in a "stop-start" approach as changes occur in the political system. One Minister may view the language schemes as a priority, while another may well regard the schemes as irrelevant and cumbersome. This weakness may also impact on the development of capacity within the Ministry. It is necessary to build up skills and competencies amongst a core staff within the Department of HRGA if the language schemes are to proceed and develop as set out in the legislation. During successive interviews, it was noted that public bodies may play on the fact that there is uncertainty in the government's approach, which could, in turn, lead to a loss of focus, and possibly reduce the importance of the language schemes in the eyes of the public body. When the "driver" of change is the Ministry and the Department, rather than specific enactments of law, the model is at the mercy of the political and administrative system. This bespeaks a public culture of ambiguous commitments, and effectively renders language legislation less binding than, for example, child care or public health legislation within the state.

A second set of weaknesses are related to the process by means of which confirmation of compliance by the Public Bodies is handled. At first, there was some ambiguity as to how exactly this process should be managed; but with the

experience now garnered over several years, this aspect has improved of late. Yet the very fact that this is an on-going process, handled by a small number of staff, does pose challenges, since the volume of the schemes necessitates a judicious prioritisation, in order to determine which aspects of the public sector should receive regular attention. The regular sampling of sectors, the issuing of report cards and the occasional in-depth scrutiny of some aspects of language legislation implementation serve, to some extent, as mitigating factors against the possibility of being overwhelmed by the sheer number of bodies with which the Commissioner's Office has to deal.

Language legislation and the political system are, in reality, as closely intertwined in Ireland as they are in Canada. However, Williams and Ó Flatharta (2012) have noted that the Commissioner's office depends to a certain degree on the authority derived from the law, rather than having the option of imposing hard-hitting sanctions on public bodies for non-compliance. In a case where non-compliance with the law becomes a major issue in the public system, one option would be to introduce hard-hitting sanctions against the public body for non-compliance. Section 27 of the Act allows for a compensation scheme to be put in place, but this has not yet been introduced. The reasons for this are well-rehearsed, since the system needs time to adjust to the realities of the new legislative landscape. This is a line of reasoning that is also heard in Finland and Wales, as the language issues are so sensitive that a great deal of care has been taken to win the argument in favour of linguistic duality by means of persuasion and good practice first, rather than by resorting to heavy fines, which may turn out to be effective in the short term, but potentially damaging over the long term, especially since the target language is being navigated into the mainstream of public administration and socio-economic life as a shared public good.

The Commissioner's staffing and finances are somewhat dependent on the political system; and this is another perceived weakness in the model. In the event of severe difficulties arising between the Commissioner and the political establishment at any given time, it is not unreasonable to suggest that requests from the Commissioner for additional staff or funding might well fall on deaf ears within the political system.[12]

As an interim conclusion, it may be stated that the Office has been established successfully and has secured the goodwill and support of the Irish language community. The Office fulfils its statutory duties with diligence, and has confronted some difficult issues and demonstrated its independence. However, even statutory independence is not guaranteed, for the government announced on 17 November 2011 that it had decided to merge the Oifig an Choimisinéara Teanga (Irish Language Commissioner) and transfer its functions to the Office of

the Ombudsman. This has been interpreted as a serious threat to the language regime which has been so assiduously built up during this past decade. In the light of this proposal, one may rightfully wonder what value one can place on Language Acts and the state's declared language policy and strategies. The Commissioner's role has been guaranteed by statutory edict, in the form of the Official Languages Act of 2003 (Acht na dTeangacha Oifigiúla 2003). What value can one place on legally guaranteed independent agencies, and how can one expect them to engender public confidence, if they can be moved, shut down and silenced without a great deal of public discussion, and more pertinently, despite overwhelmingly convincing evidence regarding the effectiveness of their past performance?

It is doubtful whether there is any evidence whatsoever that the Commissioner's Office has been failing to perform its duties under its statutory obligations. In fact, it is generally understood that the Commissioner's Office has been very successful, both in educating Irish citizens regarding their rights and in conducting investigations into non-compliance. A logical reading of the current decision might lead to the conclusion that the principal reason that the Office has been threatened with abolition is that it has been too successful in highlighting the deficiencies in the Irish system, and that as a consequence, the government has taken the decision to eliminate an agency which guarantees some degree of democratic accountability and redress for the inconsistent application of Irish language legislation. If this is so, then such moves belie the integrity of the state's commitment to the honouring of Irish as the first official language.

Between the winter of 2011 and the early summer of 2012, the Irish government conducted a review of the Official Languages Act, 2003. In the briefing note announcing the review process, it is stated that the Programme for Government contains the following commitment:

We will review the Official Languages Act to ensure that expenditure on the language is best targeted towards the development of the language and that obligations are imposed appropriately in response to demand from citizens.

The objective of the review is "to ensure that the Act is an effective mechanism to support the development of the Irish language in an efficient and cost-effective manner and that the obligations arising from the Act are appropriate to ensure the satisfactory provision of services in Irish by public bodies, in line with public demand" (Government of Ireland 2011). In this regard, the terms of reference have been framed in relation to the constitutional position of the Irish language, all existing legislation, the policy objectives of the *20-Year Strategy for*

*the Irish Language 2010-2030*, and the relevant commitment in the Programme for Government.

The review seeks to:

- examine the provisions of the Official Languages Act to evaluate the effectiveness of the legislation in ensuring the provision of public services through Irish, in line with the demands of citizens who wish to conduct their official business in that language;
- consider if the provisions of the Act should be amended to ensure that the public services to be provided through Irish are those which are most in demand;
- consider if the objectives of the Act could be met by alternative or amended provisions which would ensure that expenditure arising from the legislation is cost-effective, particularly in the context of the present economic constraints;
- consider if the obligations placed on public bodies under the Act are appropriate, having regard to the foregoing and to the constitutional status of the Irish language;
- consider if the provisions of the Act should be amended to ensure that it better supports the preservation and promotion of Irish as the community language in Gaeltacht areas; and as the language of choice of others throughout the State;
- consider if the language rights confirmed in the Act continue to be appropriate; and
- review the provisions setting down the role of the Office of An Coimisinéir Teanga (Government of Ireland 2011).

The review was led by officials of the Department of Arts, Heritage and Gaeltacht Affairs, who consulted with key stakeholders, including the Office of An Coimisinéir Teanga, government departments, other public bodies, Irish language and Gaeltacht organisations, members of the general public and international experts.[38] On completion of the relevant processes, the Minister will make recommendations to be considered by the full government.

Apart from the nature of the review itself, it is interesting to note that the tone of the review briefing note reflects the current concern with cost-effectiveness, demand and rational behaviour. Nowhere does the review remit argue for a more robust system, or for the full implementation of the 20-Year Strategy

as a priority. Neither does it give an unequivocal guarantee that, as a result of the review, the position of Irish will not be weakened. Two other features combine to cause concern for Irish language supporters. The first is the lack of implementation of the language schemes. In the past four years, the number of schemes being submitted and/or approved has dwindled to nothing – this, despite the fact that such trends occurred during the tenure of the champion of the OLA process, Minister Éamon Ó Cuiv; and thus, this failing cannot be laid at the door of the current government. It is very evident, both in terms of the weaknesses of the language scheme implementation process and in terms of the very low number of public servants charged with disregard of the OLA and language schemes, that the Irish language regime is not fully committed to the full realisation of the OLA itself.

The second difficulty is the regular threat made by Fine Gael, both while in opposition and now in government, that it is considering the possibility of changing the status of Irish within the statutory education system from a core subject of the Leaving Certificate, to an option within the curriculum, in order to "better reflect the real demand for Irish in society". What effect will the downgrading of the constitutionally guaranteed national language have on the capacity of the system to deliver bilingual services, to operate in Irish, to engage with citizens in the language of their choice? What effect will it have on the psychology of the nation, or on the vitality of Irish in the 21st century?

These are difficult questions indeed for any marginalised language group; and they are rendered doubly difficult when they appear to be the product of a system which at best appears neutral toward the fortunes of the language, and at worst, downright hostile.

## 4. INAUGURATING THE WELSH LANGUAGE COMMISSIONER

The establishment and operation of a Language Commissioner, together with a new approach to language service delivery through an agreement pertaining to Standards, was specified in the proposed Welsh Language (Wales) Measure introduced on 4 March 2010. At its launch, the Heritage Minister, Alun Ffred Jones, told AMs that the Measure would fulfil the three commitments specified in the Cymru Un/One Wales concordat, namely to confirm the official status of Welsh; to affirm language rights in the provision of services; and to establish the post of Language Commissioner.[39] This new system would be augmented by an Advisory Panel and an Appeals Tribunal and would replace the Welsh Language Board.

The Welsh Language (Wales) Measure, presented to the NAfW on 4 March 2010, received Royal Assent on 9 February 2011. It is a comprehensive expression of

the WAG's determination to undergird the authority by which Welsh language policy is enacted and regulated.

The aim of the Measure is to provide greater clarity and consistency for Welsh speakers about the services they can expect to receive in Welsh.

- The Measure confirms the official status of the Welsh language;
- Creates a new system of placing duties on bodies to provide services through the medium of Welsh;
- Creates a Welsh Language Commissioner with strong enforcement powers to protect the rights of Welsh speakers to access services through the medium of Welsh;
- Establishes a Welsh Language Tribunal;
- Gives individuals and bodies the right to appeal decisions made in relation to the provision of services through the medium of Welsh.

The Measure

- Creates a Welsh Language Partnership Council to advise Government on its strategy in relation to the Welsh language.
- Allows for an official investigation by the Welsh Language Commissioner of instances where there is an attempt to interfere with the freedom of Welsh speakers to use the language with one another.
- Is intended to modernise the existing legal framework regarding the use of the Welsh language in the delivery of public services. In doing so, it meets the commitments made in the 'One Wales' document.

**Source:** Welsh Assembly Government statement, February 7th 2011.

This Measure gives a prominent role to the Commissioner, which entails more than merely serving as an Ombudsman, since the office-holder is expected to be "a champion for the Welsh language". The language service Standards derive from the full authority of the NAfW and are thus meant to be extended to all aspects of policy, as part of the cross-cutting mandate of the Assembly's commitment to official bilingualism. The Commissioner has a strong regulatory function, but has also been allocated the responsibility of developing language rights in response to the implementation of new service Standards. The Measure includes a Welsh Language Tribunal facility, which is intended to scrutinise the Commissioner's investigations to determine whether or not they adhere to the letter of the law, and thus forestall any "rush" to test or challenge the Measure's application through the courts.

Questions could be raised as to the likely evolution of the Welsh model. My Canadian experience would suggest that the field of language rights and regulation could benefit from a more systematic and regular comparison of the work and impact of Language Commissioners worldwide. Likewise, within the UK, greater scrutiny of the role of subject Commissioners/Ombudsmen would certainly influence the Language Commissioner's remit, range and significance within public policy writ large.

A second element likely to be of great concern, given the professionalisation of the Canadian language policy process, is the need to be vigilant in fine-tuning the relationship between systemic duties, individual rights and community vitality. Having pressed for greater clarity in respect of individual language rights, it is very probable that Wales will face the Canadian issue of how to incorporate the needs of the community into language legislation. Doubtless when the revised Welsh system is fully operational, there will be some challenges.[40] I assume that initially, the Welsh model will operate as an elementary form of OCOL, without the constitutional conventions and full range of language rights; but as the agency matures, its investigations and advocacy role will increasingly be subjected to challenges on points of law, as mediated by the Welsh Language Tribunal, or possibly even tried before the courts. Thus, consideration needs to be given now to the question as to whether or not there are any pieces missing from the jigsaw, such as, for example, a Welsh version of the Canadian Court Challenges/ Language Rights Support Program (LRSP) (Foucher 2012).

A desirable outcome that could be envisaged in this regard would be the development, over time, of a network of Language Commissioners from Canada, Ireland, Wales, Northern Ireland, Finland and other jurisdictions sharing their experience with Commissioners in policy areas, such as Administration, Children, the Elderly, Health and Welfare. Much evidence-based policy and best practice is available as a result of the deliberations of the British-Irish Ombudsmen Association, the Commonwealth Ombudsmen and the European Ombudsmen; but hardly any reference is made to this wealth of experience in discussions regarding language policy and rights.

One could also envisage an international network of plurilingual municipalities and local authorities, sharing their experiences of coping with robust language legislation relating to issues of customer satisfaction, staff language awareness training, IT, etc. The delivery of multilingual public services is a major area of public policy and has ramifications at all levels in the political hierarchy, from the EU down to the level of the local council. Consequently, future research in this field could usefully be directed towards tracing the impact of EU legislation on language rights,[41] or determining how the constitutional order which the EU

represents might come into play in relation to the harmonisation of official, but not state-wide, languages such as Basque, Catalan and Welsh. Within the UK, consideration should be given to the manner in which the Equality and Human Rights Commission and the Single Equality Act could operate in order to extend discrimination law to include language rights and the individual rights of citizens. Both of these fields of enquiry signal the need to be vigilant as regards the consequence of increased recognition of the official status of Welsh in the UK and Europe. Many hitherto unanticipated consequences may flow from such official recognition.

One significant lesson is that it is the institutional and individual autonomy of the Language Commissioners that allows them to conduct investigations without fear of contradiction or direct political interference. Yet notions such as independence, separation of functions and relative freedom to interpret the remit of an office, are elusive concepts when applied in different legislative and language regimes. Thus, while much has been written about the status of judicial independence in its institutional and functional contexts, little is known about the experience of Language Commissioners, since they have not hitherto been subjected to close comparative scrutiny.

## 5. CONCLUSION

If my arguments are correct, the Welsh Language Commissioner faces some additional developmental issues and possible challenges of legitimacy in terms of practice and procedure. The developmental issues relate to the relationship between language promotion, regulation and implementation; to the non-Commission functions of the WLB and the question as to how they will fare, having been transferred to the WAG. They also relate to the capacity of the Welsh legislative system to implement future legislation, clauses and refinements related to language as an issue within policy development. Despite the comprehensive nature of the Welsh Language (Wales) Measure, it may still be feasible to suggest that an opportunity has been missed to adopt a lean Irish model, instead of aggregating too many of the Welsh Language Board's residual responsibilities and functions into one body corporate.

The challenges also relate to the channels of accountability and independence of the WLC, i.e. being accountable to a Minister(s) – rather than to the full Welsh Assembly, thereby guaranteeing the financial independence/sustainability of the Welsh Language Commissioner.

Moreover, despite the filter provided by the Tribunal, there is always the possibility of establishing a Court Challenge and Remedy programme à la

Canada. More generally, it is not yet known to what degree the Language Commissioner's judgements and interventions will have an authoritative "bite", since if the office fails to convince its target audience, there is a serious possibility that the investigative process will be characterised by a series of administrative and judicial appeals.

Future scrutiny and review issues will likely interrogate the definition and development of the common standards approach to the delivery of language services; the application of the new standards to UK Crown Bodies; the fit between the Welsh Language Measure, 2011 and the Welsh Language Act 1993; the question as to how language rights will be developed in fact; and also the question as to whether they will necessarily constitute individual rights only, or whether they could also pertain to collective, communal rights, as in Canada.

Finally, what is the significance of this legislative reform and construction of a new regulatory system in relation to the underlying rationale for the greater specification of the role of law in language protection? In Canada and Ireland, the role of the Language Commissioner is to protect, refine and articulate the recognised language rights. In Wales, no such concrete rights have been incorporated within legislation, except the "right" to expect an equitable standard of service by nominated bodies. In that sense, the Welsh model would appear to be an incomplete or immature version of an emerging international norm. However, it is necessary to temper this observation by also taking account of the fledgeling emergence of legislative devolution and the slow evolution of a Welsh legal regime as it seeks to handle the increased demands of administrative law and a distinct Welsh interpretation of UK public life.

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## ENDNOTES

1 I am deeply honoured to have been invited to present this keynote address at the Bloemfontein Conference. The interpretation offered here is framed in social and policy-related terms, rather than being presented in terms of a strictly legal or legislative perspective. I am mindful of the fact that political considerations and changes of direction that are quite radical, as well as fiscal pressures, can render the role of Commissioners rather traumatic within a challenging socio-political landscape.

2 While I acknowledge this cautious view of the impact of Welsh legislation, my own view in respect of language rights runs counter to the conventional wisdom, since if rights are not recognised, how is one to exercise real language choice in respect of educational provision, health care and the like? Woehrling (2012) has aptly highlighted the dilemma by asking: "Are linguistic rights fundamental rights, founded on human dignity and liberty like other human rights, or are they special and context-dependent rights, deriving from some political compromise between majority and minorities?"

3 Other interesting variants exist, for example in Finland, where the Ministry of Justice performs a regulatory function; and the Catalan and Basque versions are also worth noting.

4 During the OCOL's formative period, Commissioner Keith Spicer was largely engaged in detailing the role of the Commissioner, the mandate and activities of the Office, as well as the philosophy in terms of which the Office would operate.

5 The revised 1988 *Official Languages Act* had a much greater scope than that of 1969 and acquired a quasi-constitutional status. It contained a preamble, and officially recognised the right of federal employees to work in the official language of their choice. It also included the principle of equitable participation and demonstrated the federal government's commitment to enhancing the development of official language communities and the advancement of English and French in Canadian society. The Act also provided for the possibility of a court remedy and effectively renewed the official languages programme. In 1992, the Act was supplemented by the *Official Languages (Communications with and Services to the Public) Regulations*. Source: OCOL Annual Report, 2009-2010.

6 For a summary of the first forty years of the OCOL's activities, see Chapter 1 of the OCOL Annual Report, 2009-2010.

7 In fact, many officials at Canadian Heritage have expressed surprise and dismay that so many foreign observers focus on the OCOL's remit, to the exclusion of the work undertaken by the Canadian Heritage and its myriad programmes to promote the official languages.

8 This transpired during interviews between Mr Fraser and the author, in December 2009 and November 2010.

9 Cases in point include the reinterpretation of the Secession Reference (1998).

10 Only a summary will be provided here, as this case study is discussed in detail by Williams and Ó Flatharta (2012).

11 The office is located in An Spidéal in the Galway Gaeltacht. Staff of the office are civil service appointments from within the service itself; or, if appointed from outside, staff join the civil service. The Office is allowed a staff complement of a minimum of eight persons, in addition to the Commissioner, Mr Seán Ó Cuirreáin, according to allocations made by the Department of Finance. Job titles and job specifications match the functions accorded to the Office in the Act, and are currently constituted as follows: Compliance Manager, Investigations Manager, and an Office Director serving as coordinator and reporting directly to the Commissioner. The office is financed from public funds through the Department of Arts, Heritage and Gaeltacht Affairs, and in 2009 received a budget of €796,000.

12 This is a common predicament and was experienced in Canada in the mid-90s when the Government of Canada carried out a cost-cutting exercise to reduce the deficit, which included attempts to cut and re-route the finances needed for the OCOL and the official language communities, and saw a lack of progress in implementing Part V11 of the Act. "The Commissioner concluded that these transformations had contributed to a 'subtle but cumulative erosion of language rights'" (OCOL Annual Report 2009-2010, p. 11).

13 The terms of reference for the review are published on the Department's website, at www.ahg.gov.ie.

14 Cymru Un/One Wales was the document agreed on by the Labour Party and Plaid as the basis for their coalition agreement to govern Wales following the NAfW elections of 2007. It was published on 27 June 2007. See http://wales.gov.uk/strategy/strategies/onewales/onewalese.pdf?lang=en.

15 Legal experts have suggested to me that, if the Scottish precedent holds true, there will be far fewer instances than expected, as civil society tends to be "tolerant" of the need for devolved powers to become established and to be given time to work and adapt to a new legal system.

16 One such comprehensive account may be found in Ahmed (2011), especially on pp. 146-68.

# LAW, LANGUAGE AND THE MULTILINGUAL STATE

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**Abstract**

In many political contexts where two or more languages are used within the same territory, contacts, conflicts and inequalities among these languages are common phenomena. The political and legal intervention of modern states and public authorities (at all levels – national, regional, local and municipal) in language matters is aimed at resolving the linguistic problems that arise from these phenomena. In this contribution, emphasis is placed on the different methods employed by the states in legally determining and establishing the status and use of the languages in question, especially in terms of the official usage of languages. This kind of intervention is relatively new, and can be attributed, in particular, to three comparatively recent social phenomena and problems, namely the democratisation of education, the globalisation of communications and the growing importance of the linguistic diversity of the world.

**Résumé**

Dans beaucoup de contextes politiques, il y a des contacts, des conflits et des inégalités entre les langues utilisées sur le même territoire. L'intervention politique et juridique des États modernes et des pouvoirs publics (à tous les niveaux, national, régional, local et municipal) en matière de langue a pour objectif de résoudre les problèmes linguistiques issus de ces phénomènes que sont les contacts, les conflits et les inégalités linguistiques. L'accent est mis sur les différents moyens employés par les États dans le traitement juridique du statut et de l'utilisation des langues en question, surtout en matière d'usage officiel des langues. Ce type d'intervention est assez nouveau, grâce surtout à trois problèmes et phénomènes sociaux relativement récents, à savoir la démocratisation de l'enseignement, la mondialisation des communications et l'importance grandissante de la diversité linguistique dans le monde.

## 1. INTRODUCTION

In many political contexts where two or more languages are used within the same territory, contacts, conflicts and inequalities among these languages tend to arise. In practice, it has been observed that these languages often seem to co-exist in an uneasy, "dominant-dominated" relationship, thereby leading to a situation in which linguistic majorities and minorities are in conflict.

The fundamental goal of modern linguistic legislation is to resolve, in one way or another, the language-related problems arising from these linguistic contacts, conflicts and inequalities, by legally determining and establishing the status and use of the languages in question. Absolute or relative priority is accorded to the promotion and protection of one or several designated languages, through legal language obligations and language rights that have been formulated with this end in view. The legal language policy of a state is constituted by all the legal measures pertaining to the field of language. These legal measures are the linguistic law (or *language law*) of a state.

Canadian linguistic legislation (the Official Languages Act) is an example of official legislation that applies language obligations and language rights to two designated official languages, English and French.[1] Quebec's linguistic legislation (the Charter of the French Language) is an example of exhaustive legislation that applies language obligations and language rights, in a different way, to the official language, French; to a few more or less designated languages; and to other languages, to the extent that they are not designated.[2]

Increasing legal intervention in language policy led to the birth, or recognition, of a new legal science, comparative linguistic law. Comparative linguistic law (or *language law*) is the study of linguistic law throughout the world (as well as of the language of law and the relation between law and language). To the extent that language, which is the main tool of the law, becomes both the object and the subject of law, linguistic law becomes *metajuridical* law. To the extent that comparative linguistic law recognises and enshrines linguistic rights in the world – albeit sometimes rather vaguely and implicitly – it becomes *futuristic* law, since it builds on historical roots. This in itself is remarkable, since the growing recognition or historical enshrinement, in time and space, of linguistic rights promotes the linguistic diversity of our world and the cultural right to be different, which holds a promise of creativity for individuals and families, as well as for societies, nations and the international community.

The intervention of states and public authorities (at all levels – national, regional, local, municipal, etc.) in language-related matters is a relatively new phenomenon, which has been necessitated, in particular, by three relatively

recent social phenomena and problems, namely the democratisation of education, the globalisation of communications and the growing importance of the linguistic diversity of the world.

## 2. LINGUISTIC LEGISLATION

Linguistic legislation is divided into two categories on the basis of its **field of application**, namely legislation that deals with the **official (**or *public*) usage of languages, and that which deals with their **non-official** (or *private)* usage. Needless to say, there are grey areas in this classification.

Linguistic legislation can also be divided into four categories, on the basis of its **function:** it may be *official*, *institutionalising*, *standardising* or *liberal*. Legislation that fulfils all these functions is **exhaustive** linguistic legislation, while other linguistic legislation is **non-exhaustive**.

*The majority of modern countries are linguistically multilingual. However, the majority of modern states are legally unilingual or moderately bilingual or multilingual, by virtue of their official linguistic legislation.*

**Official linguistic legislation** is legislation that is aimed at making one or more designated, or more or less identifiable, languages (generally the national ones and, according to circumstances, some historical minority languages) – either totally or partially, explicitly or implicitly, countrywide or regionally, in a symmetric or asymmetric manner – "*de jure" official*, in the domains of legislation, justice, public administration and education, to the exclusion of other languages. The other languages existing in the state are not official. A language is legally official to the extent that it is endued with legal rights and legal obligations in the official domains. An official language is thus a language whose usage is compulsory for the state, and which can legally be used for official purposes by its inhabitants and citizens. Depending on the circumstances, one of two principles is applied: linguistic **territoriality** (basically, the obligation to use one designated language within a given territory) or linguistic **personality** (basically, the right to choose a language among official languages).

In principle, in multilingual states, the obligation to use the official languages applies only to the public authorities, while the inhabitants and the citizens have a choice among the official languages. With some exceptions, the majority of people in an officially bilingual or multilingual state are not necessarily bilingual or multilingual.

Generally speaking, the official language of a state is the most commonly spoken language in the country. This is not the case in many states of Africa, and in

some states of Asia. In Indonesia, for example, Malay-Indonesian is the official language, while the most spoken language is Javanese. The official languages of Bosnia-Herzegovina are Bosnian, Croat and Serb; but from a linguistic point of view, the three languages are actually the same language.

Making one or more designated languages official does not necessarily or automatically entail major legal consequences. The legal sense and scope of officialising a language depends on the effective legal treatment accorded to that language in practice. Otherwise, an official language without legal "teeth" is only a symbolic official language. In Bolivia, Section 5 of the new Constitution of 2009 recognises 38 official languages, namely Castilian and 37 indigenous languages. In practice, Castilian is still, for the moment at least, the real official language, even though the recognition of the 37 indigenous languages is a very significant step towards the recognition of the historical linguistic diversity of the country.

From a linguistic point of view, the domain of education is the most important domain that falls within the scope of an important officially legal language policy.[3]

The majority of modern states have their own official linguistic legislation. In some countries, there are "*de facto*" official languages. In Morocco, for instance, the only "*de jure*" official language is Arabic; but French remains an important "de facto" official language, since it is used in some official documents. Moreover, many prominent states, such as the USA (at the federal level), the United Kingdom, Germany (at the federal level), Japan, Australia and Argentina (at the federal level), do not have any official language, probably because they have no significant linguistic conflicts. However, it can be said that the language in which their constitutions and their fundamental legal texts are written is their "*de facto*" official language.

**Institutionalising linguistic legislation** is legislation which seeks to make one or more designated languages the normal, usual or common language or languages in the non-official domains of labour, communications, culture, commerce and business. From a linguistic point of view, the domain of communications is the most important domain that falls within the scope of an important legal language policy. The interventions of modern states in the non-official domains are relatively minor, and rather liberal in nature.

**Standardising linguistic legislation** is designed to make one or more designated languages adhere to certain language standards and linguistic terminology in very specific and clearly defined domains, usually official

or highly technical. The intervention of modern states in the domain of linguistic terminology tends to be minor in extent, with some exceptions. The standardising process was applied with great success during the past century to the Afrikaans, Hebrew, Hindi and Malay languages.

It is the written form (the language as medium) and not the written linguistic content (the language as message) that is usually targeted by legal rules dealing explicitly with language. The linguistic content may be the object of legislation that is generally not explicitly linguistic in character, such as Civil, Commercial and Criminal Codes or Acts; Charters of Human Rights; or Consumer Protection Acts. Moreover, while the presence of a language or the "quantity" of its usage may be the object of exhaustive language legislation, language "quality" or correct usage belongs to the realm of example and persuasion, where language usage is non-official, and to the domain of schools and government, where language usage is official.

**Liberal linguistic legislation** is legislation designed to enshrine legal recognition of language rights, implicitly or explicitly, in one way or another. But linguistic law, viewed objectively (as legal rules on language), makes a distinction with regard to linguistic rights, which are subjective, and thus belong to any person. On the one hand, there is the right to "the" language (the historical right to use one or more designated languages, belonging to majorities or some historical minorities, in various domains, especially in official domains); and on the other, there is the right to "a" language (the universal right to use any language in various domains, particularly in non-official domains). These linguistic rights, based respectively on the principle of territoriality and the principle of personality, allowing for specific exceptions, are essentially individual from a legal point of view (particularly for the linguistic minorities), but – naturally – are also both individual and collective from a cultural point of view. However, the linguistic rights of indigenous people are considered to be collective ones.[4]

The important but non-official Barcelona Universal Declaration of Linguistic Rights of June 9, 1996, states that linguistic rights are historical and both individual and collective.

## 3. COMPARATIVE LINGUISTIC LAW

Linguistic legislation never obliges anyone to use one or more languages in absolute terms. The obligation applies only to the extent that a legal act covered by language legislation is actually accomplished in terms of the obligation. For example, the obligation to use one or more languages on product labels is only

applicable if there is an obligation, in non-linguistic legislation, to put labels on products.

Generally speaking, linguistic terms and expressions or linguistic concepts (such as that of the "mother tongue") are the focus of language legislation only to the extent that they are formally understandable, intelligible, translatable, usable or identifiable, in one way or another, or have some meaning in a given language. Thus, anything that is linguistically "neutral" is not generally targeted by language legislation, as can be seen, *inter ali*a, in section 20 of Quebec's Regulations regarding the language of commerce and business.

Section 58 of Quebec's Charter of the French Language originally stated that, allowing for exceptions, non-official public signs had to be solely in French (the practical target of this prohibition was the English language). In terms of this provision, if a word that is used on such a sign is understandable in French, it is legally a French word (for instance, "ouvert"). On the other hand, if a word on the sign is not understandable in French, it is not legally a French word, in cases where it has some meaning in another specific language, and is translatable into French. In such instances, the public sign is illegal (for example, if the word "open" is used). However, this section has subsequently been partially repealed, after the Supreme Court of Canada stated, in 1988, that section 58 contravened freedom of expression and the principle of non-discrimination, and was thus incompatible with Canada's and Quebec's Charters of Human Rights.[5] According to the Supreme Court of Canada, a state can impose the use of a specific language on non-official public signs, but it cannot forbid other languages. This decision was partially upheld by the United Nations Human Rights Committee in 1993. The Committee declared that section 58 was incompatible with freedom of expression, as envisaged by the International Covenant on Political and Social Rights of December 16, 1966, enforced on March 23, 1976. [6] Moreover, the European Court of Justice declared, in the *Peeters case* of 1991, that a state cannot impose an exclusive regional language on the labels of products, provided that the information is conveyed in "an [easily] understandable language" in order to comply with the principle of free trade in Europe. [7]

In principle, linguistic legislation is aimed at the speakers of a language (as consumers or users), rather than at the language itself (as an integral part of the cultural heritage of a nation), unless that legislation states the contrary or is clearly a public policy law. A public policy law is any law comprising legal standards that are so fundamental and essential to the interests of the community, both individually and collectively, that they become imperative or prohibitive in absolute terms, so that they cannot be avoided in any way.

Legal rules in linguistic matters are less stringent than grammatical rules. There are four fundamental reasons for this: firstly, the best laws in this context are those that entail the least legislation, particularly in respect of the non-official usage of languages; secondly, language, as an individual and collective means of expression and communication, is an essential cultural phenomenon, in principle difficult to appropriate and define legally; thirdly, legal rules, such as socio-linguistic rules, are only applied and applicable if they respect local custom and usage and the behaviour of reasonable people (who are not necessarily linguistic paragons), while grammatical rules are based on the teacher-pupil relationship; and fourthly, legal sanctions in the field of language, such as criminal sanctions (fines or imprisonment) and civil sanctions (damages, partial or total illegality), being generally harsher than possible language sanctions (low marks, loss of social prestige or loss of clients), are usually limited to low, "symbolic" fines or damages.

Since the legal sanctions of a public policy law (partial or total illegality, for instance) are formidable, many jurists, especially those in Canada (and Quebec) prefer not to think of language laws as being exclusively public policy laws, except when their legal context clearly requires such an interpretation, as may be the case in some official domains of languages. Admittedly, the French *Cour de cassation* declared implicitly, in the *France Quick case* (October 20, 1986), that French Language legislation comprised a public policy law. But that did not prevent the Court of Appeal of Versailles, in the *France Quick case* (June 24, 1987), from considering terms such as "spaghetti" and "plum-pudding" to be French terms, for all practical purposes, because they were "known to the general public". These terms were thus considered by the Court to be in keeping with such legislation. The fundamental goal of this legislation is thus to protect both Francophones and the French language. A Francophone is anyone whose language of use is French; that is to say, from a legal point of view, any person who can understand and speak French, in an ordinary and relatively intelligible manner.[8]

In the *MacDonald case* (May 1, 1986) and the *Ford case* (December 15, 1988), the Supreme Court of Canada recognised and enshrined, to all intents and purposes, the distinction between the right to "the" language (a principal right, envisaged as such in the Canadian Constitution, and explicitly historical, owing to the historic background of the country, in the domains of the official usage of languages), and the right to "a" language (an accessory right, not explicitly envisaged as such in the Canadian Constitution, *being implicitly an integral part of the human rights and fundamental freedoms category*, in the domains of the unofficial usage of languages). The Court thus recognised and enshrined the main differences between the official and the unofficial usage of languages.

According to the Supreme Court of Canada, the right to "a" language is therefore implicitly an integral part of the explicit fundamental right of freedom of speech.[9]

A relatively complete study carried out for the United Nations in 1979, the Capotorti Report, indicated that, although the use of languages other than the official language(s) in the domains of official usage was restricted or forbidden in various parts of the world, the use of languages in the domains of non-official usage was generally not restricted or forbidden.[10] We arrived at the same conclusion, in 1977, in our analysis of the constitutional clauses of 147 states in the field of languages.[11] Since then, many states, including Algeria, Malaysia, South Africa, East Timor, 29 states of the USA and, especially, the states that were established after their secession from the former USSR and the former Yugoslavia, have enacted important and often drastic linguistic legislation.

France made French the official language of the state in 1992 (the "language" of the Republic, according to section 2 of the Constitution). The Constitutional Council of France declared unexpectedly, on 15 June 1999, that the 1992 European Charter for Regional or Minority Languages was incompatible with the French Constitution! This Charter applies only to historical and individual linguistic rights. However, the situation has changed since 2008, when the French Constitution was amended so as to recognise the "regional languages" as being part of the "Heritage of the Republic" (section 75-1).

There are only a few examples of prohibitive linguistic legislation in the world in the field of non-official linguistic legislation. Some bad examples of this kind of linguistic legislation were encountered in the past, in Francoist Spain and fascist Italy (for example, pertaining to public signs, trademarks and firm names). There were also similar examples, in the recent past, of prohibitive linguistic legislation in Quebec and in Turkey (and also indirectly in Indonesia, where only Latin characters were allowed to be used on public signs) in the field of the non-official usage of languages; but this kind of linguistic legislation has been totally or partially revoked. Turkey prohibited, in some cases, the use of certain languages, other than the first official language of each country which recognises the Republic of Turkey, and practically prohibited the use of the Kurdish language.[12] These prohibitive measures contravened section 27 of the International Covenant on Civil and Political Rights, which recognises the right of members of linguistic minorities to use their own language. This Turkish law has therefore been revoked. The International Covenant applies, moreover, to individual linguistic rights (pertaining to "members" only, not to "linguistic minorities"), whether they are historical or not.[13]

In other respects, there are some good examples of legal linguistic tolerance and freedom in many countries, such as Finland (which has two official

languages, and where the Swedish minority is very well protected), South Africa (with eleven official languages, and where the right to "a" language is explicitly recognised), Canada and Australia (where effective policies are in place pertaining to multiculturalism, for example). This makes us relatively optimistic – albeit still absolutely vigilant – regarding the future of comparative linguistic law.

## 4. CONCLUSION

The right to "a" language will become an effective fundamental right only to the extent that it is explicitly enshrined, not only in higher legal norms, but also in norms with mandatory provisions that identify, as precisely as possible, the holders and the beneficiaries of language rights and language obligations, as well as the legal sanctions that accompany these rights and obligations. Otherwise, the right to "a" language will remain but a theoretical fundamental right, like several other human rights that are proclaimed in terms of norms with directive provisions that cover language rights, but have no real corresponding sanctions and obligations.

While the law inhabits a grey zone, especially regarding the usage of languages, the right to "a" language (and therefore the right to be different) will only have meaning, legally speaking, if it is enshrined (especially for historical linguistic minorities), in one way or another (and particularly, in the official usage of languages), in norms with mandatory provisions, as the right to "the" language generally is.

As a historical right (which takes into account the historical background of each country), the right to "the" language warrants special treatment in certain political contexts, even if it is not in itself a fundamental right. As a fundamental right (a right and freedom to which every person is entitled), the right to "a" language, even if it enshrines the dignity of all languages, cannot be considered an absolute right under all circumstances. A hierarchy exists that must take into account, in ways which are legally different and not discriminatory, the historical and fundamental linguistic imperative of the nations and individuals concerned, also including the imperative of establishing a way to effectuate legally equitable treatment between languages coexisting in a given political context.

It is clear that states (at all levels) have the right to legally impose as official, in one way or another, a language or some languages (especially the national ones and certain historical minority languages), in order to ensure, according to the circumstances, some kind of social cohesion among citizens. It is also clear that citizens and inhabitants have the duty to legally respect the official language(s)

of their states. However, modern states must respect the linguistic diversity of our world. This has to be done in an equitable way. Equity is the key to finding acceptable solutions in comparative linguistic law.

There are thousands of languages and dialects in the world (even though about 75% of the population speak 23 languages, one of which is spoken by more than one percent of the world population). According to UNESCO, there are more than 6 000 languages in the world. The Bible has been translated into more than 2 000 languages and dialects. There are international, national, regional and local languages and dialects. All languages and dialects have equal dignity in terms of international law. But they are not all equal amongst themselves. A natural – and sometimes also an artificial – hierarchy is manifesting itself among languages. The most spoken languages in the world are Chinese and Hindi-Urdu; but the most prominent international languages are English and French, especially English-American, which is spoken by millions of native as well as millions of non-native speakers.

Lingua francas are necessary for international communications, not for deep cultural expression. (In the past, Latin and French were the prominent lingua francas; now, English-American is most prominent; and tomorrow, some other language – such as Portuguese-Brazilian – may occupy the dominant position in this regard.) The only real "danger" that may conceivably be posed by lingua francas is that a strong lingua franca could prevent good-quality teaching and learning of foreign languages as third languages. However, the real danger does not lie only in "globalisation", but also in "localisation", to the extent that localisation actually becomes "ultra-nationalisation".

The recent political trend in favour of linguistic and cultural *diversity* is inspiring if it promotes the right to "a" language. It is not so inspiring if it only promotes the right to "the" language. It is really embarrassing that some trends within this recent cultural movement are aimed, above all, at defending strong languages, such as French, German, Italian, Spanish, Russian and Portuguese. In reality, the languages that should be promoted and protected above all are those that are less used (having fewer than a million speakers and, in some cases, only a few million speakers), as well as those that are in a minority situation, to the extent that they are vulnerable. It is the historical minority languages that should be promoted and protected! For this reason, on June 16, 2006, the International Academy of Linguistic Law sent a *Call to Unesco* for an International Convention on Linguistic Diversity.

By ruling, in section 89 for instance, that "[w]here this act does not require the use of the official language (French) exclusively, the official language and

another language may be used together", Quebec's Charter of the French language recognises and enshrines the right to "a" language *and* the right to "the" language, by creating an interesting hierarchical solution between them in the field of language policy. The problem was that the "exclusive" use of French was accorded too much importance in the enactment of the Charter. This is currently no longer the case – at least not to the same extent.

The importance of linguistic law, that is, the extensive legal intervention of states in the field of languages, shows that the globalisation of communications has apparently become so dramatic that it has to be controlled by promoting and protecting, according to the circumstances, national, regional and local languages and identities – in other words, the linguistic and cultural diversity of the world. In this respect, linguistic law is the realm of "linguistic regionalisation".[14]

Let us hope that "linguistic ultra-nationalisation" will not be allowed to triumph – which is what happens when nationalisation, in some public territories, means both the right to "the" language, and the free reign of linguistic fundamentalism. This would create new walls and boundaries and, consequently, major and new conflicts among nations. To paraphrase Clausewitz: Is language becoming a new way to wage war? Let us hope not. Language must not become the new religion of the new Millennium – and it will not, if we remain vigilant in this regard.

For all these reasons and others, we are relatively satisfied that the natural Tower of Babel is stronger than the artificial and technical globalisation of communications. However, we are somewhat concerned that the Tower of Babel may not necessarily be stronger than the possible and dangerous ultra-nationalisation of languages.

## ENDNOTES

1 Official Languages Act, R.S.C., 1970, c. C-02.

2 Charter of the French Language, R.S.Q., c. C-11. The Charter is popularly known as *Loi 101* (*Bill 101*).

3 Fleiner, Thomas, Peter H. Nelde and Joseph-G. Turi (eds). 2001. *Law and Languages of Education – Droit et langues d'enseignement*, Institut du Fédéralisme de Fribourg, Bâle, Genève, Munich: Helbing & Lichtenhahn, 561 p.

4 Indigenous and Tribal Peoples Convention of the International Organization of Labour, of June 27, 1989, enforced on September 5, 1991. Thus far, the Convention has been ratified by 22 states, including 14 states of Latin America. The rights protected by the Convention are accorded to "peoples".

5 *MacDonald v. City of Montreal*, [1986] 1 S.C.R. 460; *Ford v. Quebec* [1988] 2 S.C.R. 712. In the *Ford case*, the Supreme Court of Canada declared that "[l]anguage is so intimately related to the form and content of expression that there cannot be true freedom of expression by means of language if one is prohibited from using the language of one's choice" (p. 748). With regard to the discriminatory nature of certain provisions of Bill 101 (Sections 58 and 69, concerning the exclusive use of the French language on signs and posters and in the names of firms), the Supreme Court of Canada decided in the *Ford case* that the distinction based on the "language of use", created by Section 58 of Bill 101, had the effect of "nullifying" the fundamental right "to express oneself in the language of one's choice" (p. 787). With regard to the non-discriminatory nature of certain provisions of Bill 101 (Section 35 requires that professionals should have an appropriate knowledge of the French language), see the Supreme Court of Canada's decision in the *Forget case* (*The Attorney General of Quebec v. Nancy Forget*, 1988, 2 S.C.R. 90). Moreover, in this judgement, the Court declared that "[t]he concept of language is not limited to the mother tongue but also includes the language of use or habitual communication... there is no reason to adopt a narrow interpretation which does not take into account the possibility that the mother tongue and the language of use may differ" (p. 100). In the case of *Attorney General of Quebec v. Irving Toy Limited* [1989] 1 S.C.R. 927, 970, the Supreme Court defined freedom of speech as follows: "Indeed, freedom of expression ensures that we can convey our thoughts and feelings in non-violent ways without fear of censure" (p. 970). For the Court, freedom of speech applies, in principle, to any content (any message, including commercial messages) in any form (any medium, and therefore, any language), except violence.

6 *Ballantyne, Davidson and McIntyre v. Canada* (March 31 and May 5, 1993). Communications Nos. 359/1989 and 385/1989, U.N.Doc. CCPR/C47/D/359/1989 and 385/1989/Rev.1 (1993).

7 Cf. *Peeters case*, European Court of Justice, June 18, 1991, C-369/89.

8 Arrêt no 85-90-934, du 20 octobre 1986, de la Chambre de criminelle de la Cour de cassation. Arrêt no 69-87, du 24 juin 1987, de 7e Chambre de la Cour d'appel de Versailles.

9 See *supra*, note 5.

10 Capotorti, Francesco. 1979. *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, United Nations, New York (see p. 81 and 103, in particular). It must be pointed out, however, that according to the Capotorti Report, it is not only the right to be different that constitutes a human right; the right to be assimilated also comprises a human right (p. 103).

11 Turi, Joseph-G. 1977. *Les dispositions juridico-constitutionnelles de 147 Etats en matière de politique linguistique*, Québec: CIRB-Université Laval, 165 p.; Turi, Joseph-G. 1996. "Législation linguistique", in *Kontaklinguistik – Contact Linguistics – Linguistique de contact* volume 1, edited by H. Goebl, P.H. Nelde, Z. Stary and W. Wolck, 160-168. Berlin-New York: Walter de Gruyter.

12 Republic of Turkey, Law regarding publications in languages other than Turkish, Law No. 2832 (October 19, 1983).

13 General Comment No. 23 of the UN Human Rights Committee, April 6, 1994.

14 Turi, Joseph-G. (1989). "Introduction au droit linguistique". In *Language and Law – Langue et Droit*, edited by P. Pupier and J. Woehrling, 55-84. Montréal: Wilson et Lafleur. See also: Su, Jinzhi, J-G. Turi and J. Wang (eds). 2006. *Law, Language and Linguistic Diversity*. Beijing: Law Press China, 507 p.

# ITALIE, PAYS MULTILINGUE: DE LA PROTECTION DES MINORITES LINGUISTIQUES HISTORIQUES AUX ENJEUX DES NOUVELLES MINORITES

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**Résumé**

Le modèle italien des droits linguistiques est fondé sur quelques articles de la Constitution italienne de 1948, notamment l'Article 6, et se précise par la Loi nationale 482 de 1999, ainsi que par un *corpus* de lois régionales. Tous textes confondus, il est possible de déceler quelques carences communes, et notamment :

a) En premier lieu, l'absence d'un véritable souci d'intégration sociale des minorités, notamment des plus récentes. Celles-ci, au niveau de la doxa font en général l'objet de discours sécuritaires qui ne prennent normalement pas en compte la possibilité d'une intégration qui passe par une reconnaissance mutuelle des identités socioculturelles. Pourtant, l'existence d'un Département pour les libertés civiles et l'Immigration, relevant de la Direction centrale pour les Droits Civils, la Citoyenneté et les Minorités (Ministère de l'Intérieur) laisserait espérer (ou à tout le moins rendrait théoriquement possible) une sorte de convergence institutionnelle entre la reconnaissance des vieilles et des nouvelles minorités ;

b) En second lieu, on remarque dans ce *corpus* de lois que la diversité culturelle et sociale caractérisant toute communauté alloglotte n'est généralement pas envisagée comme un levier d'actions de développement local.

C'est à partir du constat de ces carences majeures que nous nous proposons de contribuer à mettre à jour le modèle italien de protection et de promotion des minorités linguistiques, anciennes et nouvelles. L'occasion d'une telle mise à jour s'est présentée lorsque nous avons été sollicités afin d'amender la proposition de loi régionale des Abruzzes n°430 de 2003 visant la protection de la seule minorité linguistique historique reconnue de la région, c'est-à-dire l'îlot arbëresh de Villa Badessa.

**Abstract**

The legal framework of Italy's linguistic rights is based on certain articles of the 1948 Constitution; especially article 6, further developed in detail in national law no./decree 482 of 1999. A *corpus* of regional laws completes the structure. These laws, in their totality, have some common shortcomings, and notably the following:

a) First of all, there is a complete lack of concern regarding the social integration of minorities, and particularly the more recently created minorities. Public opinion conceptualises the issue regarding new minorities only in terms of a security problem, leaving out any consideration of a potential, reciprocal recognition of socio-cultural identities. However, the existence of a Department for Civil Liberties and Immigration under the Directorate for Civil Rights, Citizenship and Minorities (at the Interior Ministry) leaves room for hope (or at least makes it theoretically feasible) for some kind of institutional convergence between the recognition of old and new minorities;

b) Secondly, this body of law has little interest in encouraging the development of local activities, starting with the utilisation of the peculiar cultural-linguistic features of alloglot communities.

As a result of our observation of these significant limitations, we wish to contribute to the renewal of the Italian model of protection and promotion of minority languages, both ancient and new. The opportunity to do so arose when we were called in to amend a legislative proposal in the Abruzzo region (n°430 of 2003) regarding the protection of its only historic linguistic minority, living on the Arbëresh island of Villa Badessa di Rosciano (Pescara).

**Mots-clés:** droits linguistiques, minorités historiques, nouvelles minorités, diversité linguistique, langues d'Italie, langue arbëresh, développement social

## 1. APERÇU DU MODELE ITALIEN DES DROITS LINGUISTIQUES

Pendant longtemps, en Italie, le principal repère juridique portant sur la protection des minorités linguistiques a été l'Article 6 de la Constitution de 1948 : « La République protège par des normes particulières les minorités linguistiques ». Cette remarquable disposition – et, qui plus est, son statut de « principe fondamental » – est une marque évidente de l'esprit antifasciste et pluraliste qui est le soubassement même de notre Charte constitutionnelle. Mais, comme il arrive parfois aux déclarations de principe dont la grande portée symbolique paraît se suffire à elle-même, on a dû attendre plus d'un demi-siècle pour que cet Article 6 trouve son application. Ce n'est en effet qu'en 1999, après bien des débats, que le Parlement italien a approuvé la Loi 482 (« Normes en

matière de protection et de défense des minorités linguistiques historiques »)[1] : « En vertu de l'Article 6 de la Constitution et en harmonie avec les principes généraux établis par les organisations européennes et internationales, la République protège la langue et la culture des populations albanaise, catalane, germanique, grecque, slovène et croate, et de celles qui parlent le français, le franco-provençal, le frioulan, le ladin, l'occitan et le sarde. » (Article 2).

Nous soulignons cette détermination (« historiques »), puisqu'elle ne figurait pas dans l'Article 6 de la Constitution. Elle implique bien une dimension topologique, géographique, outre que chronologique. Sur cette base, la Loi 482 exclut les minorités n'ayant pas d'assise territoriale depuis au moins deux siècles[2] – comme par exemple, en raison de leur caractère soi-disant nomade, les communautés Rom et Sinti, diffuses dans toute la Péninsule, ainsi que les migrants, les *nouvelles minorités*.

Cela dit, le critère qui a mené à sélectionner les douze minorités protégées par cette Loi a fait l'objet de maintes critiques (Orioles 2007 ; Telmon 2007). D'une part parce que, en ce qui concerne les communautés Rom et Sinti, elles sont à quelques endroits de notre territoire sédentarisées depuis plusieurs siècles ; d'autre part, parce que ce critère exclut les « hétéroglossies internes », comme les gallo-italiques et les tabarquins. Enfin, l'Article 2 introduit une discrimination curieuse, sinon subreptice, entre des populations *parlant* des langues minoritaires (« [les populations] *qui parlent* le français, le franco-provençal, le frioulan, le ladin, l'occitan et le sarde») et des populations où il y a *pleine correspondance entre identité ethnique et linguistique* (« la langue et la culture des populations albanaise, catalane, germanique, grecque, slovène et croate »). On dirait qu'un critère, flou et discutable, d'« ethnicité » s'est quelque part et peut-être inconsciemment faufilé au moment de rédiger le texte de loi.

Quoiqu'il en soit, avant cette loi nationale, les régions qui étaient le plus intéressées par la présence de minorités linguistiques sur leurs territoires ont adopté des dispositifs dès les années 50. Mais c'est à compter des années 90 que l'on a pu assister en Italie à un véritable essor de lois régionales (ou de propositions de loi) visant la protection de minorités linguistiques[3]. Cette chronologie ne surprend guère : c'est l'époque de l'adoption de la part du Conseil de l'Europe de deux textes « cousins » qui ventilent protection des patrimoines linguistiques minoritaires (approche *patrimonialiste*) et protection de groupes humains à langue-culture minoritaire (approche *droit-de-l'hommiste*). Il s'agit, respectivement, de la *Charte européenne des langues régionales ou minoritaires* (1992, désormais « Charte des langues ») et de la *Convention-cadre pour la protection des minorités nationales* (1995, désormais « Convention-cadre »). L'Italie n'a toujours pas signé la Charte des langues, alors qu'elle a signé la

Convention-cadre le 1er février 1995 et l'a ratifiée le 3 novembre 1997. Elle est entrée en vigueur le 1er mars 1998[4].

Cet essor, ainsi que l'entrée en vigueur de la Loi 482, permettent aujourd'hui de tracer les contours de ce que nous pouvons bien appeler le « modèle italien » des droits linguistiques. Dans la plupart des cas, les lois régionales, en ce qu'elles prennent en compte de plus près les réalités de terrain, sont plus fonctionnelles, et donc plus efficaces, que la loi nationale, plus générale.

Cela dit, tous textes de loi italiens confondus (régionaux et national), il est possible de déceler quelques carences communes, et notamment:

a. En premier lieu, l'absence d'un véritable souci d'intégration sociale des minorités, notamment des plus récentes. Celles-ci, au niveau de la doxa, font en général l'objet de discours sécuritaires qui ne prennent normalement pas en compte la possibilité d'une intégration qui passe par une reconnaissance mutuelle des identités socioculturelles. Pourtant, l'existence d'un Département pour les libertés civiles et l'Immigration, relevant de la Direction centrale pour les Droits Civils, la Citoyenneté et les Minorités (Ministère de l'Intérieur) laisserait espérer (ou à tout le moins rendrait théoriquement possible) une sorte de convergence institutionnelle entre la reconnaissance des vieilles et des nouvelles minorités;

b. En second lieu, on remarque dans ce corpus de lois que la diversité culturelle et sociale caractérisant toute communauté alloglotte n'est généralement pas envisagée comme un possible levier d'actions de développement local.

C'est à partir du constat de ces carences majeures que nous nous proposons de contribuer à mettre à jour le modèle italien de protection et de promotion des minorités linguistiques, anciennes et nouvelles.

L'occasion d'une telle mise à jour s'est présentée lorsque nous avons été sollicité afin d'amender la proposition de Loi régionale des Abruzzes n°430 de 2003 visant la protection de la seule minorité linguistique historique reconnue de la région, c'est-à-dire l'îlot arbëresh de Villa Badessa. Dans les paragraphes suivants nous allons d'une part illustrer ce contexte territorial au point de vue historique, culturel et sociolinguistique, et de l'autre analyser la proposition de loi régionale afin d'en justifier quelques amendements.

## 2. L'ILOT ARBËRESH DE VILLA BADESSA : UN CADRE POUR METTRE A JOUR LE MODELE ITALIEN DES DROITS LINGUISTIQUES ?

### 2.1 Les origines

Situé à mi-chemin entre la mer Adriatique et la chaîne montagneuse des Apennins, le village de Villa Badessa compte aujourd'hui environ 250 habitants et fait partie de la commune de Rosciano, dans la province de Pescara (Abruzzes). Les premiers colons (dix-huit familles) qui le fondèrent arrivèrent ici de Piqeras, un village du littoral de la région albanaise de Himarë, non loin de la frontière avec la Grèce. Fort probablement ils avaient dû quitter très rapidement Piqeras à cause d'un conflit avec un village voisin, Borsh, qui à l'époque était de religion musulmane. Après leur arrivée à Brindisi et une première halte à Bacucco, l'actuelle Arsita, dans la montagne près du Gran Sasso, le 4 mars 1744 Charles III de Bourbon leur assigna trois cents hectares environ de terrain, ancienne propriété de sa mère Élisabeth Farnèse, qui comprenaient les fiefs allodiaux de Abbadessa et de Piano di Coccia. C'est ainsi que naquit celle qui est aujourd'hui considérée comme la plus récente et la plus septentrionale des communautés historiques italo-albanaises d'Italie.

### 2.2 La langue et l'identité symbolique

Aujourd'hui, à Villa Badessa, personne ne parle plus la langue arbëresh. Les vieux du village ne gardent plus que quelques mots, quelques dictons, comme une récente enquête l'a montré[5]. Mais l'identité symbolique de l'ancienne communauté albanaise s'est conservée dans le temps.

Le rôle de relais culturel intergénérationnel est joué notamment par le rite catholique gréco-byzantin du Tipikòn de Constantinople, qui a accompagné les premiers colons et qui est encore pratiqué. La paroisse de l'église de S. Maria Assunta de Villa Badessa appartient à l'Éparchie grecque orientale de Lungro (en Calabre) et une partie considérable de la liturgie (ainsi que les chants) se fait en grec.

Toujours dans le cadre de l'église et de la ritualité orientale, un autre élément au cœur de l'identité culturelle badessaine est représenté par la richesse des icônes sacrées provenant d'Albanie. L'église de Villa Badessa garde 75 précieuses icônes byzantines dont la plupart remontent à la seconde moitié du XVIII$^{e}$ siècle. Ces icônes constituent actuellement la seule collection de ce genre en Europe occidentale. Elles sont l'expression matérielle la plus authentique de la réalité arbëresh de Villa Badessa, la seule attestation tangible d'une individualité culturelle qui s'est conservée dans le temps.

## 2.3 Les actions de promotion culturelle

Malgré cette remarquable persistance symbolique, la langue ayant quasiment disparu, l'identité culturelle de cet îlot est évidemment en danger. Ainsi, la Mairie de Rosciano a réalisé et soutenu dans le temps une série d'actions dans le but de valoriser ce patrimoine culturel. En plus de la restauration architecturale et urbaine du centre historique, des échanges culturels avec d'autres communautés arbëresh du Sud d'Italie ont été mis en place, ainsi qu'un concours de prose en langue arbëresh ouvert aux écoles italiennes et albanaises, un prix de poésie et, finalement, un cours de langue à l'école primaire de Rosciano. De plus, une bibliothèque interculturelle multimédia a été créée à Villa Badessa, mais elle est à présent désaffectée.

En 2006 a été publié le premier catalogue sur les icônes sacrées byzantines de l'église de Villa Badessa (Passarelli 2006). Plus récemment, en 2008, un petit musée ethnographique a été aménagé dans le centre historique du village. On y expose des monnaies, des icônes, des gravures, des tissus, des vêtements traditionnels, des bijoux et des armes du XVIII$^{e}$ siècle.

Évidemment, la réalisation de ces initiatives, importantes encore que quelque peu isolées, a posé le problème, très concret, des soutiens financiers. La Mairie de Rosciano, sur la base des dispositions de la Loi 482, a présenté au Conseil Général de Pescara une demande de découpage infra-communal concernant le village de Villa Badessa, afin d'y appliquer les dispositions de protection de la minorité linguistique historique arbëresh. Par ailleurs, comme nous l'avons signalé plus haut, il existe aujourd'hui une proposition de loi intitulée « Protection de la minorité linguistique arbëresh de Villa Badessa ». Celle-ci est à présent en veilleuse, sa discussion s'étant arrêtée au niveau d'une commission spécialisée du Conseil régional.

## 2.4 La proposition de loi 430/2003

Malgré son envergure régionale, la proposition de loi abruzzaine avancée par le Conseil général de Pescara est en fait une loi *ad hoc* qui « reconnaît la Communauté ethnique linguistique d'origine arbëresh présente dans le territoire de la Commune de Rosciano, en tant qu'élément non secondaire de la culture abruzzaine »[6].

Inspirée de la Loi 482/99, cette proposition vise « la conservation, la récupération et le développement de l'identité culturelle » de la communauté minoritaire arbëresh à travers « toutes les initiatives [pouvant encourager] la permanence

des habitants dans les lieux d'origine et [permettant] l'approfondissement des traits de leur identité ».

Composée de sept articles, cette proposition de loi fait la part belle à l'instruction en tant que cadre primaire de la transmission intergénérationnelle de la langue. On y évoque la promotion de cours de culture locale, d'activités didactiques et le financement de programmes d'étude de la langue arbëresh dans les écoles maternelle, primaire et secondaire de la Commune de Rosciano.

En plus de l'enseignement, sont mises en relief d'autres initiatives (Article 2), relatives:

a. à la conservation et à la valorisation des témoignages historiques, artistiques, culturels, liturgiques et religieux caractéristiques de la communauté arbëresh;

b. au développement de la recherche historique et linguistique, à la publication et à la diffusion d'études, recherches et documents et à la récupération de la toponymie locale en arbëresh;

c. à la création de musées locaux, de centres d'étude et de coopératives de service visant ces activités spécifiques;

d. à l'organisation de manifestations pour valoriser les usages, les coutumes et les traditions de la communauté badessaine;

e. au développement de formes de solidarité avec des communautés albanophones en Italie et à l'étranger.

### 2.5 Notre proposition…

Tout récemment, quelques événements culturels d'envergure internationale ont relancé cette proposition de loi du fait d'avoir attiré beaucoup d'attention sur la communauté badessaine.

Résultat d'une longue année de travail qui a impliqué la communauté tout entière, au printemps 2010, Rosciano et Villa Badessa ont accueilli le deuxième Festival des littératures minoritaires d'Europe et de la Méditerranée, manifestation artistique annuelle organisée par l'association LEM-Italia et liée au colloque international Quatrièmes Journées des Droits Linguistiques (désormais JDL 2010). Celui-ci s'est tenu entre l'Université de Teramo, Rosciano et Villa Badessa du 20 au 23 mai 2010 et a mis à l'honneur justement cet îlot linguistique[7].

Parmi les différents événements au programme, en clôture du Festival a eu lieu une table ronde en plein air à laquelle ont participé la Conseillère régionale

(Nicoletta Verì), le Président de l'association culturelle Villa Badessa (Giancarlo Ranalli), le Maire de Rosciano (Alberto Secamiglio), les réprésentants de l'*Albanian Forum for the Alliance of Civilizations* de Tirana (Laura Xhaxhiu et Ajsela Spahija), le Président de l'Association LEM-Italia (Giovanni Agresti), les participants au colloque JDL 2010 et évidemment la communauté badessaine, tous réunis pour discuter ensemble de la possibilité d'amender la proposition de loi régionale 430/2003. Loin de toute dérive bureaucratique, et sans doute grâce aux dimensions circonscrites et par là maîtrisables de l'îlot arbëresh de Villa Badessa, cette formule de débat public, on ne peut plus démocratique, introduit à notre sens une nouveauté importante dans la façon même de gérer la protection et la promotion de la diversité linguistico-culturelle dans la perspective d'un développement à la fois social et territorial. La table ronde s'est terminée par le propos partagé de développer une synergie entre les différents acteurs institutionnels et sociaux impliqués afin d'intégrer le texte de loi régionale par la prise en compte des aspects de la promotion sociale généralement délaissés par les réglementations régionales, nationales et européennes concernant les minorités linguistiques.

Plus précisément, nous souhaitons mettre l'accent :

- sur les actions visant les phénomènes migratoires (les « nouvelles minorités », *in primis* la minorité albanaise), dans le sens de l'établissement d'un dialogue plus ouvert et d'une intégration plus satisfaisante et équilibrée. Nous estimons en effet que, loin de son annulation ou effacement, la valorisation de la culture du sujet migrant est la démarche la plus propice à une reconnaissance de la dignité et de la richesse dont ce sujet est porteur. Il y a lieu de penser que cette reconnaissance peut avoir des retombées très positives même en termes d'apaisement de conflits soi-disant « interethniques » ou à tout le moins, en termes d'apaisement des raidissements communautaristes ;
- sur le rôle créateur de la société civile et sur le soutien aux actions exprimant la volonté des membres de la communauté minoritaire ;
- sur la préservation de la biodiversité, et plus en général sur le rapport entre protection de l'environnement et protection du paysage naturel, humain et socioculturel.

### 2.6 … par rapport au modèle italien des droits linguistiques

Pour étoffer ces propositions et les comparer au modèle italien des droits linguistiques, nous avons tout d'abord répertorié les points saillants de la

Loi nationale 482/99 pour ensuite les évaluer à l'aune des différentes lois régionales. Ces points sont principalement:

- l'éducation linguistique minoritaire dans les écoles (Articles 4 et 5) et dans les universités (Article 6);
- l'alphabétisation des adultes dans la langue minoritaire (Article 4, alinéa 3);
- l'usage oral et écrit de la langue minoritaire dans les bureaux et dans les actes de l'Administration Publique (Articles 7-9);
- l'adoption des toponymes dans la langue minoritaire (Article 10);
- le rétablissement des noms de famille en langue minoritaire (Article 11);
- la production de programmes à la radio et à la télévision et la promotion de la presse et de l'édition en langue minoritaire (Articles 12-14);
- la création d'instituts spécialisés dans la protection du patrimoine linguistique et culturel minoritaire (Article 16);
- la promotion du développement des langues et des cultures des minorités linguistiques répandues à l'étranger (Article 19).

Ces éléments sont présents dans les textes des lois régionales de manière plutôt homogène.

Nous avons par la suite fait le chemin inverse. Nous avons comparé les lois régionales à la loi nationale tout en soulignant les mesures qui ont été omises par cette dernière, à savoir:

- l'organisation de manifestations culturelles, folkloriques, religieuses et artistiques et la création de bibliothèques représentatives de la culture minoritaire;
- l'ouverture de concours et l'institution de prix pour des œuvres en langue minoritaire;
- la restauration d'anciens bâtiments en style traditionnel des communautés minoritaires;
- la récupération, la conservation et l'enregistrement du répertoire linguistique minoritaire;
- la promotion de la production littéraire et artistique dans les langues minoritaires.

Les constantes mais surtout les éléments absents et des textes des lois régionales et de la loi nationale nous poussent à suggérer un amendement à l'Article 2 de la proposition de loi abruzzaine. Cet article, en ce qu'il prévoit « le développement de formes de solidarité avec les communautés albanophones en Italie et à l'étranger », pourrait permettre la construction et la consolidation de réseaux et consortiums non seulement entre l'îlot linguistique de Villa Badessa et les autres îlots arbëresh du Sud de l'Italie, mais également entre ceux-ci et la patrie d'origine, c'est-à-dire l'Albanie.

Ce dernier aspect renvoie à la très féconde idée, déjà énoncée dans la Charte de Chivasso de 1943[8], des minorités linguistiques en tant que *charnières* entre pays différents, ce qui du coup leur attribue un rôle d'acteurs non secondaires dans le dialogue transfrontalier au niveau culturel aussi bien que social et même économique. Nous estimons que ces potentialités méritent d'être autrement exploitées, ce qui nous conduit à amender l'Article 2 comme suit (nous soulignons les passages amendés par l'emploi de l'italique) :

« Le Conseil Régional est autorisé à concéder annuellement des contributions à la Mairie de Rosciano pour la réalisation d'initiatives concernant :

- le développement de formes de solidarité *et partenariat* avec les communautés albanophones en Italie et à l'étranger, *anciennes ou nouvelles*.

L'Article 2 ainsi modifié, la loi régionale abruzzaine serait à l'avant-garde en Italie en ce qui concerne la protection des minorités linguistiques. Au juste, ce qu'il manque dans le modèle italien, et qui s'avère être de plus en plus une nécessité dans les communautés multiculturelles contemporaines, est la prise en considération des *nouvelles minorités* et des problèmes de *l'immigration* et de *l'intégration* liées de près ou de loin au facteur linguistique.

À ce sujet, nous nous devons de remarquer que la législation régionale abruzzaine est à la pointe en ce qui concerne les mesures en faveur de la protection des langues immigrées. En effet, en 1995, la Région Abruzzo a adopté la loi n° 79 qui a pour but la protection des immigrés (et des leurs familles) présents sur le territoire régional. Cette loi promeut des « initiatives directes visant à favoriser l'insertion sociale et professionnelle [tout en protégeant] l'*identité linguistique*, culturelle et religieuse de ces populations ».

Le Conseil Régional a ensuite promulgué la loi n° 46/2004 (« Interventions en faveur des étrangers immigrés ») par laquelle la Région a l'obligation de réaliser les politiques et les interventions pouvant assurer aux étrangers immigrés « le maintien des liens avec la terre d'origine, en valorisant leur patrimoine *linguistique*, culturel et religieux ».

Ces repères fournissent une base très solide, à notre sens, à l'amendement de l'Article 2 de la proposition de loi régionale abruzzaine, amendement qui pourrait favoriser une meilleure intégration (sans assimilation) linguistique et culturelle des immigrés provenant d'Albanie. La communauté de Villa Badessa pourrait alors devenir – symboliquement, socialement et culturellement – une véritable passerelle entre les deux rives de la mer Adriatique.

Cet horizon de dialogue transfrontalier n'est pas utopique. Un récent voyage (octobre 2010) du Président de l'Association culturelle Villa Badessa (Giancarlo Ranalli) et du Président de l'Association LEM-Italia (Giovanni Agresti) en Albanie méridionale et tout particulièrement dans la région de Himarë, a permis de renouer après un temps indéfini les rapports entre les habitants de Piqeras et la communauté badessaine, même si ce processus de reconnaissance n'en est qu'à ses débuts. Au point de vue politique, la signature d'un jumelage est en cours de négociation entre la Commune de Rosciano et celle de Lukovë, qui est la collectivité locale dont dépend Piqeras.

Finalement, la proposition de loi régionale amendée devrait encourager, faciliter cette ouverture à l'égard des nouvelles minorités et, plus en général, à l'égard d'une culture contemporaine qui, loin de toute cristallisation folklorique, agit au sein de sociétés vivantes et « compétentes », c'est-à-dire en mesure de décider de leur avenir parce que conscientes de leur mémoire historique.

Le pari d'une cohabitation socioculturelle positive et d'une meilleure compréhension entre les différentes communautés du territoire pourrait constituer non seulement une garantie du respect des différentes identités, mais aussi une chance de développement culturel et économique. En effet, les localités caractérisées par la présence de communautés linguistiques minoritaires pourraient devenir des destinations de grand attrait culturel et linguistique, favoriser le tourisme et donc le développement économique et social du territoire. Si l'insertion du *tourisme culturel* (religieux, en particulier) et du moins connu *tourisme linguistique*[9] pourrait figurer dans un nouvel alinéa de l'Article 2 de la proposition de loi abruzzaine, l'ouverture au dialogue interculturel, devenu urgent pour les nouvelles minorités, pourrait contribuer à inscrire les programmes de protection/promotion de l'îlot linguistique arbëresh de Villa Badessa dans le cadre d'un projet européen plus ample et solide. La protection de la diversité linguistique pourrait ainsi s'autofinancer et ne représenterait plus un coût pour la communauté régionale.

## 3. CONCLUSIONS

Bien qu'il soit toujours nécessaire de parler en termes de langue-culture, le cas de Villa Badessa démontre qu'une partie significative de la culture, et donc de l'identité symbolique que celle-ci véhicule, peut se transmettre d'une génération à l'autre en deçà et au-delà de la transmission intergénérationnelle de la langue. Cela dit, c'est à l'approche de la disparition des derniers locuteurs arbëresh, et suite à l'effacement de la langue comme outil d'interaction, que quelques habitants de Villa Badessa ont ressenti la nécessité urgente d'un retour aux origines, et donc d'une récupération de l'ancien patrimoine linguistique, historique et culturel.

Or, s'il est facile de penser aux actions de récupération et de sauvegarde des patrimoines tangibles (c'est le cas de la collection des icônes sacrées), en ce qui concerne les patrimoines intangibles, linguistiques en particulier, le discours est bien différent. Il est illusoire de mettre en œuvre des stratégies de planification linguistique en faisant l'économie de la volonté et du désir des habitants d'apprendre et par la suite d'utiliser la langue tous les jours et sur plusieurs registres.

Cette évidente difficulté pose certaines questions qu'on ne saurait contourner : pourquoi sauver la langue arbëresh de Villa Badessa ? Et que signifie, dans ce contexte, *sauver* la langue? Les citoyens sont-ils réellement intéressés d'apprendre une langue que les générations badessaines des trente dernières années n'ont presque pas connu? Quels bénéfices peut apporter, pour la réalité locale et les territoires environnants, un retour aux origines à travers la reconstruction du passé linguistique?

Pour répondre à ces questions, quelques réflexions générales peuvent être utiles. Si, d'un point de vue instrumental, la récupération et l'éventuel rétablissement ne serait-ce que partiel, discontinu, de la langue des ancêtres n'aurait pas de sens, d'un point de vue symbolique et social les choses pourraient être interprétées de manière différente. Comme l'observe Sparti (2007: 253): « La perte de la langue maternelle, plus qu'un choix conscient, est souvent un abandon de fait; et l'insistance à vouloir conserver la langue résulte d'une volonté extérieure à celle des personnes concernées. L'attention, dans ce cas, plus que sur la langue doit être posée sur les locuteurs et sur la culture qu'ils continuent de véhiculer.»

Autrement dit, pour citer Henri Giordan (2010 : 19), il faut avant tout « créer le désir de langue »:

> Décrire les langues, les enregistrer, les donner à voir et à entendre dans un musée, est somme toute facile. Assurer leur reproduction est beaucoup plus délicat. En

> effet, une langue vivante n'existe pas sans locuteurs qui l'utilisent. Pour que la survie d'une langue soit raisonnablement assurée, il est nécessaire qu'il existe, dans le présent et dans le futur, un groupe de personnes qui éprouvent le désir de parler cette langue. Une politique visant à la survie de cette langue cherchera activement à créer les conditions permettant à un tel groupe d'exister.

Même dans le cas de Villa Badessa – où l'on ne peut nullement parler de l'arbëresh comme d'une langue vivante – nous croyons que l'accent doit être mis sur le désir de la communauté de redécouvrir, de faire renaître le patrimoine linguistique et culturel dont elle est porteuse, car la seule protection de ce patrimoine risquerait *ipso facto* de le cristalliser. Mais en fait, lorsque nous disons qu'il faut « mettre l'accent » sur ce désir, nous évoquons une synergie féconde entre trois acteurs majeurs: la communauté linguistique minoritaire, tout d'abord, qui trop souvent néglige ses richesses. La communauté scientifique et plus largement intellectuelle (y compris les artistes), ensuite, qui est en mesure de susciter, chez la communauté linguistique minoritaire, l'intérêt à l'égard de ses patrimoines – et donc d'en accroître l'autoconscience (*empowerment*). La sphère politique, enfin, qui doit être sensible au dialogue entre les deux premiers acteurs afin d'en recevoir les instances les plus cohérentes et fournir les moyens pour leur mise en œuvre – et pour que ces réalisations retombent positivement sur la société tout entière et non seulement sur la communauté minoritaire.

Ce n'est qu'à travers cette pleine interaction que l'on peut espérer décloisonner le domaine des droits linguistiques et suggérer une voie originale de développement social conjuguant l'instance de protection et valorisation du patrimoine et celle, capitale, du respect des droits de l'homme.

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## ENDNOTES

Université de Teramo (Italie) et Associazione LEM-Italia. Giovanni Agresti est l'auteur des parties 1 et 3, alors que Silvia Pallini a rédigé la partie 2.

1 Cette loi nationale a été suivie de son Règlement d'application à travers le Décret du Président de la République du 2 mai 2001, n° 345.

2 www.interno.it/mininterno/export/sites/default/it/temi/minoranze/sottotema001.html. Page web consultée le 22/09/2010.

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4 Cf. *III Rapporto dell'Italia sull'attuazione della convenzione quadro per la protezione delle minoranze nazionali* (2009). Document établi par la Direzione centrale per i Diritti Civili, la Cittadinanza e le Minoranze - Dipartimento per le libertà civili e l'Immigrazione www.interno.it/mininterno/export/sites/default/it/sezioni/sala_stampa/documenti/minoranze/0997_2009_10_06_III_rapporto_minoranze.html. Page web consultée le 23/09/2010.

5 Il s'agit de l'enquête dirigée par Carlo Consani et Carmela Perta du Département de Studi comparati e comunicazione interculturale de l'Université « G. d'Annunzio » de Chieti-Pescara. Cette recherche, financée par la Loi 482, a débouché, en novembre 2010, sur un rapport final ainsi que sur un court dictionnaire sous la forme d'une base de données numérique.

6 Pour toutes les références on se reportera au texte de cette proposition de loi, téléchargeable à l'adresse www.consiglio.regione.abruzzo.it/leggi/lexreght/testilex/043003f.htm

7 Les Actes ont paru en 2012 par les soins de Giovanni Agresti et Michele De Gioia (Rome : Aracne – « Lingue d'Europa e del Mediterraneo »). L'Association LEM-Italia a par ailleurs confié à la société LogicFilm la réalisation d'un film portant sur le Festival des littératures minoritaires, dans le but de prolonger cette rencontre et de contribuer au développement

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# BILINGUALISM AND THE CITY: MEASURING LINGUISTIC CONVIVIALITY WITH A LANGUAGE BAROMETER

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## Abstract

The management of bi- or multilingualism forms part of public policy. Thus, officially bilingual municipalities or territories, or municipalities which aspire to this status, may wish at regular intervals to gauge the language competence and attitudes of their citizens, together with their past and present language use, the quantity and quality of contacts across language communities, including minority-majority contacts, and the identity of the speakers – in the same way that other social surveys would provide insights into the stakeholders' fluctuating degree of satisfaction regarding, say, health care, employment, or the management of environmental issues. In this contribution, which was part of a symposium dealing with the Finnish Barometer (amongst other issues), I will present results from the Language Barometer of the bilingual city of Biel/Bienne (Switzerland) carried out in 1986, 1998 and 2008. The successive surveys attest to the positive development of linguistic conviviality. By and large, the cohabitation between the two communities represented by the official languages is good. The last Barometer shows that bilingualism is an important component of the identity of the citizens, who widely acknowledge that the local authorities promote both official and individual bilingualism. Both language groups consider bilingualism to be an overall advantage. However, shortcomings are encountered in the economic and administrative domains. In addition to the survey in Biel/Bienne, the projects in Fribourg/Freiburg and the Canton of Graubünden/Grischun/Grigioni will also be briefly discussed herein.

## Résumé

La gestion du bilinguisme ou plurilinguisme fait partie des politiques publiques. Ainsi, des municipalités ou des territoires officiellement bilingues, ou alors des entités qui visent un tel statut, souhaitent parfois mesurer les compétences et les attitudes langagières de leurs administrés, ainsi que l'usage de la langue

actuel ou passé, la quantité et la qualité des contacts interlinguistiques, les contacts entre la majorité et la minorité, l'identité des locuteurs, etc., et ceci à des intervalles réguliers, à l'image d'autres enquêtes qui jaugent le degré de satisfaction parfois fluctuant des administré(e)s concernant, par exemple, les politiques en matière de santé, d'emploi, ou de gestion de l'environnement. Dans cette contribution, faisant partie d'un symposium intégrant également un baromètre sur la Finlande, je vais présenter quelques résultats du baromètre des langues de la ville bilingue de Biel/Bienne en Suisse, effectué en 1986, 1998 et 2008. Les enquêtes successives démontrent un développement positif de la convivialité linguistique. Dans l'ensemble, la cohabitation entre les deux communautés linguistiques peut être qualifiée de bonne et elle va en s'améliorant. Le dernier baromètre démontre que le bilinguisme est une composante importante de l'identité des Biennoises et Biennois et que ceux-ci apprécient la promotion du bilinguisme officiel et individuel de la part des autorités. Tant les francophones que les germanophones considèrent que le bilinguisme présente plutôt des avantages. Toutefois, des améliorations peuvent être apportées dans les domaines économique et administratif. Cet article présente aussi brièvement des projets de baromètres à Fribourg/Freiburg, ainsi que dans le Canton trilingue des Grisons.

**Key words:** language contacts, multilingualism, bilingualism, Switzerland, survey, language Barometer, attitudes, language policy

## 1. INTRODUCTION

According to its Constitution (1999, art. 4, art. 70) and its Language Law (2007, art. 2, art. 5), Switzerland has four national languages (German, French, Italian, Romansh) and three official languages (German, French, Italian), with Romansh being considered as a semi-official language. Of the 26 cantons, 17 are German-, four French-, and one Italian-speaking, while three are bilingual – German-French or French-German (Bern/Berne, Fribourg/Freiburg, Valais/Wallis) – and one, trilingual (German, Romansh, Italian). Individual and social multilingualism is widespread, and combines national languages, including Swiss-German/standard German diglossia, immigrant languages and English. A large body of pluridisciplinary research exists, which focuses on the investigation of individual, social and institutional multilingualism by means of descriptive research methods, both qualitative and quantitative. Language use, language learning and language contacts are part of private and public discourse; and these topics are widely discussed in the media.

Despite the fact that multilingualism – to varying degrees, of course – is part of collective and individual identity, official bi- and multilingual municipalities

in Switzerland are scarce, with only a few of the approximately 2 550 cities and villages enjoying a multilingual status. The two paradigmatic examples of municipal bilingualism are Biel/Bienne (50,000 inhabitants, Canton of Berne), with a German-speaking majority and a French-speaking minority, and Fribourg/Freiburg (37,000 inhabitants, Canton of Fribourg), with a French-speaking majority and a German-speaking minority (Kolde 1981; Brohy 1999, 2000, 2006, 2009a; Schüpbach 2008). Both cities are located on the German-French language border in Western Switzerland. This contribution focuses on Biel/Bienne and a survey on language contacts known as the Language Barometer, the background of the survey and the development of the instrument, and also presents some results. After the 1986 and 1998 surveys, the third Barometer was launched in 2008, with the aim of gathering information about the quality of cohabitation between the two language communities, the identity of the citizens, their attitudes towards bilingualism and languages in contact, their language use and their language competence. A total of 508 citizens were interviewed in face-to-face encounters. This sample was adjusted to reflect the respective sizes of the German- and French-speaking populations of the city. This contribution presents the results of the 2008 Barometer; and some of these results are compared to those of the two previous surveys.

Language Barometers have been used in various multilingual settings. The results of two surveys in Brussels are available (Taalbarometer 1 and 2; cf. Janssens 2008), and the results of the third are due to be published by the end of 2012. In multilingual South Tyrol, the Language Barometer is part of the statistic poll (ASTAT 2006); it contains data on language biographies, language use and identity, and language learning. In officially bilingual Finland, a Language Barometer yields data on the use of Finnish and Swedish. At the European level, the Eurobarometer yields comparative data on language use, language competence and language attitudes in the European Union (Commission européenne 2001/2006). In La Réunion, a survey on the Creole language provides insights regarding the status that the language users wish to attribute to their language in daily life and at school (Le créole à l'école 2009). As far as bilingualism in Wales is concerned, Baker (1985: 167) describes the population census as an "inexact but important and irreplaceable barometer of the condition of the Welsh language". He regrets, however, that no such barometer exists to measure the condition of Welsh culture.

## 2. BIEL/BIENNE – SHARED AND CONSENSUAL BILINGUALISM?

The city of Biel/Bienne, the second largest in the Canton of Berne, has a population of just over 50,000, of whom 55.4% are German-speaking and 28.2% French-speaking, while 16.4% are speakers of other languages

(including Italian-speakers, who account for 6%). In this city, 26.2% of the resident population are non-Swiss (census of the Federal Office of Statistics, 2000). About 40% of the population use French as the official language for communication with the authorities, while 60% use German. For the German-speaking community, a diglossic situation exists; the Swiss-German dialect prevails in most oral contexts, while standard German is predominant in most written contexts.

The city's official German-French bilingualism is enshrined in the Bernese cantonal Constitution (art. 6), and in laws and ordinances. The principle of personality is applied for the purposes of contact with the municipal administration and for the choice of the school language. In terms of the linguistic landscape, public space is largely bilingual (Brohy 2011); street names, signs, and other official information appear in both languages, and in many cases this also applies to private information (advertisements, shop windows, etc.). The authorities and civil society promote cultural activities in German, in French, and in both languages together. Media, schools and other educational institutions are German, French, or bilingual (German-French). Furthermore, the city's bilingualism is an export product; Biel-Bienne has called itself the "city of the future", and has also claimed to be a city with no history – a claim which reputedly accounts for the flexibility and tolerance of its inhabitants. The linguistic interrelations which link the citizens and the authorities are seen as a "social contract" (Conrad *et al.* 2004); and the term *bielingue*, a contraction of *Biel* and *bilingual*, is a frequently-used pun.

The city was founded in the 13th century on German territory close to the language border. However, the city had strong economic and political ties with French-speaking territories; and from the beginning of the 16th century, the city scribes were bilingual. As part of the Prince-Bishopric of Basel, after the French Revolution, between 1798 and 1815, the city belonged first to the French Department Mont-Terrible and then to the Department Haut-Rhin, with French as an official language. During the Congress of Vienna in 1815, along with the Jura, it was assigned to the Canton of Berne, and German became the official language once again. Around the middle of the 19th century, Biel modified its restrictive immigration policy, as an economic strategy. This allowed an influx of French-speaking watchmakers from the Neuchâtel and Jura regions during the 1840s. With the arrival of these newcomers, the number of French-speakers reached a critical proportion which could no longer be assimilated; and Biel/Bienne gradually became bilingual. French schools, social and cultural associations, political parties, and media were founded. From the turn of the 20th century onwards, the mayors and political and cultural institutions promoted bilingualism, creating a bilingual ideology according to which each citizen

should be proud of the bilingualism of his or her hometown. These efforts caused the city's Swiss-German/German/French bilingualism to become more widely known. From the 1950s onward, successive waves of Italian, Spanish and Portuguese immigration have augmented the use of French, the minority language, since these communities usually choose French as the language of administration and education.

During the early 1980s, however, the bilingual façade began to crack, and many inhabitants and institutions feared that the two language communities would drift apart. Many influential leaders and politicians – one of whom was a former city mayor – took up the topic of cohabitation: "Permanent attention as well as conscious empathy and generosity in daily life are needed in order to live as much as possible in togetherness (*miteinander*) (and not only side-by-side [*nebeneinander*])" (Fehr 1981: 172, my translation). It was also feared that linguistic indifference might eventually lead to reciprocal hostility (*gegeneinander*).

In addition, it was argued that the inhabitants could derive cultural, linguistic and economic benefits from the particular language situation of the city. A number of citizens and politicians wanted to give social bilingualism more prominence, and a Biel student in Sociology at the University of Zurich was commissioned by the authorities to measure the quality of language contacts in Biel/Bienne in a major survey (Müller 1987). The aim was to measure the language attitudes and behaviour of the citizens, and not those of the policy-makers, who might have been tempted to give too positive an image of linguistic cohabitation. The results were not as positive as expected, since the survey revealed that city bilingualism was largely perceived as a mere juxtaposition of the language communities, rather than as a fruitful and constructive togetherness. The municipal government withheld these conclusions for a certain period of time. Between 1989 and 1991, several initiatives in the city parliament (Stadtrat/Conseil de Ville) were needed before the results were made public (Hadorn 1992). One of the consequences of this political action was the founding of the Forum for Bilingualism, as well as the plan to organise a regular Language Barometer.

## 3. THE SUCCESSIVE BAROMETERS OF 1986, 1998 AND 2008

The three Barometers were carried out by different teams; and this can be discerned in the sampling, item structure, translation and scope of the questionnaires. The 1986 survey (Müller 1987), which was declared *post quam* to be the first Barometer, was the longest. It entailed 80 questions on linguistic issues (81 for the French-speakers, since they had to answer two sets of questions regarding their competencies in German – one concerning Swiss-German and the other, standard German – whereas the German-speakers had

to answer only one set of questions concerning French), and 34 questions on cultural and socio-economic issues. An interviewer protocol had been added, comprising a description of the perceived interest of the interviewees, the quality of their language, their mode of dress and hairstyle – and even the type of dwelling in which they resided, and their furniture (the interviews were conducted in the homes of the informants). The 1998 questionnaire contained 36 questions regarding bi- and multilingualism. As in 1986, it was aimed at Swiss citizens only; but this time it was supplemented by additional questionnaires administered to 78 foreign citizens: 40 Italian-speakers with French as a second language and 38 people who spoke German as a second language (Turkish- and Arabic-speakers, as well as speakers of other European languages). The questionnaire used in the 2008 survey, which I monitored, was directed at all city residents aged 18 or over, regardless of nationality, with the sample being adjusted by means of proportional quota sampling. Whereas in 1986 and 2008 the samples represented the relative numbers of majority and minority language speakers, the French-speaking minority was clearly over-represented in 1998.

In 2008, the survey mode consisted of face-to-face interviews, with 33 questions on languages, bilingualism and the image of the city of Biel/Bienne, and eight questions concerning socio-economic issues. As in 1998, the interviews were conducted face-to-face, either at the homes of interviewees or on the streets.

In the 1986 and 1998 Barometers, there were two independent variables, the French-speakers and the German-speakers, according to the language chosen for the interview. In 2008, 306 interviews were conducted in German and 202 in French. Since a significant number of people could not make up their minds regarding the questionnaire language, leaving the choice to the interviewer, a bilingual group was generated, using combined criteria including the main language of parents, language competence and the language of the questionnaire. Thus, the sample eventually consisted of 298 German- and 134 French-speakers, together with 76 bilinguals. The sample represents about 1% of the city's population. Because of these different categories, and some differences in respect of translation and item selection, diachronic comparisons are necessarily somewhat tentative.

The most salient differences between the questionnaires used over the years concern the question items themselves. In 1986 and 1998, there were only three identical questions with the same answer format, and these were, of course, reused in 2008:

- Do you think that bilingualism in Biel/Bienne has more advantages or disadvantages?
- Bilingualism as a topic of public discourse: In your opinion, do people speak too much or not enough about bilingualism in Biel/Bienne?
- In your opinion, can German- and French-speakers' cohabitation be described as *miteinander*, *nebeneinander* or *gegeneinander* (with each other, side by side, against each other)?

**Table 1:** Sample comparison

| Year | 1986 | 1998 | 2008 |
|---|---|---|---|
| Poll institute | IPSO | Gfs | Gfs |
| Mean duration of interviews | German 44 min.<br>French 50 min. | 30 min. | 26 min. |
| Sample | 438<br>Swiss citizens<br>age 15-69 | 525<br>Swiss citizens<br>minimum age 18 | 508<br>city residents<br>minimum age 18 |
| Questionnaires | | | |
| German | 288 | 258 | 306 |
| French | 150 | 267 | 202 |
| Language groups | | | |
| German | 288 | 258 | 298 |
| French | 150 | 267 | 134 |
| Bilingual | - | - | 76 |

For the 1986 and the 1998 versions, the source language of the questionnaire was German, which explains the convenient use of the compound adverbs *miteinander*, *nebeneinander* and *gegeneinander* in the third question. These terms are commonly used in the media and in private discourse. In 2008, the question items were produced and edited in French and German, in parallel format.

**Table 2:** Translation of German terms into French

| | French terms | | |
|---|---|---|---|
| German terms | **1986** | **1998** | **2008** |
| Miteinander | plutôt ensemble | plutôt en bonne entente | plutôt en bonne entente |
| Nebeneinander | plutôt côte à côte | plutôt séparément | plutôt côte à côte |
| Gegeneinander | plutôt les uns contre les autres | plutôt en opposition | plutôt de manière conflictuelle |

The items of the 2008 Barometer concentrated on identity, connotations of the term bilingualism, advantages and disadvantages of bilingualism, treatment of the two language groups, family languages, self-evaluation of language competencies in German, Swiss-German and French, proficiency in other languages, bilingualism as a topic in public discourse, the image of the citizens of Biel/Bienne, the quality of cohabitation of the two language groups, languages used at work, language learning at school, and geo-political reorganisation. In order to be eligible to answer the questionnaire, respondents had to reside in the city of Biel/Bienne, and, of course, be proficient enough in either French or German. This contribution focuses on the major 2008 results; and where applicable, some trends between 1986, 1998 and 2008 are sketched. The data used for this purpose were drawn from Müller (1987), Fuchs and Werlen (1999), as well as Gfs (2008) and the latter's technical report.

## 4. ICH BIN EIN BIELER

Language is intrinsically linked to identity, and the respondents were asked to indicate two identities out of 13 that were proposed, five of which were *language-neutral* (e.g. Swiss, citizen of the world), three *language-sensitive* (e. g. Jurassian), and five *language-loaded* (e.g. Swiss-German, bilingual).

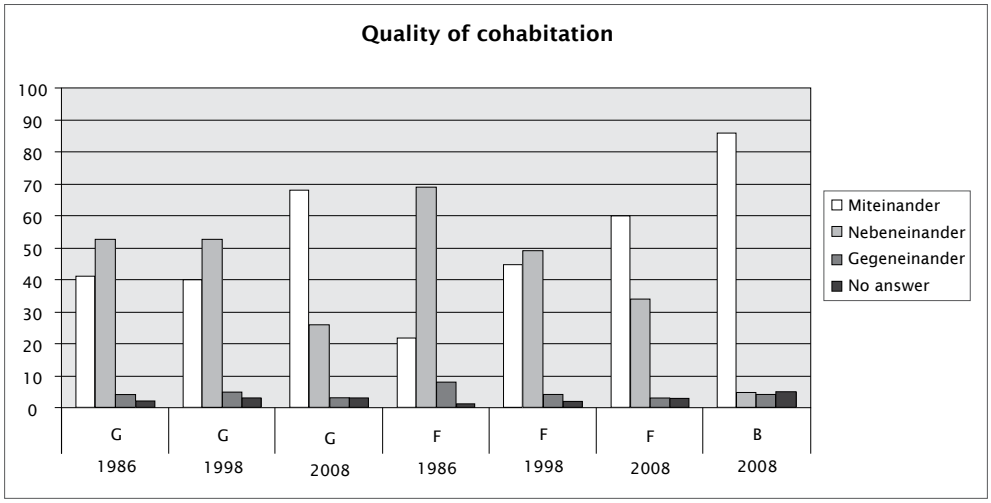
The main identification option chosen by the respondents is *Bieler* (or *Biennese*, in the case of the French respondents). In terms of a local-global perspective, Francophones identify themselves as being Biennese and citizens of the world to an equal extent, whilst German-speakers identify themselves firstly as *Bieler*, and secondly as Swiss. Bilinguals opt for Biennese first, and then Swiss and bilingual to an equal extent, without ethnic or geographic specification. French-speakers identify more strongly with the French-speaking part of Switzerland (Romandie) than German-speakers do with the German-speaking part; this is corroborated by other surveys (Gfs 2007), and is in keeping with the double minority status of the French-speakers at regional and national level. Bilingual identity is more strongly associated with German, since more German-speakers identify themselves as bilinguals and more bilinguals identify themselves as German *Bieler*. The 1986 and 1998 surveys also show that the German-speakers identify with the city more strongly than the French-speakers do, but both the question and the answer formats were too different to allow further comparisons. European identity was not provided as an answer option in 1986, but between 1998 and 2008, Euroscepticism grew within both language communities, as the number of those who opted for European identity decreased; however, the number of French speakers who favoured European identity was twice as high as the number of German speakers who chose this option. This mirrors the Swiss situation regarding European integration.

## 5. BILINGUALISM AS CITY BRAND AND IDENTITY MARKER

The respondents were asked to cite spontaneous associations with the term "bilingualism", a term which proved to be strongly linked to competence in two languages, with the city of Biel/Bienne itself, and with positive attitudes expressed in concepts such as "advantages" and "enrichment". Moreover, the respondents have positive perceptions regarding typical citizens of the city, expressed in terms of attributes such as tolerance, open-mindedness, plurilingualism and multiculturalism.

The degree of emphasis on bilingualism in public discourse is regarded as adequate by 82% of the German-speakers, 63% of the French-speakers, and 80% of the bilinguals. Interestingly, the 2008 results were closer to those of 1986 than to those of 1998. In 1986, 35% of the French-speakers found that bilingualism was not mentioned sufficiently often. The corresponding percentages of the other surveys were 52% in 1998, and 19% in 2008.

**Fig. 1:** Quality of cohabitation according to German- (G), French- (F) and bilingual speakers (B)




A majority of people in both language groups feel that the language communities live together (*miteinander*) rather than side by side (*nebeneinander*) or in conflict (*gegeneinander*). This aspect displayed a positive trend between 1986 and 1998 for the French-speakers (from 22% to 45%) and a stable one for the German-speakers (from 41% to 40%), and a clear positive trend between 1998 and 2008 for both language groups (from 40% to 68% for the German-speakers, and from 45% to 60% for the French-speakers). In 2008, 86% of the bilingual

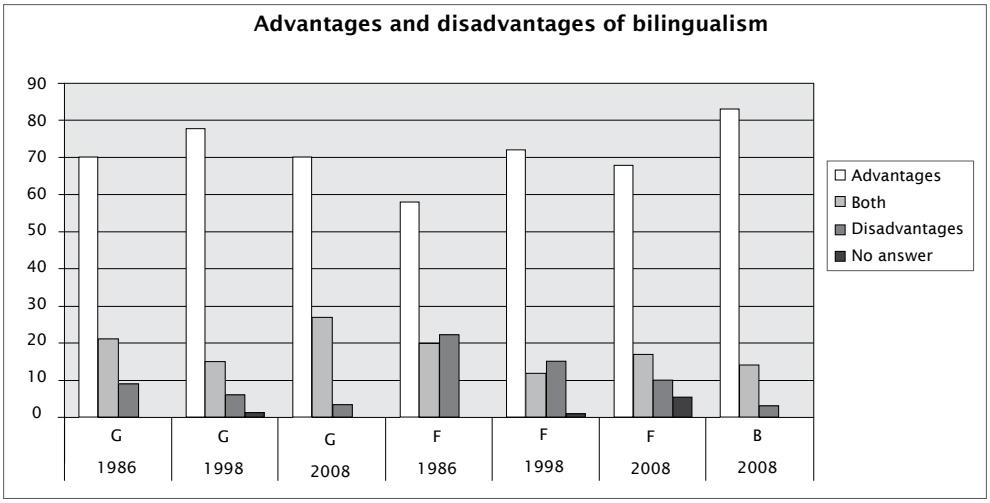
group thought that the language communities were living "together", which is not surprising, since bilinguals, defined in terms of competence and identity, are likely to encounter fewer conflicts and problems, which might influence their perception. The results confirm the widespread assumption in Biel/Bienne that the inhabitants live both socially and geographically in a shared territory.

Concerning the equality of treatment between the two language groups, the perception of the language groups differs significantly. A relative majority of French-speakers and bilinguals (49% of each group) believe that the Francophones are disadvantaged, whereas 43% of the French-speakers and 47% of the bilinguals feel that the language groups are treated equally, compared to 67% of the German-speakers, while 23% of the latter also think that the French-speakers suffer from disadvantages. At least this fact is acknowledged by the language majority!

The question as to whether municipal bilingualism yields more advantages or disadvantages was asked in all three surveys. In both language groups, the number of informants who linked bilingualism with drawbacks decreased over the years. However, between 1998 and 2008, the number of German- and French-speakers who associated more advantages with bilingualism dropped slightly, as the number of people who perceived both advantages and disadvantages increased. Not surprisingly, the champions of a positive perception of bilingualism are to be found mainly amongst the bilinguals (83%).

When asked to cite personal advantages of the city's German/French bilingualism, the respondents of all three groups indicated, in the first place, that such bilingualism has a positive impact on communication (71% of the bilinguals, 46% of the German- and 44% of the French-speakers). For the bilinguals (53%) and French-speakers (37%), the second advantage can be found in the work sphere, while for the German-speakers (39%), it lies in the opportunity to get to know other cultures. For the German-speakers, the third advantage is found in the work sphere (33%); for the French-speakers, it lies in the widening of one's horizons (33%); and for the bilinguals, it is manifested in a specific atmosphere and tolerance (45%). In 1998, a relative majority of the German-speakers (47%) indicated the opportunity to learn a language as the most important advantage, while the French-speakers cited professional advantages (46%). In 1986, the respondents could indicate one advantage only. Thirty-three percent of the German-speakers mentioned the opportunity to learn languages, while 27% of the French-speakers indicated tolerance.

**Fig. 2:** Advantages and disadvantages of bilingualism in Biel/Bienne




A majority of respondents do not think that they have to endure any personal disadvantages as a result of the German/French bilingualism of the city (61% of the bilinguals, 58% of the German- and 50% of the French-speakers). For the German-speakers, the major drawback of bilingualism lies in communication problems (22%); for the Francophones, it lies in the fact that they are disadvantaged (18%); while the bilinguals cited additional efforts and costs (13%). In 1998, 40% of the German-speakers reported that they perceived no disadvantages (as against 24% of the French-speakers). The main disadvantage cited by the German-speakers is that of language barriers (16%), while the Francophones cited the fact that they feel discriminated against (31%). In 1986, the main disadvantage indicated by both language groups was communication problems.

## 6. FAMILY LANGUAGES AND INDIVIDUAL LANGUAGE COMPETENCE

Since the intergenerational transmission of languages in a bilingual/minority language context is of crucial importance, five questions dealt with family languages (main family languages as a child, main language of father and mother, languages spoken with father and mother). Sixty-four percent of the respondents grew up with Swiss German as the main language (or one of the main languages), 36% with French, 7% with Italian, 5% with standard German, and 14% with other languages. German-, French- and bilingual speakers mostly use the same language combination with their parents, and these languages also correspond to the main languages of the parents (between 62% and 75%), with German being less "permeable" to other languages. Seventeen percent

of the respondents speak different languages with their mother and father. Bilingualism seems to be a family tradition, since most bilinguals have bilingual parents and speak either language with each parent.

**Table 3:** Languages spoken with parents (Gfs 2008: 23)

| % of sample | | Language spoken with mother | | | | | |
|---|---|---|---|---|---|---|---|
| | | German | CH German | French | Italian | Bilingual G/F | Other languages |
| Language spoken with father | German | 3% | - | <1% | - | - | - |
| | Swiss German | - | 38% | 2% | <1% | 2% | <1% |
| | French | - | 2% | 17% | - | 1% | 1% |
| | Italian | - | <1% | 1% | 4% | - | - |
| | Bilingual G/F | <1% | 1% | <1% | - | 12% | <1% |
| | Other languages | <1% | <1% | 1% | <1% | <1% | 9% |

Concerning self-evaluation of language competence in German and French (oral reception and production, written reception and production), and in Swiss-German (oral reception and production), many respondents have a strong command of both languages. Interestingly, more French-speakers assess their receptive competence (oral understanding) in the Swiss-German dialect as very good, good or adequate (72%) than in the case of standard German (68%); however, talking in standard German (62%) seems to be easier to the French-speakers than talking in Swiss German (57%). The breakdown in terms of language groups shows that the German-speakers have a better command of French than the French-speakers have of German.

Fifty-two percent of the respondents speak English as an additional language, 29% speak Italian, 9% Spanish, 3% Arabic, 3% a Southern Slavic language, and 16% other languages. Statistically, more French- than German-speakers or bilinguals speak Italian, which is, of course, in keeping with the trend pertaining to the enculturation of the Italian-speakers into the French-speaking language community.

## 7. WORKING LANGUAGES

Biel/Bienne has been an industrial town since the 19th century. It claims to be the world's watch-making capital, housing the headquarters of the Swatch group and other watch brands, as well as a number of watch factories, including Rolex. Small and medium-sized companies in the sector of mechanics and

micro-technology are among the numerous employers who have attracted a large number of migrant workers. The city is also an economic catchment area for a bilingual agglomeration in the domains of education (University of Applied Sciences, Teacher Training University, several vocational and high schools), health, culture, and services (communication, media, call centres). It is also home to the Federal Office of Communications, and thus offers a wide range of job opportunities.

Three questions in the survey concern bilingualism and the role of different languages in the workplace: languages used by the head of the company where respondents are employed, languages generally spoken at the workplace, and languages used by the respondents themselves. Forty-five percent of the interviewees indicate that the head of their company is bilingual, with some differences between the language groups (48% of the German- and 35% of the French-speakers, 54% of the bilinguals). The Swiss German dialect and French are the main languages spoken at work; standard German and English are also widely spoken (30% and 22% respectively). However, both standard German and English are more often spoken by German- than by French-speakers. Italian is indicated by 16% of the respondents, and other different languages by 10%; however, 30% do not indicate any language, since they are not economically active. The question concerning the languages used by the informants themselves yields a similar picture. Swiss-German and French are also the most widely used languages, to almost the same degree (57% and 54%). German-speakers use their second language more often than French-speakers do. Seventeen percent of the German-speakers use English, compared to 10% of the French-speakers. Eight percent of the German- and 10% of the French-speakers use Italian. Italian is a lingua franca widely used by Spanish- and Portuguese-speakers, and also by workers from the Balkans, in certain industries such as construction, since Italian was the first guest language in the area, and Italian-speakers are considered to be experts in this field.

In comparison to 1998, the position of standard German has strengthened, both as a language generally spoken at the workplace, and also as a language used by the informants themselves, at least in the case of the German-speakers (from 16% to 40%), while the result remains steady for the French-speakers (from 18% to 19%). The use of English at work was measured for the first time in 2008. In Switzerland, English is playing a growing role, albeit one which is differentiated according to the economic sectors. It was thus justifiable to include this aspect in the question items. Bilingualism in company management increased between 1998 and 2008 from 24% to 48% for the German-speakers, and from 12% to 35% for the French-speakers. In 1986, only one question yielded information on languages at the workplace. This concerned the

languages spoken by the head of the company. Also in 1986, German-speakers reported working for a bilingual management more often than French-speakers did; and bilingualism also increased between 1986 and 1998.

In the case of most Biennese employees, the workplace is largely multilingual, to an increasing degree, with Swiss German, German, French, English, and even Italian playing a significant role.

## 8. LEARNING LANGUAGES IN SCHOOLS

Questions about languages at school were not included in the 1986 and 1998 surveys. However, even in a bilingual city, the importance of formal education for the development of second-language competence should not be underestimated. Language learning can be supported in various teaching formats: core second-language instruction, bilingual teaching, and joint cultural, social and sports activities across the language sections of schools. In view of the importance of the issue, and since the role of the school in language learning is frequently commented upon in public, private and media discourse, this area of interest was introduced into the questionnaire for the 2008 Barometer. Six questions focused on language learning at school, specifically: the introduction of compulsory core second-language education from kindergarten on; the introduction of English as the second language rather than the third; more school exchanges and common activities; the role of the schools concerning the development of bilingualism; the views of informants on the claim that foreign languages are not effectively learned at school; and the introduction of optional bilingual education at all school levels.

A large majority of 83% (with 49% totally agreeing and 34% partially agreeing) desire the introduction of the second language from kindergarten on. There is no significant difference between the language groups in this regard, though the French-speakers and the bilinguals express this wish in slightly stronger terms. The reason for this could be that the German-speakers assess their own competence in the second language more highly than do French-speakers; thus, they may feel that they do not need an earlier start. Second-language teaching starts in the third grade. English is the compulsory third language. The introduction of English as the second language rather than as the third – already a reality in some German-speaking cantons in Eastern and central Switzerland – was rejected by 70% of the informants (with 35% fully disagreeing and 35% partially disagreeing), while 24% (of whom 8% fully agree and 16% partially agree) would accept this change. The results of the survey show no significant differences between the language groups. Seventy-five percent of the respondents would favour more exchange activities among pupils across

language sections in the schools, with the French-speakers slightly more in favour of this option than the German-speakers and the bilinguals. However, the difference is not statistically significant. Regarding the statement that schools contribute sufficiently to the development of bilingualism, 53% of respondents think that schools do their share in this regard, while 22% feel that schools should take a more proactive stance. In this case, however, there are differences between the language groups: nearly 70% of the bilinguals, 56% of the German-speakers, but only 40% of the French-speakers commend the schools. Almost 60% of the informants do not agree with the statement that a foreign language cannot be learned at school; and there are no noteworthy differences between the language groups in respect of this item. This is in line with the findings of *Werlen et al.* (2011).

Bilingual education is a recurrent topic in public discourse; many schools at various levels offer different bilingual models, such as total and partial immersion, bilingual activities, bilingual modules, etc. However, before the 2008 Barometer, immersion from kindergarten onwards was not yet available as an option; and it was thus interesting to measure the respondents' interest. Sixty-three percent agree with the statement that optional immersion should be offered at all school levels. The need in this regard is perceived differently by the language groups: 75% of the Francophones are in favour of bilingual education (17% are against this option), while the German-speakers are clearly less enthusiastic (56%, as against 41% who are opposed to this option). Bilinguals display an intermediate stance regarding this issue, with 68% for and 30% against bilingual education.

In contrast, a survey carried out in 2008 by the local education authorities amongst parents of children born in 2004 and 2005, in order to gauge their interest in enrolling their children in a bilingual kindergarten class (Walther 2009), found that 91% of the parents were prepared to do so, provided that such classes were available at the closest school. Seventy-five percent agreed to send their child to a bilingual school in the neighbourhood. However, this figure dropped to 20% in cases where the child would have to commute to another part of town. There are slight differences between the language groups: 96% of the Francophones, 91% of the German-speakers and 88% of the allophone parents were interested in the bilingual classes. Since the survey of the local authorities demonstrated a strong commitment on the part of the parents to bilingual education, four kindergarten classes started in 2010, applying the model of early reciprocal immersion (mixed-language classes – 50% in French, 50% in German).

## 9. NEW TERRITORIAL ORGANISATION

After the creation of the officially francophone Canton of Jura in 1979 (Jenkins 1986), which split from the bilingual Canton of Berne after a long period of political consensus which started in the 19th century and ended in self-determined autonomy, new territorial structures are again being discussed, e.g. a merger between the Canton of Jura and the three francophone districts of the Bernese Jura which remained with the Canton of Berne in 1979, or the creation of an even larger political entity in the Jura region. Since 1994, political bodies, such as the Interjurassian Assembly, with a parity delegation of 24 members – 12 from the Canton of Jura and 12 from the Bernese Jura – have had the task of strengthening regional collaboration across the cantonal borders and making proposals for a future reorganisation (Brohy 2009b).

Any new territorial structure would, of course, hold consequences for the language issues in the city of Biel/Bienne. A merger between the Bernese Jura and other political entities would significantly alter the proportion of Francophones living in the Canton of Berne; the French-speaking minority would plunge from 7.6% (population census of 2000) to 3.2%. If Biel/Bienne were to join this new territory, only 1.7% of the population of the Canton of Berne would be francophone. In such a case, it is unlikely that the Canton would be able to continue to fulfil its role as a bridge between German- and French-speaking Switzerland, as its Constitution stipulates (art. 2). In view of the ongoing discussions, it was interesting to note the opinions of the respondents on this particular subject. Six closed questions were asked, focusing on various merger scenarios and the maintenance of the status quo. The respondents rated their views on a Likert scale (from "strongly agree" to "strongly disagree"). In addition, the informants had to answer an open-ended question on the possible consequences for the French-speaking minority, particularly in respect of increasing cooperation between the Bernese Jura and the Canton of Jura.

The respondents rejected all five merger proposals: the creation of two half-cantons, Jura and Bernese Jura; the merging of the Bernese Jura and the Canton of Jura; the merging of the Bernese Jura with both the Canton of Jura and the Canton of Neuchâtel; the inclusion of the city of Biel/Bienne within a merged Bernese Jura and Canton of Jura; and the inclusion of the city of Biel/Bienne within a canton formed by merging the Bernese Jura, the Canton of Jura and the Canton of Neuchâtel. However, between 25 and 29% of all informants had no opinion on the different scenarios; in fact, among the Francophones, between 34% and 47% did not know what to think. There is thus great uncertainty as to the political and administrative future of the region. The responses to the open-ended question regarding the effects of stronger cooperation display general

concern; the respondents fear negative consequences for the French-speakers, tensions between the language groups, and general detrimental effects. Eight percent foresee positive consequences, with significant differences amongst the language groups (German-speakers 6%, French-speakers 16%, bilinguals 3%). However, almost 40% (including 74% of the non-Swiss residents) do not anticipate any consequences.

## 10. CONCLUSION

With the challenge of growing urbanisation, cities have increasingly become the focus of interdisciplinary research. In addition to other scientific domains addressing the issue, such as human geography, sociology, anthropology, law, urbanism, literature, architecture and economics, linguistic and semiotic approaches are widely used to investigate the citizens' interpretation and representation of their dwelling, working and leisure spaces. Urban social and individual bi- and multilingualism are worldwide phenomena. However, there are important differences concerning the *institutional* recognition of language diversity. Officially bilingual municipalities worldwide are relatively scarce; they are not only language laboratories, they also offer *in vivo* situations providing an opportunity to gauge the quantity and quality of language contacts, and their corollaries such as language competence, attitudes and identity. Bilingual municipalities may wish to measure the degree of satisfaction regarding bilingual services in the domains of education, culture, administration, politics and health. Although a population census is likely to provide some diachronic information on language competence and identity, or language use, more detailed data are required for a comprehensive picture of language and minority issues in multilingual settings. Regular language or bilingualism barometers reveal trends in the quality of linguistic cohabitation; they are part of language policy, as well as instruments on which future language policies can be based.

In the case of the officially bilingual city of Biel/Bienne, three surveys have been conducted so far. Because of differences in the length of the questionnaires, as well as in question and answer formats, sampling, translation of items, etc., comparisons can only be made on a tentative basis. The 2008 questionnaire had to be shortened because of the individualisation and acceleration of everyday life, and also because of the cost of a survey of this kind. Some questions included in the first two Barometers were excluded, e.g. the estimation of the percentage of Francophones living in the city, since information technology provides this information, and knowledge or ignorance, over- or underestimation of the linguistic composition of a territory cannot be regarded as a valuable tool for measuring language attitudes, which were also assessed by means of the semantic differential in both the 1986 and the 1998 survey. However, here

again the format was different (different pairs, translation problems, auto- and heterostereotypes in 1986, only heterostereotypes in 1998). This tool is problematic. It could cement language stereotypes; and one can never be sure whether the respondents are reporting their own beliefs, or simply common, cultural and shared stereotypes. Questions about membership of clubs and associations, and the important role played by language in this context, were also omitted.

The 2008 survey reveals that the quality of language contacts again improved over the intervening years, and bilingualism is clearly perceived as an added value. Interestingly, the majority, namely the German-speakers, speaks the second language to a greater extent than the minority speaks the majority language, which is contrary to findings in many other bilingual settings. Unsurprisingly, the French-speakers have identities which are language-loaded to a greater degree. The major concerns relate to the economic disadvantages of the French-speaking minority – a concern also shared by the German-speaking majority. The informants are of the opinion that the city languages are adequately discussed in the public space; this suggests that the commitment of the city to official and individual bilingualism has borne fruit. Bilingualism is also thought to be part of a city brand, adding value to the region by attracting people and companies.

However, Language Barometers yield quantitative data which need to be supplemented by qualitative research, e.g. interviews and/or observations with a focus on linguistic variation, code mixing and switching, language change, discourse and attitudes (cf. the project bil.bienne in Conrad *et al.* 2004; Werlen 2005; Elmiger and Conrad 2006).

To conclude, bilingualism in Biel/Bienne is more than an urban myth. It is a widely accepted phenomenon and part of the citizens' identity. Nowadays, language issues are highly consensual; there is a high degree of overlapping between private and public discourse.

## 10.1 OTHER PLANNED BAROMETERS

The city of Fribourg/Freiburg has been bilingual since it was founded in 1157 (Brohy 1999, 2000b). However, bilingualism there is less symmetrical than in Biel/Bienne. Bilingual services are available, with education and cultural activities provided in French and/or German. However, the city has never declared itself officially bilingual, despite the fact that the cantonal Constitution caters for this possibility. The linguistic landscape is dominated by French, the majority language (Brohy 2011). There is an initiative to launch a Language

Barometer in the city of Fribourg/Freiburg, and also in the city of Murten/Morat in the Canton of Fribourg/Freiburg.

The trilingual Teacher Training University of the Canton of Graubünden/Grischun/Grigioni also plans to investigate the contacts between the language communities by means of a Multilingualism Barometer. It should yield information concerning the relevant language competencies and use, as well as the attitudes towards cantonal multilingualism and linguistic cohabitation. It is hoped that it will reveal linguistic trends and the efficiency of political and educational measures. This is important in the context of ongoing and future municipal mergers and planned territorial reform.

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# LA CORÉDACTION DES TEXTES LÉGISLATIFS COMME LABORATOIRE DES CULTURES JURIDIQUES ET LINGUISTIQUES AU CANADA

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**Résumé**

La mise en œuvre, il y a plus de 25 ans, du principe de la corédaction pour l'élaboration des textes législatifs fédéraux au Canada peut être considérée, rétrospectivement, comme un laboratoire où droit, langue et culture se transforment en s'interpénétrant.

La corédaction suppose que deux rédacteurs rédigent simultanément, suivant les instructions qui leur sont données par les chargés de projet missionnés par le ministre parrain du projet, le texte législatif qui va être déposé au Parlement ou qui a été autorisé par une loi du Parlement. Chacun des rédacteurs rédige dans la langue qu'il maîtrise le mieux – le français ou l'anglais – dans le respect de l'égalité linguistique de principe dans les institutions fédérales, mais aussi dans le respect des deux systèmes juridiques en vigueur au Canada, la *common law* et le droit civil.

Le texte qui suit analyse, en se fondant d'abord sur les textes législatifs eux-mêmes, mais aussi sur l'écho que leur ont fait la jurisprudence et la doctrine, les retombées, du triple point de vue du droit, de la langue et de la culture, de cette coexistence forcée et intime des représentants de chacune des deux principales communautés linguistiques, juridiques et culturelles du pays.

Nous verrons que chacun des deux rédacteurs assignés à l'élaboration d'un projet de loi ou de règlement est porteur, dans les faits, d'un moyen d'expression, d'une formation juridique et d'une culture qui lui sont propres, mais qu'il doit arrimer, par le truchement de la langue, à l'autre système de droit, expression d'une autre culture, afin de préserver l'unicité du message juridique, quitte à façonner un droit nouveau.

**Abstract**

Almost 30 years ago, the simultaneous drafting of all Canadian federal legislation in both English and French was initiated. In retrospect, what was at first envisaged as a bold experiment – putting both of Canada's official languages on an equal footing in respect of all things legislative – turned out to be a productive laboratory where law, languages and cultures intertwined and ended up transforming each other for the better.

Co-drafting implies that two drafters are simultaneously called upon to draft the legislative text that will either be tabled in Parliament, or which has been authorised by Parliament, by following the instructions delivered *viva voce* by the technical experts of the initiative's sponsoring department. Each drafter works in the official language in which he or she is most comfortable – normally his or her mother tongue – in accordance with the policy of equal status for both of these languages within the federal government. They must also take account of the significant differences between Canada's two legal systems, the civil law and common law, and reconcile federal legislation with both of these.

The following presentation will focus on the added value – from a legal, linguistic and cultural point of view – brought about by legislative co-drafting as practised in Canada. I will attempt to reveal how, by simply putting into place a new and innovative drafting process, different ways of thinking, perspectives and backgrounds were usefully brought together. Evidence of that legislative added value is, of course, to be found in the legislative texts themselves – but also in the case law and scholarly writings that flowed from them.

The outcome of this ongoing experiment, as we shall see, is that the process has generated a new way of expressing the law. The legal meaning of both linguistic versions of Canadian legislative texts must, of course, be exactly the same – this has not changed since the introduction of co-drafting. Before that, translators also strove to convey a single legal message. The real innovation brought about by co-drafting is that now, two lawyers representing two different languages, cultures and legal systems, by sifting through the drafting instructions, discussing them, and having to consider other points of view, can engage in a new mode of legal communication, which has almost incidentally been created by co-drafting.

## La corédaction des textes législatifs comme laboratoire des cultures juridiques et linguistiques au Canada

Au Canada, depuis plus de trente ans, les lois et règlements fédéraux sont rédigés simultanément en français et en anglais, une méthode que l'on appelle corédaction.[1] Chaque projet est élaboré par deux avocats ayant pour

langue de travail l'anglais ou le français et issus de deux cultures juridiques différentes, la *common law* et le droit civil. Les réflexions qui suivent portent sur l'enseignement peut-être le plus étonnant qu'on peut tirer de l'expérience corédactionnelle: comme dans un laboratoire scientifique où les manipulations, les expériences, les recherches et les analyses mènent parfois à des découvertes, l'interpénétration des cultures juridiques et linguistiques a produit, dans les textes législatifs fédéraux canadiens, un discours original.

Au Canada, le système juridique de droit civil, pourtant majoritaire dans le monde, ne vaut que pour le Québec. Son principal corps de règles, le Code civil, y joue le rôle de droit commun. Ce droit commun ne s'arrête pas au seul droit privé, mais s'étend à une partie du droit public comme l'a reconnu la Cour suprême du Canada.[2] Pour le reste, le droit canadien – fédéral, provincial ou territorial – est l'héritier de la *common law* britannique. Ce n'est pas un hasard si c'est au Québec que se trouvent l'essentiel des francophones du Canada, l'histoire en a voulu ainsi, si bien qu'un avocat formé à la *common law* a, en toute probabilité, l'anglais comme langue maternelle et, inversement, l'avocat francophone est plus susceptible d'avoir une formation en droit civil. Quand il s'agit de rédiger des lois, cela n'est pas anodin : le rédacteur francophone aura instinctivement tendance à concevoir la norme suivant l'esprit de la langue française et du droit civil tandis que l'anglophone fera de même, en parallèle, sous l'influence d'une conception du monde anglaise imprégnée de *common law*.

L'esprit ou l'influence de la langue a, en rédaction législative comme dans toute œuvre intellectuelle, un rôle important à jouer. Le linguiste Guy Deutscher, de l'Université de Manchester, a présenté son dernier livre de la façon suivante, prenant d'abord appui sur une conclusion notoire du linguiste Roman Jakobson :

> « 'Languages differ essentially in what they *must* convey and not in what they *may* convey.' This maxim offers us the key to unlocking the real force of the mother tongue: if different languages influence our minds in different ways, this is not because of what our language *allows* us to think but rather because of what it habitually *obliges* us to think *about*. » (Deutscher 2010b)

En matière de rédaction législative, les forces combinées du français et du droit civil inciteront le rédacteur francophone à rendre une idée de norme d'une certaine façon, souvent à l'opposé de celle suivie par son collègue, qui se trouve sous l'empire de l'anglais et de la *common law*. À l'opposé ici ne signifie pas forcément contradictoires mais, plutôt, que les deux versions du texte utiliseront des moyens très différents pour parvenir à la même fin, celle de faire voir l'intention du législateur.

> « The habits of mind that our culture has instilled in us from infancy shape our orientation to the world and our emotional responses to the objects we encounter, and their consequences probably go far beyond what has been experimentally

> demonstrated so far; they may also have a marked impact on our beliefs, values and ideologies. We may not know as yet how to measure these consequences directly or how to assess their contribution to cultural or political misunderstandings. But as a first step toward understanding one another, we can do better than pretending we all think the same. » (Deutscher 2010a)

Le droit étant la manifestation de la volonté de vivre en commun, il doit, pour s'imposer légitimement, être connu de tous et, pour être connu, être compris et, pour être compris, être exprimé au moyen de la langue commune. Cette union entre un droit et sa langue, que Gérard Cornu a qualifiée justement d'« intime, sacrée », prend tout son sens:

> « Le parallèle entre droit et langue fait reconnaître qu'il existe entre eux des rapports profonds: 'Ce sont tous deux des phénomènes sociaux de formation largement coutumière, et empreints d'un certain caractère contraignant, normatif' (Carbonnier) [...] Donc: 1. Tous les deux produits de l'histoire. 2. Ce sont deux systèmes évolutifs. La langue est vivante, le droit aussi. Chacun reçoit les impulsions qui l'infléchissent et l'adaptent du flux spontané des usages et de l'action volontaire des autorités (néologie et innovations législatives étant d'ailleurs parfois associées). En définitive, ce qui scelle la parenté du droit et de la langue c'est la médiation d'un troisième terme, le milieu nourricier qui accompagne leur épanouissement, d'un mot, la culture dont ils sont issus. Droit et langue sont des faits culturels. » (Cornu 2000)

Permettez-moi, avant de démontrer pourquoi j'ose parler de laboratoire et invoquer des mondes parallèles, de vous expliquer en quoi consiste la corédaction des lois.

## 1 LES LOIS FÉDÉRALES CANADIENNES SONT RÉDIGÉES SIMULTANÉMENT EN FRANÇAIS ET EN ANGLAIS, CE QU'ON APPELLE LA CORÉDACTION.

Depuis le constat du commissaire aux langues officielles, dans son rapport annuel de 1976, sur le sort de parent pauvre réservé au français dans la préparation des lois fédérales, pratique centralisée au ministère de la Justice et chasse gardée de son ministre, les lois et leurs textes d'application sont rédigés simultanément en français et en anglais. Les deux rédacteurs assignés au dossier, l'un ayant pour langue maternelle le français, l'autre l'anglais, élaborent ensemble un texte commun à partir des instructions données par les experts en la matière qui leur font part des orientations du gouvernement sur le sujet.[3]

Cela fait donc une trentaine d'années que les projets de loi et de règlement sont élaborés autour d'une même table, sur laquelle se trouvent, depuis plus de vingt ans, deux ordinateurs, le premier configuré pour le rédacteur francophone,

l'autre pour le rédacteur anglophone. La méthode n'est plus remise en question et toutes les Cassandre qui ne voyaient dans ce système que perte de temps et gaspillage ont été confondues. La réunion des expertises rédactionnelles – langagières et juridiques – autour des concepteurs des orientations, porteurs des choix politiques, s'avère, au fil de la rédaction, comme le moyen le plus sûr d'aboutir, au moment du dépôt devant le Parlement, au produit juridique et linguistique le plus achevé.

Bien sûr, au Canada comme partout ailleurs, les textes législatifs se font à la hâte et les orientations, au moment où commence la rédaction, ne sont pas toujours très réfléchies. Et une initiative législative mal conçue n'en réchappe pas parce que les corédacteurs font bien leur travail. Mais la présence à la même table, au moment où on veut donner une forme concrète et définitive à ce qui n'est après tout qu'une idée, de deux esprits critiques qui forcent la validation de chaque orientation, dans sa portée juridique et dans sa déclinaison logique, permet en bout de ligne de gagner du temps et d'avoir l'assurance d'un texte qui tient la route.

Ce n'est pas la rencontre de ces esprits, si brillants soient-ils, qui, en soi, permet de gagner du temps et d'assurer la qualité du texte, c'est le fait qu'ils interviennent au moment crucial où la pensée encore abstraite va prendre forme, tant du point de vue juridique (droit civil et *common law*) que du point de vue linguistique (français et anglais), porteurs de deux conceptions du monde qui ne manqueront pas de remettre en question, systématiquement, la forme qu'on aurait voulu primitivement donner à l'idée. La connaissance combinée des deux langues et des deux systèmes juridiques donne au résultat une plus- value:

> « […] deux lexiques, deux morphologies; mais aussi (peut-être surtout) parce qu'elle s'appuie sur deux conceptions particulières de la vie qui informent ces langues ou en découlent par voie de conséquence : deux cultures, deux littératures, deux histoires et deux géographies, bref – pour reprendre un terme que nous avons utilisé tout à l'heure à la légère, deux génies différents. » (Vinay et Darbelnet 1973)

## 2. APRÈS TRENTE ANS, QUE PEUT-ON DIRE DES TEXTES « CORÉDIGÉS ?

L'observation subtile de Gérard Cornu, qui connaissait bien la situation canadienne, est toujours valable:

> « […] il reste que, lorsqu'un droit né dans une langue est transposé dans une autre, l'égalité de principe des deux versions n'empêchera jamais que, relativement à l'affinité naturelle qui règne entre un droit et sa langue de naissance, la réussite de la transposition soit une conquête de haute lutte, fruit du labeur et de la peine […] ». (Cornu 2000)

J'ajouterais: surtout dans les situations de traduction, ainsi qu'on peut le constater à la lecture des textes bilingues de certaines provinces.[4] Tous les mots utilisés dans la version française de ces textes traduits appartiennent indubitablement au vocabulaire de la langue française, mais le message est tout aussi indubitablement « marqué d'un certain artificialisme » (Cornu 2000) parce que trop collé à la syntaxe et à la terminologie anglaises. L'appréhension du sens est difficile parce que le style n'est pas naturel. Ce sera toujours un défi au Canada de rendre le droit civil en anglais et la *common law* en français.

Pour plusieurs raisons, l'administration fédérale a mieux réussi, dans ses textes, à rendre une même loi en deux langues, comme le veut le postulat de l'interprétation des textes bilingues adopté par les tribunaux: la loi est une et se trouve au-dessus des deux langues qui cherchent à l'exprimer.[5] Pour emprunter au langage de la psychanalyse, la loi *sublime* les langues dans lesquelles elle est exprimée. C'est avant tout affaire d'expertise: les rédacteurs fédéraux sont plus nombreux, sont mieux formés et mieux appuyés dans leur travail par des jurilinguistes et des réviseurs rédactionnels d'expérience.[6]

Toutefois, la raison qui me semble la plus intéressante, et sur laquelle je vais maintenant m'attarder, c'est précisément celle que la notion de laboratoire rend le mieux: les deux langues et chacune des deux cultures juridiques qui y sont attachées se sont interpénétrées au point de donner naissance, sinon à un langage nouveau, du moins à un discours original.

## 3. L'ORIGINALITÉ DU DISCOURS ISSU DE L'INTERPÉNÉTRATION DES SYSTÈMES JURIDIQUES ET DES LANGUES.

Lors de l'élaboration des textes législatifs fédéraux, deux univers linguistiques et deux univers juridiques sont en présence, chacun étroitement lié au premier. Sans tomber dans le dogme ni dans la caricature, on peut relever, sans prétendre à l'exhaustivité, certains traits des deux conceptions du monde qui entrent en jeu et qui font, en s'influençant mutuellement, l'originalité du discours.

Au fil des trente dernières années, le style de la version anglaise des textes législatifs fédéraux a beaucoup changé. Le style traditionnel du droit écrit anglais, pétri de son opposition congénitale à la coutume non écrite et à la toute-puissance du roi, est caractérisé par l'insistance à faire voir la procédure avant le droit qu'elle doit pourtant servir, par les répétitions, par la recherche éperdue de la précision, souvent par la revue de tous les scénarios envisageables, par le découpage de la phrase jusqu'à l'enjambement, etc. Ce style traditionnel s'est peu à peu transformé dans la moulinette de la corédaction. [7]

Le style traditionnel de la version française des textes législatifs fédéraux était, quant à lui, avant l'avènement de la corédaction, lourd et asservi par une traduction trop littérale, plein de calques. Il s'est transformé sous l'impulsion des jurilinguistes francophones embauchés au début des années 1980 pour soutenir la méthode alors nouvelle de la corédaction. La version française a commencé, oh révolution!, par concevoir en français le droit qu'il fallait écrire et, pour l'exprimer, à mettre à profit les ressources formidables d'abstraction et de précision de la langue commune.

La prise de conscience du statut inférieur du français dans la filière législative n'était qu'une manifestation de la prise de conscience plus générale de la fragilité du fait français au Canada. Le droit, comme la langue, constate Cornu, est un fait culturel et ce n'est donc pas un hasard si le commissaire aux langues officielles s'est intéressé à l'élaboration des lois fédérales au moment où le Québec se dotait d'une *Charte de la langue française*.[8]

Cette providentielle prise de conscience a permis de remettre en valeur les vertus cardinales d'un texte législatif que sont la concision et l'unité intellectuelle, applicables également aux deux versions. Elle a aussi permis aux deux conceptions du monde en présence dans la « manufacture du droit » de se faire valoir afin de mieux rendre le même message juridique.

Nous revenons ainsi à la thèse chère au linguiste Deutscher :

> « When your language routinely obliges you to specify certain types of information, it forces you to be attentive to certain details in the world and to certain aspects of experience that speakers of other languages may not be required to think about all the time. » (Deutscher 2010a)

### a) La *common law* se fonde sur le précédent, ce qui renforce la tradition et freine l'innovation.

Lecteur de faits sociaux[9], le législateur a tendance à réagir plutôt qu'à prendre les devants. Il va préférer corriger le tir plutôt que de tout remettre à plat. Cette attitude réactionnaire est commune à tous les parlements de la terre et passe parfois pour de la sagesse. La tradition juridique britannique, par l'importance qu'elle accorde aux précédents, accentue ce penchant conservateur. Le précédent relève bien sûr d'abord de la sphère judiciaire mais, le jugement étant la première source du droit en *common law*, la prudence guidera le législateur et la façon dont ses rédacteurs exprimeront la norme juridique. Cela n'avait pas échappé à de Toqueville débarquant, il y a un siècle et demi, en Amérique:

> « Le légiste anglais ou américain recherche ce qui a été fait, le légiste français ce qu'on a dû vouloir faire; l'un veut des arrêts, l'autre des raisons. Lorsque vous écoutez un légiste anglais ou américain, vous êtes surpris de lui voir citer si souvent l'opinion des autres, et de l'entendre si peu parler de la sienne propre, tandis que le contraire arrive parmi nous. […] Cette sorte d'abnégation que fait le légiste anglais et américain de son propre sens, pour s'en rapporter au sens de ses pères; cette espèce de servitude, dans laquelle il est obligé de maintenir sa pensée, doit donner à l'esprit légiste des habitudes plus timides et lui faire contracter des penchants plus stationnaires en Angleterre et en Amérique qu'en France. Nos lois écrites sont souvent difficiles à comprendre, mais chacun peut y lire; il n'y a rien, au contraire, de plus obscur pour le vulgaire, et de moins à sa portée qu'une législation fondée sur des précédents. Ce besoin qu'on a du légiste en Angleterre et aux États-Unis, cette haute idée qu'on se forme de ses lumières, le séparent de plus en plus du peuple, et achèvent de le mettre dans une classe à part. Le légiste français n'est qu'un savant; mais l'homme de loi anglais ou américain ressemble en quelque sorte aux prêtres de l'Égypte; comme eux, il est l'unique interprète d'une science occulte. Aussi est-ce surtout en Angleterre qu'on peut voir en relief ce type légiste que je cherche à peindre : le légiste anglais estime les lois, non pas tant parce qu'elles sont bonnes que parce qu'elles sont vieilles; et, s'il se voit réduit à les modifier en quelque point, pour les adapter aux changements que le temps fait subir aux sociétés, il recourt aux plus incroyables subtilités, afin de se persuader qu'en ajoutant quelque chose è l'œuvre de ses pères, il ne fait que développer leur pensée et compléter leurs travaux. N'espérez pas, lui faire reconnaître qu'il est novateur; il consentira à aller jusqu'à l'absurde avant que de s'avouer coupable d'un si grand crime. C'est en Angleterre qu'est né cet esprit légal, qui semble indifférent au fond des choses, pour ne faire attention qu'à la lettre, et qui sortirait plutôt de la raison et de l'humanité que la loi. La législation anglaise est comme un arbre antique, sur lequel les légistes ont greffé sans cesse les rejetons les plus étrangers, dans l'espérance que, tout en donnant des fruits différents, ils confondront du moins leur feuillage avec la tige vénérable qui les supporte. » (de Tocqueville 1980)

Le droit n'est pas la seule discipline qui soit le legs de la tradition (Cornu 2000). Il est, comme d'autres disciplines, au cœur de l'activité des hommes et le parallèle, pour ne citer que celui-là, entre la musique et le droit est, dans la bouche de Sir Thomas Beecham, trop évident pour ne pas y voir en filigrane toute la tradition britannique. Jeune chef au début du XXème siècle, Beecham voulait affranchir ses compatriotes du joug de cette tradition à tous crins:

> « To the foreigner the principal charm of England is its odd mixture of sprightly modern resource and stately medieval lumber. In most countries when customs outwears its use it is abolished; with us hardly ever, even though it be quite obsolete or has long been crying out for reform. But no one can do anything about it, for a mysterious force, almost an occult influence, creeps insidiously through the body politic and social to head us away from the folly and danger of change. We become ashamed of our seriousness and falter in our determination to make wrong things right, nor does it matter in the least that our conservatism is not only an inconvenience to ourselves but the object of ridicule to others. We have

> a sneaking affection for the one and an open contempt for the other, and abuses or absurdities that would make some nations blush for shame and other rush to the barricades we endure cheerfully for the sole reason they are our own, just as indulgent parents delight to protect the weakly among their offspring. » (Beecham 1987)

### b) Le juriste de common law ne cherche pas instinctivement, comme son collègue civiliste, à suivre la démarche qui va du général au particulier, l'exception pour lui peut aussi bien avoir préséance sur la règle.

Il est bien connu que la procédure ou le recours qui met en œuvre un droit a, dans la tradition juridique anglaise, une importance qu'elle n'a pas dans l'esprit du juriste civiliste. Le droit civil va normalement aborder l'objectif (le droit) puis donner les moyens de le faire valoir. On attribue à Sir Henry James Sumner Maine l'observation mordante qui veut que « le droit anglais soit né dans les interstices de la procédure ». Cette façon de concevoir la norme n'est pas sans influencer le rédacteur législatif anglophone contemporain. Voici un exemple :

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15. (1) The Governor in Council may

(a) appoint, layoff or terminate the employment of the employees of the Agency; and

(b) establish standards, procedures and processes governing staffing, including the appointment, lay-off or termination of employment otherwise than for cause, of employees.

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Dans la version anglaise de cette disposition, le conseil peut 1) nommer les employés, 2) les mettre en disponibilité, 3) les licencier et 4) prévoir des règles de dotation.

On constate 1) que tous les pouvoirs de dotation (*appoint, layoff, terminate*) sont énumérés dans le premier alinéa sans qu'il soit question de dotation (*staffing*) ; 2) que ces pouvoirs de fond précèdent le pouvoir de se donner une procédure de dotation, procédure à laquelle le conseil sera pourtant tenu de se conformer quand il exercera les pouvoirs de fond ; 3) ces pouvoirs (*appoint*, *layoff*, *terminate*) reviennent mot pour mot dans la formulation du pouvoir de prévoir des règles de dotation, à l'alinéa *b*), précédés cette fois de l'idée générale de dotation; 4) les instruments que le conseil est autorisé à prendre sont des *standards*, des *procedures*, des *processes* sans qu'on sache bien, comme c'est souvent le cas dans le style traditionnel britannique, où se trouve la délimitation sémantique de chaque terme. La même notion semble faire triple emploi.

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| **15. (1)** The Governing Council may<br>(a) appoint, layoff or terminate the employment of the employees of the Agency; and<br>(b) establish standards, procedures and processes governing staffing, including the appointment, lay-off or termination of employment otherwise than for cause, of employees. | **15. (1)** Le conseil d'administration dote l'office du personnel nécessaire à son fonctionnement et établit à cette fin des règles régissant notamment, outre la nomination, la mise en disponibilité et le licenciement sans motifs valables. |

La version française procède autrement. « Le conseil dote l'office du personnel nécessaire », ce qui apparaît comme l'idée principale et « à cette fin », charnière qui rend les deux propositions principales de la phrase inséparables, il établit des règles. Cet exemple de deux façons différentes de concevoir la règle selon qu'on lit la colonne de gauche ou celle de droite est assez typique de deux « mondes » en présence à la table de rédaction. Aujourd'hui, la discussion entre ces « mondes », au moment de cristalliser la règle par écrit, va souvent infléchir la position de chacun en faveur d'un énoncé plus logique et plus concis.

Voici un autre exemple où la même version anglaise est rendue de deux façons complètement différentes en français :

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| 17. (1) Every person reaches the age of majority, and ceases to be a minor, on reaching the age of 19 years.<br>(2) Every person who, on March 1, 1972, has reached the age of 19 years but has not reached the age of 21 years, reaches the age of majority and ceases to be a minor on March 1, 1972. | 17. (1) Est majeur et n'est plus mineur quiconque atteint l'âge de 19 ans.<br>(2) Était majeur et n'était plus mineur le 1er mars 1972 quiconque avait atteint l'âge de 19 ans mais n'avait pas atteint l'âge de 21 ans au 1er mars 1972. |
| 18. Section 17 applies for the purposes of any rule of law in respect of which the Legislature has jurisdictio | 18. L'article 17 s'applique à toute règle de droit relevant de la compétence de la Législature. |
| 22. (1) The time at which a person reaches a particular age expressed in years shall be the beginning of a relevant anniversary of the date of the person's birth. | 22. (1) Une personne atteint un âge déterminé exprimé en années dès le début du jour anniversaire de sa naissance. |

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| (2) Subsection (1) applies only if the relevant anniversary falls after March 1, 1972, and in relation to any Act or any regulation, rule, order, or bylaw made under an Act or any deed, will or other instrument has effect subject to the provisions thereof. | (2) Le paragraphe (1) s'applique seulement si l'anniversaire pertinent tombe après le 1er mars 1972. Son application à une loi, un règlement, une règle, un décret ou un arrêté pris conformément à une loi, à un instrument, notamment à un acte scellé ou à un testament, est subordonnée à la loi, au règlement, à la règle, au décret ou à l'arrêté, ou à l'acte scellé, au testament ou autre instrument. |

La version anglaise et la première version française illustrent bien le style traditionnel, dans le premier cas du droit écrit anglais – quoique ces dispositions soient toujours en vigueur, en l'état, dans certaines provinces et territoires – et, dans le deuxième cas, de l'asservissement de la version française à la pensée anglaise. Il n'était pas rare autrefois de voir le législateur affirmer un fait (Est majeur) pour ensuite insister en niant le contraire (et n'est plus mineur), mais la tournure n'a rien de français.

La deuxième version française fait preuve de concision: la « personne », omniprésente dans l'élaboration de toute règle de droit de *common law*, sous prétexte qu'il faut que le lecteur sache à qui imputer le droit ou l'obligation, n'entre plus en considération parce que le véritable sujet, l'âge de la majorité, se prête à une formulation impersonnelle sans qu'il soit besoin de le rattacher à quelqu'un.

### c) En français, le choix des mots est concret mais le premier effort est celui de l'abstraction pour parvenir à la généralité.

Prenons l'exemple suivant, qui veut que la personne âgée de 70 ans ne puisse siéger à la Commission et, qui plus est, doive renoncer à ses fonctions si elle y siège quand elle atteint cet âge.

La version anglaise procède généralement comme ceci:

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| **22.** A person who has reached the age of seventy years is not eligible to be appointed to the Commission and a person appointed to the Commission ceases to hold office upon reaching the age of seventy years. |

Voici une première possibilité pour la version française:

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| **22.** A person who has reached the age of seventy years is not eligible to be appointed to the Commission and a person appointed to the Commission ceases to hold office upon reaching the age of seventy years. | **22.** Est inadmissible aux fonctions de commissaire la personne qui a atteint l'âge de soixante-dix ans. Le commissaire qui atteint cet âge cesse d'être en fonction. |

Irréprochable sur le plan linguistique, le texte suit la structure de l'anglais. La version française utilise deux phrases tandis que la version anglaise coordonne les deux idées dans la même phrase. On trouve aussi dans les lois fédérales le texte qui suit à titre d'équivalent du même texte anglais:

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| **22.** A person who has reached the age of seventy years is not eligible to be appointed to the Commission and a person appointed to the Commission ceases to hold office upon reaching the age of seventy years. | **22.** Ne peuvent être nommées ou maintenues à la Commission les personnes qui ont atteint l'âge de soixante-dix ans. |

Ce faisant, on intègre les deux idées dans la même phrase. Maintenant, que penser de ce qui suit?

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| **22.** A person who has reached the age of seventy years is not eligible to be appointed to the Commission and a person appointed to the Commission ceases to hold office upon reaching the age of seventy years. | **22.** La limite d'âge pour l'exercice des fonctions de commissaire est de soixante-dix ans. |

On voit ici une illustration de la progression dans l'abstraction. La dernière proposition est vraiment la réduction au principe, ce que le rédacteur d'une norme doit toujours chercher même si ce n'est pas toujours possible.

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| **22.** Est inadmissible aux fonctions de commissaire la personne qui a atteint l'âge de soixante-dix ans. Le commissaire qui atteint cet âge cesse d'être en fonction. | **22.** Ne peuvent être nommées ou maintenues à la Commission les personnes qui ont atteint l'âge de soixante-dix ans. | **22.** La limite d'âge pour l'exercice des fonctions de commissaire est de soixante-dix ans. |

### d) Le français et l'esprit civiliste tablent sur l'implicite; l'anglais et la tradition de la *common law* se méfient du lecteur et voudront préciser coûte que coûte.

Il est naturel pour le rédacteur francophone de laisser le lecteur tirer les conclusions les plus évidentes d'un énoncé : dès que la communication est établie avec son lecteur, il s'abstiendra de préciser cette évidence. La formulation impersonnelle lui permet souvent d'arriver plus vite à l'essentiel, l'accessoire ne faisant l'objet que de l'éclairage indispensable pour que le lecteur en déduise le message. Pour toutes sortes de raisons, tirées notamment de l'histoire du droit anglais, le rédacteur francophone va préférer, parce qu'il présume presque la mauvaise foi du lecteur, boucler la boucle, tout préciser dans les détails. Deux exemples suffiront à illustrer cette recherche de précision :

Dans le premier exemple, les articles 2 et 3 de la version anglaise font voir, sous prétexte de précision, la répétition de plusieurs éléments. Et s'il serait gênant pour le rédacteur francophone de prévoir que « le titulaire d'une autorisation de posséder est autorisé à posséder… », cette formulation vient plutôt intuitivement au rédacteur anglophone. C'est dans la discussion entre les rédacteurs que réside la voie de la raison.

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| **2.** The holder of an authorization to possess is authorized to possess dried marihuana, in accordance with the authorization, for the medical purpose of the holder. | **2.** Toute personne physique résidant au Canada peut être autorisée par le ministre à posséder de la marihuana séchée pour ses propres fins médicales. |
| **3.** A person is eligible to be issued an authorization to possess only if the person is an individual who ordinarily resides in Canada. | |
| 12. (1) The Minister shall refuse to issue an authorization to possess if<br>a) the applicant is not eligible under section 3; or […] | 12. Le ministre refuse de délivrer l'autorisation de possession si le demandeur ne satisfait pas aux conditions prévues […] |
| **3.** No person shall sell, offer for sale a tobacco product unless it is stamped. | **3.** Seul le produit de tabac estampillé peut être vendu ou offert à la vente. |

Dans le deuxième exemple, la version française utilise une formulation impersonnelle opposable à tous qui va droit au but, ce que le rédacteur anglophone est généralement réticent à faire d'emblée. Il préférera camper la norme sur le sujet (*No person*) alors que dans la version française l'objet est devenu le sujet.

### e) Question de sexe et de genre

L'affirmation du droit des femmes à l'égalité a fait remonter à la surface la question du genre dans les textes officiels, dont les plus officiels d'entre eux, les textes législatifs. Un des outils du protocole de rédaction des textes législatifs fédéraux prévoit, pour l'unique version anglaise:

> « Gender neutrality is important when writing about people because it is more accurate — not to mention respectful — and is consistent with the values of equality recognized, for example, in the Canadian Charter of Rights and Freedoms. It is also professionally responsible and is mandated by the Federal Plan for Gender Equality, which was approved by the Cabinet and presented to the Fourth United Nations World Conference on Women in 1995. » (Legistics)

Au tournant des années 1990, il est devenu intolérable en termes socio-politiques au Canada de perpétuer des dispositions ainsi rédigées[10]:

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| **12.** Every taxpayer shall file *his* tax return no later than April 30 of the year following the year in which *he* earned the income on which he is paying taxes. | **247.** Every one who kidnaps a person with intent<br>*a*) to cause *him* to be confined or imprisoned against *his* will, |

La réforme des règles de rédaction en anglais, fondée sur une question de sexe, a mis la puce à l'oreille à certains parlementaires qui ont cru faire subir à la version française la même cure. On a donc sommé les rédacteurs francophones de s'expliquer sur la prédominance du genre masculin dans la version française des textes législatifs : par quels moyens en arriver, dans la version française, à un texte qui soit neutre quant au genre?

Or, l'ignorance est toujours mauvaise conseillère: depuis la disparition du neutre latin en français, le genre non marqué, c'est-à-dire le masculin, a pris sa relève. Le féminin est donc le genre marqué et cette marque, précisément, limite son extension.

En français, comme pour la plupart des langues européennes, le genre est déterminé par l'étymologie et non par quelque caractérisation sexuelle. « Le ministre » n'est pas forcément un homme parce que le mot est masculin. En d'autres mots, le masculin et le féminin sont des catégories grammaticales qui n'ont généralement rien à voir avec le sexe.

> « For native speakers of English, the rampant sexing on inanimate objects and occasional desexing of humans are a cause of frustration and merriment in equal measure » The erratic gender system was the main charge in Mark Twain's famous indictment of 'The Awful German Language' […] » (Deutscher 2010a)

La loi doit donc être rendue avec le génie propre à chaque langue : il n'est pas dit qu'un effort de modernisation terminologique dans la version anglaise pour éviter de passer les femmes sous silence puisse être transposable tel quel dans la version française.

> « Ainsi, tandis que l'énoncé 'l'avocat est tenu au secret professionnel' a une valeur générique sans distinction de sexe, la phrase 'l'avocat**e** s'y est opposée' a une valeur spécifique parce qu'elle vise une personne en particulier. Dans le premier cas, contrairement au second, l'énoncé est exprimé de manière générique et neutre (il vise la catégorie professionnelle) sans référence aucune au **sexe** des personnes en cause. Cette manière de faire est fondée sur un principe purement grammatical, qui, encore une fois, n'a strictement rien à voir avec le sexe des individus. Prétendre le contraire équivaut à faire abstraction tant de l'histoire de la langue que de l'usage, à renier des siècles de création littéraire et, surtout, à renoncer aux qualités de clarté et d'économie (par la concision et l'implicite) qui caractérisent le BON français. Quoi qu'il en soit, il va sans dire que, les lois et les règlements étant par définition des textes de portée générale, les cas de différenciation sexuelle restent l'exception en matière législative. » (Guide jurilinguistique)

Cela dit, le genre est exprimé de façon si différente en français et en anglais qu'il n'est pas besoin de citer des exemples. Le genre représente d'ailleurs plus, pour le locuteur francophone, que la double difficulté de mémoriser celui qui convient pour toutes les personnes et tous les objets animés ou inanimés et de faire le suivi des accords.

> « For a gender system may come close to being a prison-house nevertheless – a prison-house of associations. The chains of associations imposed by the genders on one's language are all but impossible to cast off. » (Deutscher 2010a)

Non seulement les substantifs sont-ils « privés de liberté », mais les pronoms personnels ou démonstratifs (il, elle, ils, elles, ceux, celles, etc.), l'une des grandes richesses du français et en même temps l'un des outils qui rend les textes concis (Guide jurilinguistique), et les accords en genre des participes passés et des adjectifs également. Pour en revenir à Jakobson, le genre serait une particularité de la langue française, par rapport à la langue anglaise, qui force la main du rédacteur législatif. Quand il exprime le droit dans les textes, il a, contrairement à son collègue anglophone, constamment à l'esprit la question du genre; cela ne brime pas sa liberté d'expression mais il ne peut pas ne pas en tenir compte.

> « Languages that treat an inanimate object as a he or a she force their speakers to talk about such an object as if it were a man or a woman. And as anyone whose mother tongue has a gender system will tell you, once the habit has taken hold, it is all but impossible to shake off. When I speak English, I may say about a bed that "it" is too soft, but as a native Hebrew speaker, I actually feel "she" is too soft. "She" stays feminine all the way from the lungs up to the glottis and is neutered

> only when she reaches the tip of the tongue. In recent years, various experiments have shown that grammatical genders can shape the feelings and associations of speakers toward objects around them. […] once gender connotations have been imposed on impressionable young minds, they lead those with a gendered mother tongue to see the inanimate world through lenses tinted with associations and emotional responses that English speakers — stuck in their monochrome desert of "its" — are entirely oblivious to. » (Deutscher 2010b)

Vous voyez bien le tableau: quand, à Ottawa, un rédacteur législatif francophone s'assoit à côté de son collègue anglophone pour élaborer un texte commun, il est plein d'une secrète commisération pour son collègue qui n'a qu'une vision « monochrome » de la réalité… De quoi faire croire à ce dernier, vous vous doutez bien, qu'il lui faut se prémunir contre la vision en Technicolor de son collègue francophone…

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## ENDNOTES

1 On entend par règlement tous les textes d'application des lois, que ce soit des décrets (faits du gouvernement), des arrêtés (faits du ministre) ou à proprement parler des règlements dans la nomenclature fédérale canadienne.

2 Disposition préliminaire du Code civil du Québec: « Le code est constitué d'un ensemble de règles qui, en toutes matières auxquelles se rapportent la lettre, l'esprit ou l'objet de ses dispositions, établit, en termes exprès ou de façon implicite, le droit commun. » Voir l'arrêt de la Cour suprême *Prud'homme c. Prud'homme* 2002 CSC 85, où il était question de l'application du Code à l'État.

3 Toutes les lois proposées par le gouvernement fédéral à la discussion du Parlement ainsi que leurs textes d'application sont rédigés par une centaine d'avocats spécialisés dans la rédaction législative. http://www.justice.gc.ca/fra/min-dept/recru/ra-lr.html

http://www.pco-bcp.gc.ca/index.asp?lang=fra&page=information&sub=publications&doc=legislation/table-fra.htm L'article 4 de la *Loi sur le ministère de la Justice* prévoit que « Le ministre est le conseiller juridique officiel du gouverneur général et le jurisconsulte du Conseil privé de Sa Majesté pour le Canada […] », ce qui en pratique lui donne le monopole des services juridiques offerts au gouvernement dont celui de la préparation des textes législatifs.

4 Quatre provinces et trois territoires édictent des textes français et anglais. Dans le fédéralisme canadien, les provinces sont responsables, aux termes du paragraphe 13 de l'article 92 de la *Loi constitutionnelle de 1867*, de « la propriété et [d]es droits civils », ce qui constitue l'essentiel du droit privé.

5 Postulat réaffirmé dans l'arrêt de la Cour suprême *R. c. Daoust*, 2004 CSC 6.

6 Le jurilinguiste est un spécialiste de la langue juridique qui, dans le contexte bilingue du Canada, compare et révise les deux versions linguistiques des textes législatifs.

7 La disposition avec enjambement, c'est-à-dire avec continuation de la partie introductive après l'énumération, est depuis les années '80 à proscrire. En présence d'un enjambement, la solution la plus indiquée consiste à remonter dans le passage introductif la partie qui suit l'énumération.

Par exemple:

**34**. Sauf sur autorisation du receveur:

*a*) aucun acte dont la surveillance exige, selon un règlement ministériel, la présence d'un préposé ne peut être accompli dans un établissement que vise une licence;

*b*) aucun article assujetti à l'accise ne peut être sorti d'un tel établissement, entre dix-sept heures et huit heures le lendemain.

8 *Charte de la langue française* L.R.Q., chapitre C-11, à l'origine le chapitre 5 des lois de 1977. L'article 1 énonce que « Le français est la langue officielle du Québec. »

9 La formule est de Henri Battifol, *La philosophie du droit*, P.U.F., Que sais-je ?, 1960.

10 On dirait davantage aujourd'hui: Every taxpayer shall file their tax return no later than April 30 of the year following the year in which they earned the income on which they are paying taxes. Et puis: Everyone who kidnaps a person with intent a) to cause he or she to be confined or imprisoned against his or her will.

# ONE NATION, ONE LANGUAGE? THE RESPONSE OF INTERNATIONAL LAW TO THE MULTILINGUAL STATE

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## Abstract

The conduct of many governments in relation to language issues has often been based on the belief that there should be only one language uniting all the population within the borders of the state. Language diversity has therefore often been perceived as an inconvenience or even as an obstacle – in terms of the view that a state's population should conform to the state's language preferences, rather than the state being obliged to respond to the language reality of its own population. This situation has gradually started to change – partially as a result of the acknowledgment that individuals have rights in terms of international law – with the realisation that governments need to respect the rights of their populations and behave more responsively in order to reflect the identity and needs of their citizens, including in the area of language. In particular, the use of a single national language, to the exclusion of all others, by public authorities, may violate a number of basic human rights, and may also be discriminatory in certain situations.

## Résumé

Une idée longtemps répandue par de nombreux gouvernements veut qu'il ne devrait y avoir qu'une seule langue unissant toute la population sur le territoire d'un état. En ce sens, la diversité linguistique est souvent perçue comme un inconvénient ou même un obstacle: la population d'un pays devrait se conformer aux choix linguistiques du gouvernement au lieu d'avoir un état prenant en compte la réalité linguistique de sa population. Ce n'est que très progressivement – en partie avec la reconnaissance des droits individuels en droit international – que ce point de vue a changé et qu'il est désormais acquis que les gouvernements doivent respecter et mieux refléter l'identité et les besoins de leurs population, y compris dans le domaine de la langue. En

particulier, l'utilisation d'une seule langue nationale par les instances publiques, excluant toutes les autres, peut dans certaines situations enfreindre les droits de l'Homme les plus fondamentaux, et même être discriminatoires.

## 1. INTRODUCTION

> Language is one of the essential characteristics of a nation. Those who belong to the Turkish nation ought, above all and absolutely, to speak Turkish. [...] Those people who speak another language could, in a difficult situation, collaborate and take action against us with other people who speak other languages (Mustafa Kemal, *Atatürk*, 1931).[1]

The views of Atatürk are by no means unique today: many governments still take the view that a state's population must be united by a common language, even if they do not articulate this sentiment in terms that are quite as vehement or nationalistic as those used by Atatürk. But does a common language need to be an exclusive language, and more particularly, does the ideal of a common language mean that a state can simply impose – even by force, if necessary – the official use of an exclusive official language, regardless of the composition or preferences of its population? What if most people in a country do not understand the official language? Can international human rights law play any role in this regard?

This section focuses on the question as to whether or not international law itself can have any effect on the linguistic preferences of a state. This is an issue of some relevance to South Africa, since in all likelihood, there may be a need to have recourse to international law, in order to persuade the South African Government to comply with and fully implement the language rights which appear to be enshrined in this country's constitution.

## 2. STATE SOVEREIGNTY AND THE CHOICE OF AN OFFICIAL LANGUAGE

> Now hear this. You are mountain people. You hear me? Your language is dead. It is forbidden. It is not permitted to speak your mountain language to your men. It is not permitted. Do you understand? You may not speak it. It is outlawed. You may only speak the language of the capital. That is the only language permitted in this place. You will be badly punished if you attempt to speak your mountain language in this place. This is a military decree. It is the law. Your language is forbidden. It is dead. No one is allowed to speak your language. Your language no longer exists. Any questions?[2]

In his 1971 movie, *Bananas*, Woody Allen plays an American trapped in a Central American country, San Marcos, in the middle of a revolution. There are

references in this film to a number of language issues, including interpretation and the relative "sexiness" of French, Italian and Yiddish. Italian is apparently considered to be the most exciting. More seriously, there is another language issue that arises after the revolution succeeds and the leader of the rebels finally becomes *El Presidente*. Blinded by power, *El Presidente* eventually announces to the people of San Marcos that the only official language of that country will be… Swedish, which of course almost no one in this Central American country can speak. Needless to say, his presidency is destined to be rather brief.

As strange as the foregoing story may sound, the choice of Swedish as an exclusive official language, despite its being spoken by no one in that country, would have been perfectly legitimate in the eyes of international law – as bizarre as this may seem – until relatively recently. Until the emergence of international human rights law after the Second World War, the legal position was clearly that the treatment of a state's own citizens in relation to language was a matter that was determined by the state, and the state alone. Although this is a generalisation – since there are obviously always a number of exceptions – it remains true that many governments have simply imposed an official language with little regard for the language actually used on the ground in different parts of the world. European colonial powers such as the British, the French, the Spanish and the Portuguese – particularly after the 16th century – adopted legislation and policies in terms of which indigenous and minority languages – even if these languages were spoken by a predominant proportion of the population – were no longer to be used or tolerated; they were to be extinguished because they were "obstacles", or simply because the colonial authorities wanted them to be displaced by an official language of unity. One of the earliest European examples of such legislation involved what are known as the 1367 *Statutes of Kilkenny*, which made it an offence to speak Irish. The penalty for disregarding these statutes was imprisonment, and/or the loss of land and property:

> … now many English of the said land, forsaking the English language, manners, mode of riding, laws and usages, live and govern themselves according to the manners, fashion, and language of the Irish enemies; and also have made divers marriages and alliances between themselves and the Irish enemies aforesaid; whereby the said land, and the liege people thereof, the English language, the allegiance due to our lord the king, and the English laws there, are put in subjection and decayed, and the Irish enemies exalted and raised up…
>
> III. Also, it is ordained and established, that every Englishman do use the English language, and be named by an English name, leaving off entirely the manner of naming used by the Irish;… and if any English, or Irish living amongst the English, use the Irish language amongst themselves, contrary to the ordinance, and thereof be attainted, his lands and tenements, if he have any, shall be seized into the hands of his immediate lord, until he shall come to one of the places of our lord the king,

> and find sufficient surety to adopt and use the English language, and then he shall have restitution of his said lands or tenements, his body shall be taken by any of the officers of our lord the king, and committed to the next gaol, […].[3]

The languages of indigenous peoples in the Americas – but also those of Basque and Catalan in Spain – were often regarded as obstacles to the emergence of a modern, centralised state, or as threats to national unity, and it was therefore necessary to remove them, as is clearly illustrated in 18th-century legislation issued by Charles III of Spain.[4] It was imperative to eliminate indigenous and other languages and impose Castilian as the language for all subjects. As the monarch's legislation of 1770 clearly demonstrates, this was necessary so that Castilian could become the only language of the realm. Even during the last century, it was not uncommon for indigenous or minority children to be punished if they did not speak the official language in school: there were times when Aboriginal children in Canada, in Australia, in the United States, in Taiwan and in Finland were punished, humiliated and even beaten for talking their own language. In Turkey, the teaching of the Kurdish language was forbidden, and until relatively recently, so was the broadcasting of Kurdish songs, as well as publishing in Kurdish, or even having a Kurdish name. In Bulgaria in the 1980s, a law made speaking Turkish in public an offence: there was even a joke in Bulgaria that Turkish was the most expensive language in the world, because if you used it in the street you could be fined hundreds of lei (the Bulgarian currency). Also in the 1980s, some local authorities in Florida went as far as banning all languages except English – even Latin at the public zoo – and they also prohibited translation for the benefit of pregnant women, and for the purposes of health care in public hospitals, since English was to be the exclusive official language in any kind of communication or dealings with local authorities. The 21st century in the USA has seen a continuing progression of the "English-only" movement, with more or less serious restrictions being placed on the use of any other language by state or local authorities. Just two years ago in Uganda, a teacher beat one of his students for speaking an African language in school instead of English, and the student subsequently died.

It should not be thought that such incidents worldwide are "accidental", or attributable only to local conditions. There is, in fact, quite a high degree of ideological support for the argument that the state should be monolingual, not only in terms of having a common language, but also in terms of a putative "right" or obligation to impose – forcibly, if necessary – an exclusive language on everyone living in a country:

> A common language may well be essential if all citizens are to have an equal opportunity to work in the modern economy. Minority-language communities risk being ghettoized when their members are unable or unwilling to master the

> majority language of the state. Their economic opportunities will be limited by the work available in their own language, and they will have trouble accessing the culture of the larger society or participating meaningfully in its political life… It can be argued further that a common language facilitates the deliberative dimension of democracy. Democratic decision-making is not just a formal process of voting on the basis of antecedently given preferences. It also presupposes an ongoing activity of deliberation and discussion, mainly taking place in civil society, in which free and equal citizens exchange reasons and are sometimes moved by them to change their opinions and preferences. Too much linguistic diversity may be a barrier to the full flourishing of this informal practice of democracy. If citizens cannot understand one another, or if they seek to deliberate with co-linguists only, then democratic politics is likely to be compromised. State monolingualism works against this challenge by encouraging the formation of a common language of democratic dialogue. State institutions are also more efficient when they operate in a single language only. With a single state language, it is no longer necessary to devote as much money or time to translations, simultaneous interpretation, separate networks of schools and hospitals, and so on…
>
> Finally, as anticipated above, a common national language may also help to generate the sort of solidarity, or social cohesion, required for a democratic state to provide public goods effectively and reliably... The worry is that an excess of linguistic diversity may fragment citizens into identity groups that do not share the affective bonds of common citizenship and see cooperation with one another solely as an instrument of mutual advantage. The argument for state monolingualism is that it could work to dampen linguistic diversity somewhat by encouraging the emergence of a common language. A common language could, in turn, become one of the defining bonds of a common identity.[5]

The repeated reference to a common language in the foregoing quotation is actually misleading, since what it actually refers to is not a common language, but an exclusive language: there can be only one language, so obviously it is common. What is completely – and apparently intentionally – omitted is the admission that a common language need not be exclusive. Indeed, as most linguists acknowledge, the majority of the world's population is not monolingual, so that having more than one language, rather than one exclusive language, is a more natural state for individuals, though not necessarily for states.

While there are certainly many who consider state monolingualism as an ideal situation for various reasons, the question remains as to whether or not human rights and international law may be used to influence a state's language preferences and policies; in other words, should the people be obliged to speak the language of the state, or are there situations where the state should actually speak the language of its population?

## 3. THE EMERGENCE OF LANGUAGE RIGHTS IN INTERNATIONAL HUMAN RIGHTS LAW

> Does not the Lord send His rain upon us equally? Does not the sun shine upon us all, too? Do not we all breathe the air in the same way? And you are not ashamed to decree only three languages deciding that all other peoples and races should remain blind and deaf! Tell me: do you hold this because you consider God is so weak that he cannot grant it, or so envious that he does not wish it? (The *Life and Acts of Constantine*, Clement of Ohrid, 9th Century.)[6]

Before the Second World War, partly because of the absence of any real protection of human rights in international law, the situation was very clear: the population of a state had no "language rights" in terms of international law, and therefore effectively had to comply with the exercise of a state's sovereignty in matters pertaining to the language of the state. Until then, international law was silent on issues of language, except for a few minority treaties that only applied to a handful of countries (Thornberry, 44). An analogous situation relating to the state religion prevailed in many countries in Europe before the 17th century. The population in these countries had to follow the state's official religion, sometimes also in the name of "unity" or in terms of the principle of a "common religion", or *cuius regio, eius religio*, meaning that the religion of the state or ruler had to be the religion of the population. The religious wars of the period led to a series of treaties which – at least in Europe – contributed to the emergence of an embryonic right to freedom of religion, which limited the impact of official religions on populations. However, this did not occur in the case of official language policies. In fact, freedom of expression and non-discrimination on the grounds of language were destined to wait a few more centuries before they would become part of international law – with the potential to limit a state's discretion in the means used to impose monolingualism.

States were therefore allowed to treat their own population in any way they pleased regarding matters of language, at least in terms of international law, even to the extent of enforcing the assimilation of minorities, beating children if they did not learn the official language, forcibly changing the names of persons who did not speak the official language, denying them access to health care, or even sometimes denying them the right to vote on the grounds of language, etc. Not all countries applied such measures, of course; and historically, there are many examples of countries where the state sought to speak the languages of its populations, with Switzerland being one of the most long-established examples in this regard. Other notable examples include India, Singapore, etc. But there is no denying that in many parts of Europe and the rest of the world – in terms of both leftist ideologies and those leaning towards the right – minority languages were considered undesirable, backward, or uncivilised.

Thus, for John Stuart Mill, one of the fathers of Western liberalism, the linguistic assimilation of linguistic minorities such as the Breton and the Basque peoples was not only desirable, but also necessary for the sake of modernity:

> Experience proves it is possible for one nationality to merge and be absorbed in another: and when it was originally an inferior and more backward portion of the human race the absorption is greatly to its advantage. Nobody can suppose that it is not beneficial to a Breton, or a Basque of French Navarre, to be brought into the current of the ideas and feelings of a highly civilized and cultivated people – to be a member of the French nationality... than to sulk on his own rocks, the half-savage relic of past times...[7]

The philosophy of Friedrich Engels – Mill's ideological antithesis on the left – resonated intellectually with this view of the need to replace linguistic diversity in a state with state monolingualism, though Engels's arguments were based on what he regarded as the forces of historical revolution and development:

> There is no country in Europe which does not have in some corner or other one or more fragments of peoples, the remnants of a former population that was suppressed and held in bondage by the nation which later became the main vehicle for historical development. These relics of nations… this ethnic trash always became the fanatical bearers of counterrevolution and remain so until their complete extirpation or loss of national character, just as their whole existence in general is itself a protest against a great historical revolution.[8]

These views, from the perspective of international law, remained largely unchallenged until after the Second World War. Even then, the initial treaties which were developed after the creation of the United Nations to recognise and protect human rights in international law were still largely silent on issues of language: discrimination on the ground of language was prohibited generally, but beyond that there was almost no specific mention of language, except for one provision that stipulated, in Article 27 of the *International Covenant on Civil and Political Rights*,[9] that members of a linguistic minority should not be denied the right to use their own language among themselves.

It took quite a long time to clarify whether international law could influence a state's official language policies; and the endeavours to do so only occurred in the second half of the 20th century. In the 1970s and 80s, the United Nations Human Rights Committee, the European Commission on Human Rights and the European Court of Human Rights dealt with a number of claims involving "language rights", which in effect comprised complaints by individuals objecting to the official language(s) policies of their state. In all of these cases, the international bodies refused the requests made, and rejected the argument that under linguistic freedom, public authorities in France, Belgium, the Netherlands or Ireland should also use other languages. For the Committee, Commission and

Court, the main reason for rejecting all of these cases was that linguistic freedom as such did not exist in international law; or that the use of a particular language by public authorities had nothing to do with freedom of expression.[10] A similar judgement was issued late in 2010 by the European Court of Human Rights – once again on the grounds of the argument that not only does linguistic freedom not exist as a human right, but also that freedom of expression has nothing to do with claims that a particular language should be used by public authorities:

> La Cour rappelle qu'aucun article de la Convention ne consacre expressément la liberté linguistique en tant que telle.[11]

Yet in a certain sense, it was only in terms of a very narrow scope that these cases indicated that a particular right – that of linguistic freedom – was not part of international law. None of these cases actually overruled any possible use of international law to restrict a state's sovereignty in relation to language preferences and policies, even if these involved a state's official language. Such an employment of international law was indeed to occur for the very first time in 1993, when an international body ruled that legislation involving an official language could be affected by international law, in *Ballantyne v. Canada*. After decades of uncertainty at the international level, it was declared that freedom of expression, while not enshrining "linguistic freedom" as such, does include language as a form of expression in relation to private activities, including in business, and that this therefore includes the freedom to express oneself in one's own language of choice in private activities. The argument in favour of an exclusive, official language cannot be invoked to simply set aside this basic right:

> 11.4 […] The Committee believes that it is not necessary, in order to protect the vulnerable position in Canada of the francophone group, to prohibit commercial advertising in English. This protection may be achieved in other ways that do not preclude the freedom of expression, in a language of their choice, of those engaged in such fields as trade. For example, the law could have required that advertising be in both French and English. A State may choose one or more official languages, but it may not exclude, outside the spheres of public life, the freedom to express oneself in a language of one's choice. The Committee accordingly concludes that there has been a violation of article 19, paragraph 2.[12]

As surprising as this may seem, it is only during the last few decades that it has finally become clear that the way in which a state puts into practice its official language choice – or rather, the choice of an official language itself – must indeed comply with international human rights law, and that freedom of expression includes language preferences in private activities.

## 4. THE EXTENT OF LANGUAGE RIGHTS IN INTERNATIONAL LAW: THE "GREAT UNKNOWN"

> The unequal distribution of power between languages is a recipe for permanent language insecurity, or outright language oppression, for a large part of the world's population.[13]

Today, no one really denies any longer that the private use of a language is protected by freedom of expression in international law, and that freedom of expression restricts what a state can do in the name of its official language in private activities. Additionally, the European Court of Human Rights also concurred with the UN Human Rights Committee that "provided it respects the rights protected by the Convention, each Contracting State is at liberty to impose and to regulate the use of its official language or languages in identity papers and other official documents."[14] Beyond these matters, however, it is less clear how, and to what extent (if at all), international law affects the use of an official language by the public authorities themselves.

On the one hand, there are some who have examined these cases and concluded that international human rights law has no bearing on the use of a state's official language by public authorities themselves.[15] The only language rights that are part of international human rights law relate to the private use of language under freedom of expression, and perhaps also in terms of Article 27 of the *International Covenant on Civil and Political Rights*, which provides for the right of linguistic minorities to use a particular language amongst themselves. On the other hand, it seems that, without affecting the choice of an official language, more recent decisions have admitted – though perhaps not with any conscious reference to, or criticism of, a state's official monolingualism – that authorities must, in some situations, use other languages to comply with international human rights standards. This has been an almost unnoticed consequence of a number of even more recent decisions emanating from the European Court of Human Rights, the European Court of Justice and the UN Human Rights Committee.

For example, in 2000 the UN Human Rights Committee was, in effect, of the opinion that a non-official language, Afrikaans, should be used to some degree by public authorities in addition to English, the only official language under the Constitution of Namibia, in order to comply with non-discrimination on the grounds of language, since there was no explanation as to why it could be considered reasonable and justified for state authorities in a part of the country with a large proportion of Afrikaans-speaking citizens to be ordered to use only English in the circumstances:

> 10.10 … The Committee notes that the authors have shown that the State party has instructed civil servants not to reply to the authors' written or oral communications with the authorities in the Afrikaans language, even when they are perfectly capable of doing so. These instructions barring the use of Afrikaans do not relate merely to the issuing of public documents but even to telephone conversations. In the absence of any response from the State party the Committee must give due weight to the allegation of the authors that the circular in question is intentionally targeted against the possibility to use Afrikaans when dealing with public authorities. Consequently, the Committee finds that the authors, as Afrikaans speakers, are victims of a violation of article 26 of the Covenant.[16]

During the following year, the European Court of Human Rights concluded that the official language policies in Northern Cyprus breached the right to education, along with the right to private and family life, in such a way that the government needed to have a high school in place, in which teaching occurred in the Greek language; and that only offering public education in Turkish and English was not sufficient to comply with these rights, even though Turkish was the official language of Northern Cyprus.[17] In a number of other cases, the European Court of Justice did not hesitate to rule against a state's exclusive official language policy if it was in conflict with the basic principles of the EU, such as freedom of movement and non-discrimination.[18] These cases are relatively recent and fairly controversial, because they have effectively refuted the assumption of many that there was no possibility that international law could influence issues surrounding the choice as to which languages public authorities must use.

If there is one certainty that can be deduced from all of the more recent jurisprudence emanating from these different courts and international bodies, it is that – whether the relevant situation pertains to the private use of a language, or to the use of a language by public authorities – there is no immunity against international human rights from a legal point of view, whether one is dealing with an official language, a national language, a state language or a language with some other kind of status.

## 5. CONCLUSION

Speak white
It is a universal language
We were born to understand it
With its teargas words
With its nightstick words
Speak white
Tell us again about Freedom and Democracy
We know that liberty is a black word
Just as poverty is black
And just as blood mixes with dust in the streets of Algiers
And Little Rock
Speak white
From Westminster to Washington take it in turn
Speak white like they do on Wall Street
White like they do in Watts
Be civilized
And understand us when we speak of circumstances
When you ask us politely
How do you do
And we hear you say
We're doing all right
We're doing fine
We
Are not alone

Poem by Michèle Lalonde, 1970.[19]

International law and human rights do not affect or change in any way the actual choice of an official language, or of a number of official languages, as decided on by a state; but in some situations, international law may require the additional use of other languages. What the exact parameters will be, and what types of impact international law will have – and the extent of such impacts – will take some time to determine, since in most cases the various pronouncements of international judicial and quasi-judicial bodies are very recent. What will become increasingly obvious, even though this realisation has not taken root to any significant extent as yet, is that issues surrounding the impact and implementation of an official language are no longer beyond the reach of international law. The age of exclusive state monolingualism is dead: if states comply fully with their international legal obligations, there will be situations

where they will not only have to permit the use of other languages by private parties, but will also have to require state authorities to use other languages too, in some circumstances. As the European Court of Human Rights pointed out in *Mentzen v. Latvia*, a state is free to choose and regulate the use of any official language, but must still respect human rights in international law.

This is, in fact, also consistent with other developments in the Council of Europe, including the adoption of legally-binding treaties such as the *Framework Convention for the Protection of National Minorities*,[20] the *European Charter on Regional or Minority Languages*,[21] and the many other instruments within the United Nations and the OSCE systems[22] which suggest that the proper response to linguistic diversity, both in legal and even in purely human terms, is not state monolingualism: whatever a state's official languages are, there are situations where other languages can and must be used. None of these documents directly affect the actual choice of a state's official language; but all agree, in different terms, that certain language rights must be put in place, in terms of which the use of additional languages by public authorities is required, where it is appropriate and justified, especially in cases where large groups of individuals could be disadvantaged or excluded by state monolingualism as a result of the application of state mechanisms. The case law that has recently emerged indicates that there are situations in which the exclusion, under all circumstances, of the use of all languages – other than the official language – can constitute a violation of basic international human rights.

What is only now beginning to be appreciated in international law is that freedom of expression, non-discrimination, the right to education and the right to private and family life, amongst other rights, have a bearing on matters of language use and preferences, in the case of both private language use and the use of language by state authorities. This, in a sense, is what the European Court confirmed in 2010 in the Tahitian language case:

> [N]ulle cloison étanche ne sépare la politique linguistique du domaine de la Convention, et une mesure prise dans le cadre de cette politique peut tomber sous le coup d'une ou de plusieurs dispositions de celle-ci… [S]ous réserve du respect des droits protégés par la Convention, chaque État contractant est libre d'imposer et de réglementer l'usage de sa ou ses langues officielles dans les pièces d'identité et les autres documents officiels.[97]

A state's official language policy is not exempt from the application of international law. What remains to be seen is how this will evolve in the future, and what impact it will have in terms of language rights in practice.

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3 *A Statute of the Fortieth Year of King Edward III, enacted in a parliament held in Kilkenny, A.D. 1367, before Lionel Duke of Clarence, Lord Lieutenant of Ireland*. English translation available at http://www.rootsweb.ancestry.com/~irlkik/statutes.htm. Last accessed on 17 April 2011.

4 *Real Cédula de Carlos III, 10 de Mayo, 1770*: "...para que de una vez se llegue a conseguir el que se extingan los diferentes idiomas, de que se usa en los mismos dominios, y solo se hable el Castellano como esta mandado por repetidas Leyes Reales Cedulas, y ordenes expedidas en el asunto, estando advertidos de que en los parages en que se hallen inconvenientes en su practica deberán representármelo con justificación... [...] se pongan en practica, y observen los medios que se refieren [...] a fin de conseguir que se destierren los diferentes Idiomas que se usa en aquellos Dominios, y solo se hable el Castellano."

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11 *Birk-Levy v. France*, Application No. 39426/06, European Court of Human Rights, 14 September 2010.

12 *Ballantyne, Davidson, McIntyre v. Canada*, Communications Nos. 359/1989 and 385/1989, U.N. Doc. CCPR/C/47/D/359/1989 and 385/1989/Rev.1 (1993).

13 *Prague Manifesto of the Movement for the International Language Esperanto*, Prague, July 1996, available at http://www.geocities.com/bharato/pragajhoj/prague_manifesto.htm. Last accessed on 18 April 2011.

14 *Mentzen alias Mencena v. Latvia*, Decision on admissibility of 7 December 2004, European Court of Human Rights.

15 The dissident views of a handful of members of the UN Human Rights Committee in *J.G.A. Diergaardt (late Captain of the Rehoboth Baster Community) et al. v. Namibia*, Communication No. 760/1997, U.N. Doc. CCPR/C/69/D/760/1997 (2000) are illustrative of this position: "So far as the administration is concerned, English being the official language of the State party, it is obvious that no other language could be allowed to be used in the administration or in the Courts or in public life. The authors could not legitimately contend that they should be allowed to use their mother tongue in administration or in the Courts or in public life, and the insistence of the State party that only the official language shall be used cannot be regarded as violation of their right…".

16 *J.G.A. Diergaardt (late Captain of the Rehoboth Baster Community) et al. v. Namibia*, Communication No. 760/1997, U.N. Doc. CCPR/C/69/D/760/1997 (2000).

17 *Cyprus v. Turkey*, 10 May 2001 judgement of the European Court of Human Rights.

18 See *Groener v. Minister for Education*, C379/87 [1989] ECR 3967, [1990] 1 CMLR 401; *Ministère Public v. Mutsch*, C137/84 (1985) ECR 2681; *Case C-391/09 Malgožata Runevič-Vardyn, Łukasz Wardyn contre Vilniaus miesto savivaldybės administracija, Lietuvos*

*Respublikos teisingumo ministerija, Valstybinė lietuvių kalbos komisija, Vilniaus miesto savivaldybės administracijos Teisės departamento Civilinės metrikacijos skyrius*, European Court of Justice, 16 December 2010.

19 Translation from French available at http://www.everything2.com/index.pl?node_id=738881. Last accessed on 17 April 2011.

20 Adopted by the Council of Europe's Committee of Ministers on 10 November 1994; effective as from 1 February 1998.

21 Adopted on 5 November 1992; effective as from 1 March 1998. Text of the treaty available at http://conventions.coe.int/Treaty/EN/Treaties/Html/148.htm. Last accessed on 7 April 2011.

22 UNESCO *Universal Declaration on Cultural Diversity*, adopted unanimously by the 31st session of the UNESCO General Conference on 2 November 2001; UN *Declaration on the Rights of Indigenous Peoples*, adopted by the UN General Assembly on 13 September 2007; UN *Declaration on the Rights of National or Ethnic Religious or Linguistic Minorities*, adopted by the UN General Assembly on 18 December 1992; 2005 UNESCO *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, adopted on 20 October 2005, effective as from 18 March 2007; *The Hague Recommendations regarding the Education Rights of National Minorities*, Organization for Security and Co-operation in Europe, October 1996; *Oslo Recommendations regarding the Linguistic Rights of National Minorities*, Organization for Security and Co-operation in Europe, February 1998, etc.

23 *Birk-Levy v. France*, Application No. 39426/06, European Court of Human Rights, 14 September 2010.

# LANGUAGE RIGHTS IN NEW BRUNSWICK[1]: THE PURSUIT OF SUBSTANTIVE EQUALITY: MYTH OR REALITY?

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**Abstract**

The province of New Brunswick, one of the four Atlantic provinces of Canada, occupies a unique place amongst Canada's ten provinces and three territories. By enshrining certain language rights in the Canadian Constitution, it became the only officially bilingual province in the country. This paper will describe the recognised constitutional and legislative protection accorded to the francophone minority of this province. The linguistic landscape of New Brunswick shows encouraging signs in respect of linguistic rights. The principle of the equality of the two official languages and of the two official language communities contributes to the expansion and growth of these rights. But this legal recognition has not yet fully materialised. Linguistic rights are still too easily ignored by the political and administrative authorities, leading to the conclusion that, although New Brunswick theoretically remains a model with regard to the recognition of legal rights, this recognition remains symbolic in reality. Substantive equality still remains a distant – and possibly unattainable – objective.

**Résumé**

La province du Nouveau-Brunswick, l'une des quatre provinces du Canada Atlantique, occupe une place unique parmi les dix provinces et trois territoires du Canada. En enchâssant certains droits linguistiques dans la Constitution canadienne, elle est la seule province officiellement bilingue du pays. Le présent article décrit les garanties constitutionnelles et législatives reconnus à la minorité francophone de cette province. Le paysage linguistique du Nouveau-Brunswick montre des signes encourageants en ce qui concerne les droits linguistiques. Le principe d'égalité des deux langues officielles et celui d'égalité des deux communautés de langue officielle contribuent à l'expansion et la croissance de ces droits. Mais cette reconnaissance juridique de l'égalité n'est

pas complètement matérialisée dans la réalité. Les droits linguistiques sont encore trop facilement ignorées par les autorités politiques et administratives, menant à la conclusion que, bien que le Nouveau-Brunswick demeure un modèle, du moins en théorie, en ce qui concerne la reconnaissance des droits juridiques, cette reconnaissance demeure en réalité symbolique. L'égalité réelle reste encore un objectif lointain et peut-être inatteignable.

## 1. INTRODUCTION

The province of New Brunswick occupies a unique place amongst Canada's ten provinces and three territories. By enshrining certain language rights in the Canadian Constitution, it became the only officially bilingual province in Canada.

But why would a state want to create legislation to protect languages? When confronted by conflicting pressures, the state might regard the denial of cultural and linguistic differences as the "ideal solution", and therefore opt for a policy of assimilation of the minority linguistic group, thereby integrating it with the majority language group. A state will only become involved in linguistic policy planning for historical, political, demographical or social reasons. In other words, a state will usually only take action when this is required in order to preserve social peace or national unity.

When it does decide to intervene in the area of language planning, a state will generally have two options: it can either choose a "territorial" approach or a "personal" approach.

In terms of an approach based on the concept of "territoriality", language will be perceived as being intimately linked to the concentration of the users of that language in a particular geographic territory. Therefore, according to this approach, the recognition of a language will be geographically based. This "territorial" model will promote unilingualism in a specific and well-defined geographical territory. Such an approach derives its origins from the common human phenomenon whereby speakers of the same language tend to combine geographically, so that borders will generally coincide with "language" borders. As a result, people living within the same territory normally speak the same language. New residents of this territory will be required to assimilate, or at least to learn the dominant language of the territory.

The approach based on "personality" focuses on the possibility of using an official minority language in a territory where another official language is the dominant language. An individual is therefore not limited in the use of his (or her) language by a geographical territory, but can, in theory, exercise the right to use his language anywhere, with few or no restrictions.

However, things are not always as simple as they seem. For example, the concept of "territoriality" does not always mean that only one official language is spoken in the territory; therefore, even in cases where this approach is followed, it might be necessary to take the interests of language minorities into account. In practice, the principle of "personality" is often circumscribed by regional considerations. Thus, in some regions, the absence of speakers of the minority language makes the use of this language impossible.

Regardless of the approach taken, one thing remains certain: a state in a situation of multilingualism can rarely remain impartial on the issue of language, since many activities have a direct impact on language. These activities include, to name a few, the legislative process, the management of national institutions, the provision of government services, the administration of justice and – last but not least – education.

## 2. THE CANADIAN COURTS' APPROACH TO THE INTERPRETATION OF CONSTITUTIONAL AND STATUTORY PROVISIONS APPLYING TO LANGUAGE

As Michel Bastarache, a former justice of the Supreme Court of Canada and a leading scholar on matters pertaining to minority language rights, so eloquently pointed out, a Constitution "should be seen as a collaborative effort to give constitutional partners a legal framework for their cohabitation; this framework is seen as flexible and capable of evolution according to circumstances."[2]

This organic approach to the interpretation of the Canadian Constitution is consistent with the precepts of the Supreme Court of Canada on the matter. In *Hunter v. Southam Inc.*, for example, the Court articulated this approach as follows:

The need for a broad perspective in approaching constitutional documents is a familiar theme in Canadian constitutional jurisprudence. It is contained in Viscount Sankey's classic formulation in *Edwards v. Attorney-General for Canada*, [1930] A.C. 124, at p. 136, cited and applied in countless Canadian cases:

> The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits. The object of the Act was to grant a Constitution to Canada... Their Lordships do not conceive it to be the duty of this Board – it is certainly not their desire – to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation.[3]

The "living-tree" metaphor was applied, but also ignored, in various decisions of the Supreme Court pertaining to linguistic rights.[4] In the following pages we will try to follow the evolution of linguistic rights in Canada, as defined by the Canadian courts.

Originally, section 133 of the *Constitution Act, 1867*[5] was the only provision in the Canadian constitution which dealt specifically with linguistic rights. However, this section was never intended to establish two official languages in Canada. At most, it imposed an embryonic form of official bilingualism[6] on the institutions of the Federal and Quebec governments.

The adoption of the *Canadian Charter of Rights and Freedoms*, in 1982, was a turning point with regard to the recognition of linguistic constitutional rights in Canada. Comments issued by the Supreme Court of Canada before and shortly after the adoption of the *Charter* raised hopes that linguistic rights, like other *Charter* rights, would be interpreted in a broad and dynamic manner by the courts.[7] In *Reference re: Manitoba Language Rights (1985)*, for example, the Supreme Court stated that the importance of language rights is grounded in the essential role that language plays in human existence, development and dignity. It is through language that we are able to form concepts, in order to structure and order the world around us. Language bridges the gap between isolation and community, allowing human beings to delineate their rights and duties in respect of one another, and thus to live in society.[8]

The Supreme Court had also clearly indicated that it would follow a broad, liberal and dynamic approach to the interpretation of other rights and freedoms contained in the *Charter*.[9] However, despite these statements favouring an organic approach, the Supreme Court of Canada rendered three decisions in 1986, *MacDonald*[10] (Quebec), *Bilodeau*[11] (Manitoba) and *Société des Acadiens*[12] (New Brunswick), which had the effect of significantly curtailing the enthusiasm of those who had seen in these Constitutional linguistic provisions a tool for the enhancement and development of minority language communities.

In these three cases, also referred to as the 1986 trilogy, the Supreme Court of Canada issued the ruling that courts should show restraint in the interpretation of linguistic rights, because unlike other fundamental rights, these rights derive their origin from a political compromise. In *MacDonald*, for example, Beetz J. stated that section 133 had not introduced a comprehensive scheme or system of official bilingualism, even potentially, but rather a limited form of compulsory bilingualism at the legislative level, combined with an even more limited form of optional unilingualism, at the discretion of the speaker, in Parliamentary debates, and at the discretion of the speaker, writer or issuer in judicial proceedings or processes. He added that this incomplete scheme is a constitutional minimum which resulted from a historical compromise which can be complemented by federal and provincial legislation. He concluded that it is not open to the courts – under the guise of interpretation – to improve upon, supplement or amend this historical constitutional compromise.[13]

The approach to language rights adopted in these three decisions focuses on the right of the individual to use the official language of his or her choice, and not on the collective nature of these rights. The Supreme Court therefore refused to accept that language is a social phenomenon which, in a minority context, is experienced in very specific conditions. For the Court, since language rights derive their origins from a political compromise, they are essentially political "rights". Therefore, language rights can comprise no more than a simple response to a request for accommodation.

However, language is not simply a mode of expression or communication. It forms an integral part of a person's cultural identity. It is the means by which individuals understand themselves and each other, as well as the environment in which they live. Language provides the foundation for an individual's membership of a group or a community. The recognition of linguistic rights therefore goes well beyond the simple recognition of an individual's right to communicate in the official language of his or her choice. It penetrates to the very core of what constitutes a community.

The restrictive approach to the interpretation of language rights espoused by the 1986 trilogy was subsequently toned down in several decisions of the Supreme Court.[14] In these decisions, the Supreme Court reaffirmed the importance of language rights, took into account their purpose and favoured a broader interpretation. However, the Court did not call the political compromise theory, nor the call for judicial deference in matters pertaining to language rights, into question. This was not to occur until the Court delivered its decision in *Reference re: Secession of Quebec (Secession Reference)*,[15] as well as its decisions pertaining to *R. v. Beaulac*[16] and *Arsenault-Cameron v. Prince Edward Island.*[17]. For the purposes of this presentation, we will deal mainly with the decision in *Beaulac*.

In *Beaulac*, the Supreme Court dismissed the restrictive interpretation of language rights adopted in the 1986 trilogy. In a majority judgement, the Supreme Court concluded that the existence of a political compromise was of no consequence with regard to the scope of language rights.[18] The Court added that, to the extent that the 1986 trilogy reflected a restrictive interpretation of language rights, it was to be rejected.[19] Language rights must in all cases be interpreted purposively, in a manner consistent with the preservation and development of official language communities in Canada.[20]

The Supreme Court also asserted that, with regard to existing rights, equality must be accorded its true meaning and that substantive equality is the correct norm to apply in Canadian law.[21] In other words, the concept of equality is not an informal concept, but one that refers to a tangible reality. It should also be

borne in mind that there is often a gap between formal equality and substantive equality. Indeed, it is often not sufficient to treat every individual or every linguistic community in the same way in order to attain equality. Insofar as members of a minority community may have different needs, treating them in the same way as the members of the majority community can sometimes lead to greater inequality.

Nowhere has this principle of substantive equality been better articulated than in the famous quote of Frankfurter J. in *Dennis v. United States*: "It was a wise man who said that there is no greater inequality than the equal treatment of unequals".[22] This statement could be rephrased as follows: "There is no greater inequality than the equal treatment of two unequal official linguistic communities".

The state therefore has the obligation to ensure equal access to services of equal quality for members of both official language communities, while taking into account the specific needs of the minority community.[23] Language rights must not be considered exceptional, or as something of the nature of a request for accommodation.[24] These rights require a real commitment on the part of the state apparatus and the recognition of the specificity of the minority group.

## 3. LANGUAGE RIGHTS AND THE CONCEPT OF EQUALITY

The concept of "equality" is referred to in subsection 16(2) and section 16.1 of the *Canadian Charter of Rights and Freedoms*.

Subsection 16(2) of the *Charter* reads:

> English and French are the official languages of New Brunswick and have equality of status and equal rights and privileges as to their use in all institutions of the legislature and government of New Brunswick.[25]

The scope of this provision has been the subject of some debate in Canadian legal circles. Scholars have mulled over the question as to whether the provision states a symbolic principle, or whether it recognises effective rights. According to the former theory, section 16 should be regarded as purely declaratory in nature. In other words, section 16 should be seen as a preamble announcing the rules which should govern the interpretation of the following sections of the *Charter* pertaining to language rights. It reminds us of an ideal we wish to achieve, but does not constitute a constitutional rule laying down an obligation to achieve that ideal.

However, we are of the view that this restrictive approach to the interpretation of section 16 can no longer be accepted. We support the theory that section

16 creates specific obligations for the state.[26] The provision declares the equal status of the two official languages as to their use in the public institutions of the federal and New Brunswick governments and prohibits the promotion by these institutions of one language over the other. Section 16 requires the courts to purposefully embrace a sense of respect for duality and to apply it logically and vigorously to the entire range of affirmative rights that the courts will be called upon to implement.[27]

Section 16.1, for its part, is unique to New Brunswick and provides as follows:

> (1) The English linguistic community and the French linguistic community in New Brunswick have equality of status and equal rights and privileges, including the right to distinct educational institutions and such distinct cultural institutions as are necessary for the preservation and promotion of those communities.
>
> (2) The role of the legislature and government of New Brunswick to preserve and promote the status, rights and privileges referred to in subsection (1) is affirmed.

This section essentially reflects certain provisions of the *Act Recognizing the Equality of the Two Official Linguistic Communities in New Brunswick.*[28]

Section 16.1 gives rise to a fundamental question: what does equality between linguistic groups really mean?

In *Charlebois v. Moncton (City),*[29] the Court of Appeal of New Brunswick was asked to determine whether municipalities in the province were subject to the constitutional obligations regarding language rights contained in the *Charter*. In answering this question, the Court was called upon to interpret section 16.1. According to the Court, the principle of equality of the English linguistic community and the French linguistic community of New Brunswick, as entrenched in section 16.1 of the *Charter*, is a significant indication of the purpose of language guarantees, and a guiding principle in the interpretation of other *Charter* provisions. By deciding to entrench this principle in the *Charter* as a fundamental characteristic of the province, the drafters of the Canadian constitution intended to show their commitment towards the equality of the official language communities.

The purpose of section 16.1 is clear. While different rights flow from the collective aspect of the guaranteed equality, the purpose of section 16.1 is similar to that which has been ascribed to it by the courts. The purpose of this provision is to maintain the two official languages, as well as the cultures that they represent, and to encourage the flourishing and development of the two official language communities. It is remedial in nature and has concrete consequences. It imposes an obligation on the provincial government to take positive measures to

ensure that the minority official language community enjoys equality of status and equal rights and privileges in relation to the majority official language community. The obligation imposed on the government derives both from the remedial nature of subsection 16.1(1), in recognition of past inequalities that have thus far remained unredressed, and the constitutional commitment made by the government to preserve and promote the equality of official language communities. The principle of the equality of the two language communities is a dynamic concept. It implies governmental interventions which entail, as a minimum requirement, that the two communities should receive equal treatment, but also that, in some situations where this would be necessary to achieve equality, the minority language community should be treated differently in order to fulfil both the collective and individual dimensions of a substantive equality of status. This last requirement derives from the underpinning of the principle of equality itself.[30]

The concepts of linguistic duality and cultural autonomy are central to the principle of equality. What is meant by these concepts is the right of each linguistic community to govern the institutions which are essential for its preservation and development. In this regard, as we have seen, subsection 16.1(1) of the *Charter* provides that each official linguistic community has "the right to distinct educational institutions and such distinct cultural institutions as are necessary for the preservation and promotion of those communities".

## 4. BILINGUALISM AND THE LEGISLATIVE PROCESS

Subsection 17(2) of the *Charter* deals with the use of both official languages in the legislative process. It provides as follows:

> Everyone has the right to use English or French in any debates and other proceedings of the legislature of New Brunswick.

Although subsection 17(2) is worded in terms of the granting of individual rights, it can also be interpreted as conferring rights on both linguistic communities. The right to participate in the legislative process is one of the "minimum requirements for a language to be effective in the public as well as the private realm".[31] Moreover, "participation in parliamentary debates is an inherently social and collective process".[32] Therefore, the rights recognised in this subsection provide the minority linguistic group with the opportunity to participate in the public sphere in its own language, and endows the minority language with a status equivalent to that of the majority.

The rights conferred by this subsection are normally exercised through the use of simultaneous interpreting. However, the issue of whether simultaneous interpreting is a constitutional right included in the subsection has still not been settled.

In *Re: Forest and Registrar of the Court of Appeal of Manitoba*, the Court of Appeal of Manitoba, in interpreting a similar provision in that province, concluded that this obligation requires the establishment of a system of simultaneous interpreting.[33] However, in *MacDonald v. City of Montreal*, the Supreme Court of Canada noted its disagreement with the opinion of the Court of appeal of Manitoba. In an *obiter dictum*, Beetz J. stated:

> The only positive duty that I can read in s. 133 is the one imposed on the Houses of Parliament of Canada and the Legislature of Quebec to use both the English and the French languages in the respective Records and Journals of those Houses, as well as the duty to legislate in both languages, that is to enact, print and publish federal and provincial acts in both languages: *Blaikie No. 1* […]. In *Forest v. Registrar of Court of Appeal of Manitoba* […], it seems to have been suggested by Freedman C.J.M. that s. 23 of the Manitoba Act, 1870, imposed a duty to provide the legislature with simultaneous translation for the purposes of parliamentary debate but, with respect for the contrary view, I fail to see the imposition of any such duty in either provision.[34] (Emphasis added.)

The issue has not been raised judicially since then. But should it be raised in future, we are of the view that the courts would adopt a more positive approach to the issue than the one suggested by Beetz J. – an approach which would take the purpose of the provision into consideration. Indeed, this provision, as is the case with all other language provisions, should be interpreted liberally and generously.

It goes without saying that the right to simultaneous interpreting would be superfluous in the context of a parliamentary assembly where all members could speak both official languages. However, in Canada, such a linguistically perfect parliamentary assembly does not exist. This observation is particularly true in the case of New Brunswick, where the vast majority of English-speaking legislators are monolingual, while the French-speaking legislators are bilingual. Therefore, without the provision of simultaneous interpreting, it would be difficult for a francophone legislator to effectively use his (or her) language in parliamentary debates, since he would not be understood by his monolingual English colleagues.

Subsection 18(2) of the *Charter* imposes a requirement of legislative bilingualism. It provides as follows:

> The statutes, records and journals of the legislature of New Brunswick shall be printed and published in English and French and both language versions are equally authoritative.

This subsection declares that both the English and French versions of laws, records and journals of the legislature of New Brunswick are equally authoritative. The case law regarding the interpretation of this provision is substantially similar to that which was applied in the interpretation of section 133 of the *Constitution Act, 1867*.[35] In the *Société des Acadiens du Nouveau-Brunswick* case, the Supreme Court of Canada even suggested that "subject to minor variations of style, the language of s. 17, 18 and 19 of the *Charter* has clearly and deliberately been borrowed from that of the English version of s. 36 of the *Constitution Act 1867*".[133]

Subsection 18(2) of the *Charter* regulates both content and form and requires the simultaneous use of both languages, not only when laws are published, but also when they are adopted and promulgated. Failure to comply with this rule would have the effect of invalidating the statutory text. In *Blaikie (No. 1)*, the Supreme Court of Canada held that this obligation of bilingualism also extends to the enactment of regulatory acts and delegated legislation.[37]

However, despite the similarities between section 133 of the *Constitution Act, 1867* and section 18 of the *Charter*, the Court of Appeal of New Brunswick concluded in *Charlebois v. Moncton (City)* that subsection 18(2) operates differently in New Brunswick, and that the jurisprudence dealing with the interpretation of section 133 should therefore be approached with caution. The Court of Appeal added that the historical context in which section 133 was enacted in 1867 was fundamentally different from the context of 1982, when subsection 18(2) of the Charter was adopted.[38]

In the *Charlebois* case, the complainant had cited the invalidity of a municipal by-law of the City of Moncton, alleging that it violated his constitutional language rights. More specifically, he argued that, in terms of subsection 18(2), municipalities in the province were under an obligation to enact and adopt municipal bylaws and regulations in both official languages. However, the Supreme Court of Canada had already decided that section 133 of the *Constitution Act, 1867* and section 23 of the *Manitoba Act* did not include municipal by-laws and regulations.[39] The Court of Appeal of New Brunswick was therefore requested to apply a broader interpretation to subsection 18(2) than the Supreme Court of Canada had applied to sections 133 and 23.

The Court of Appeal of New Brunswick found that a liberal interpretation of language rights required that consideration should be given to the historical evolution of minority language rights in the province.[40] According to the Court of Appeal, the legislative and constitutional provisions applying to New Brunswick are specific to this province.[41] The Court therefore concluded that it would be incorrect to assume that a court of the province, which was obliged to rule on the interpretation of sections 17, 18 and 19 of the *Charter,* should strictly adhere to the interpretation that the Supreme Court of Canada had accorded to section 133, a constitutional provision which had been adopted in a very different historical context. The Court of Appeal therefore concluded that, considering the particular historical context of the province, by-laws and regulations adopted by New Brunswick's municipalities were covered by the constitutional obligations contained in subsection 18(2) of the *Charter*.

The *Official Languages Act* of New Brunswick implements and amplifies the constitutional obligations of subsections 17(2) and 18(2) of the *Charter*. Pursuant to section 6 of the *Act*: "English and French are the official languages of the Legislature and everyone has the right to use either language in any debate and other proceeding of the Legislative Assembly or its committees", section 7 provides that "[s]imultaneous interpretation of the debates and other proceedings of the Legislative Assembly shall be made available by the Legislature". Thus, members of the legislative assembly of New Brunswick are entitled to simultaneous interpreting services, not only during the debates in the Assembly, but also – because the section also applies to other proceedings – during the deliberations of the different committees of the Assembly. Section 8 states, in turn, that: "The records, journals and reports of the Legislative Assembly and its committees shall be printed and published in English and French and both language versions are equally authoritative."

Section 9 stipulates that "English and French are the official languages of legislation". Section 10 states that: "The English and French versions of legislation are equally authoritative". Section 11 provides that: "Bills shall be simultaneously introduced in both official languages before the Legislative Assembly and shall be simultaneously adopted and assented to in both official languages". Section 12 declares that: "The Acts of the Legislature shall be printed and published in both official languages", while section 13 makes the same declaration with regard to rules, orders, Orders-in-Council and proclamations that are to be published in *The Royal Gazette*. Finally, sections 14 and 15 require the government to publish notices in both languages.

## 5. BILINGUALISM AND THE JUDICIAL SYSTEM

The judicial system of a state is usually expected to interpret the values and the culture of the society it is called to serve. To do so in an officially bilingual state, the judicial institutions must be able to reflect both the values of the majority and those of the minority. If, for any person who does not speak the language of the majority, the right to be understood in his language by the judicial system is considered to comprise a right to procedural fairness and natural justice which can be satisfied by the use of interpreters or simultaneous translation for members of the official language groups, this right further implies that the individual in question has the right to appear before a judge who speaks his (or her) language and understands his culture and values.[42]

Bilingualism in the judicial system refers to the option given to each individual to use one or other of the official languages before a court of justice without being placed at a disadvantage because of his (or her) language of choice. In New Brunswick, the right to judicial bilingualism is enshrined in the Constitution and in the *Official Languages Act*. However, unlike other language rights, this right has so far been interpreted very restrictively by the courts.

Subsection 19(2) of the *Charter* provides as follows:

> Either English or French may be used by any person in, or in any pleading in or process issuing from, any court of New Brunswick.

Again, the wording of section 19 is very similar to that found in section 133 of the *Constitution Act, 1867*. Nonetheless, the interpretative approach adopted by the Supreme Court of Canada in *R. v. Beaulac*, and the comments made by the Court of Appeal of New Brunswick in *Charlebois v. Moncton (City)*, should lead us to the conclusion that a different interpretation should be applied to this section by the Courts.

However, in considering section 19, we must still refer to the Supreme Court of Canada's decision in *Société des Acadiens du Nouveau-Brunswick*, one of the decisions of the 1986 trilogy. In this decision, the Supreme Court of Canada concluded that section 19 essentially granted a negative right. The issue in this case was whether the right to use the English or French language before a Court in New Brunswick required that the member of the tribunal hearing the matter should be able to understand the debates and evidence in the language used by the parties without the intervention of an interpreter or the use of simultaneous translation. The Supreme Court concluded that, although section 19 gave the parties the right to use the official language of their choice before the courts, it

did not grant them the right to be understood directly in this language by the judge presiding over the proceedings.

The majority in the Supreme Court noted that if the drafters of the *Charter* had intended to grant such a right, they would have used different wording. They would, for example, have used the word "communicate" to confirm that section 19 accords the right to be understood in the language chosen by the party. The Court stated that "the right to *communicate* in either language postulates the right to be heard or understood in either language".[43] (Emphasis added.) However, section 19 provides only the right "*to use*" either of the official languages – which, according to the logic of the Court, does not include the right to be understood.

The Supreme Court of Canada indicated that there is a clear distinction between language rights and the rights guaranteeing a fair trial. It explained that "the common law right of the parties to be heard and understood by a court and […] to understand what is going on in court is not a language right but an aspect of the right to a fair hearing".[44]

However, it is important to keep in mind that language rights and the principles of natural justice which form the basis of the right to a fair trial have very different origins and purposes. Therefore, to make language rights a part of procedural fairness is to rely on a fiction in terms of which the choice of an official language by an individual is regarded as an admission of his ignorance of the other language. This sort of reasoning has led the Supreme Court of Canada to give the language rights protected by section 19 a very narrow interpretation, which protects these rights only within the limits of what is necessary. Furthermore, by establishing an equivalence between language rights and the principles of natural justice, the Supreme Court seems to consider language only as a tool of communication, depriving it of its cultural and collective content. It thus ignores the importance of promoting the development of official language communities. It pays no attention to the fact that the purpose of language rights is not only to accommodate individuals who do not speak the language of the majority, but that such rights also serve to protect official language minorities and to guarantee the equality of status and use of both official languages.

Despite the generous approach later adopted by the Supreme Court of Canada in *Beaulac*, the decision in *Société des Acadiens* with regard to the interpretation of section 19 still stands, since that issue was not brought before the Court in *Beaulac*. It can consequently be concluded that the constitutional guarantees contained in section 19 are, until decided otherwise, rather limited and incomplete.

Fortunately, the New Brunswick legislature decided, when it adopted its new *Official Languages Act*, to complete the linguistic guarantees regarding the use of the English and French languages in the courts of the Province. However, these statutory provisions do not provide the same protection as constitutional norms, because they can, under certain conditions, be modified and unilaterally revoked by the legislative assembly; but the rights they grant constitute the essence of judicial bilingualism.

Thus, the New Brunswick *Official Languages Act* ensures equal access in both English and French to courts of justice, to the rules of procedure, to court decisions and to the services available to the public, as well as to the communications with the public offered by the courts. Section 16 of the Act provides that English and French are the official languages of the courts. The expression "courts" refers to any court or administrative tribunal in the Province. Section 17 provides that every person has the right to use the official language of his or her choice in any matter before the courts, including all proceedings, or in any pleading or process issuing from a court. Section 18 states that "no person shall be placed at a disadvantage by reason of the choice made under section 17". Pursuant to section 19, a court is required to understand the official language chosen by a party to the proceedings; and when both official languages are used, it is required that both languages should be understood without the assistance of an interpreter or any process of simultaneous translation or consecutive interpreting. Section 20 provides that a person who is alleged to have committed an offence under an Act or a regulation of the Province or under a municipal by-law has the right to have the proceedings conducted in the language of his or her choice, and shall be informed of that right by the presiding judge before entering a plea. Section 21 states that every court has the obligation to ensure that any witness appearing before it can be heard in the official language of his or her choice; and upon the request of one of the parties or the witness, the court is obliged to ensure that services of simultaneous translation or consecutive interpreting are available to the person who made the request. Pursuant to section 22, where the Province or an institution of the Province is a party to civil proceedings, it shall use, in any oral or written pleadings or in any process issuing from a court, the official language chosen by the other party.

With regard to courts' decisions, the Act does not require that all final decisions, orders or judgements of a court should be drafted in both official languages. However, the Act does provide, in subsection 24(1), that final decisions, orders or judgements of a court, including any reasons and summaries, shall be published in both official languages where such decisions, orders or judgements determine a question of law of interest or importance to the general public,

or where the proceedings were conducted in whole or in part in both official languages.[45] Subsection 24(2) provides an exception to subsection 24(1). It stipulates that if it is determined that publication in both official languages would result in a delay or injustice or hardship to a party to the proceedings, then the decision, order or judgement, including any reasons, shall be published, in the first instance, in one official language and, thereafter, at the earliest possible time, in the other official language.

Pursuant to section 25, decisions of the Court of Appeal of New Brunswick are deemed, at all times, to meet the criteria of section 24. Finally, section 26 states that a judgement cannot be invalidated simply because it has been pronounced in one official language.

## 6. THE RIGHT TO PUBLIC SERVICES IN BOTH OFFICIAL LANGUAGES

The right to public services in both official languages is covered by subsection 20(2) of the *Charter*. This subsection provides as follows:

> Any member of the public in New Brunswick has the right to communicate with, and to receive available services from, any office of an institution of the legislature or government of New Brunswick in English or French.

The *Charter* designates the beneficiary of this obligation as being "any member of the public" or, in French, "le public." This naturally gives rise to the questions as to whether the "public" has an independent legal existence and whether it possesses a legal personality to a sufficient degree to effectively exercise these rights.[46] We believe that the word "public" should be given its plain legal meaning. In our opinion, in terms of this approach, it can be concluded that it includes any individuals, associations or groups, whether or not they have a legal personality, who are likely to ask for government services.

Section 20 creates two distinct rights: first, the right to communicate in the official language of choice and, secondly, the right to receive services in that language from the offices of an institution of the legislature or from the government of the province. The right to "communicate" confers the right to address, verbally or in writing, the office of an institution in the official language of choice and the right to receive a reply in that language. This right also includes the right to be heard and understood by the office in the official language that has been used.[47]

As to what is meant by "services", the courts have not yet given a clear answer to this question. But, in our opinion, "services" should include every government service designed for members of the public.

What institutions did the drafters wish to include under section 20? In the case of *R. v. Gautreau,*[48] the Court of the Queen's Bench of New Brunswick endorsed the following criteria for determining whether an agency is an "institution" which falls within the meaning of subsection 20 (2) of the *Charter*:

> First, to be classified as an institution of the legislature or government, it would appear necessary that the agency must be a creation of the state and must owe its very existence to a public Act or to an integrated functional division of a Department.
>
> The appointment of its directors, its funding, the degree of government control over its activities, the nature of its activities, can be relevant factors in categorizing an agency, but the prime factor remains the legal source of its powers.[49]

In applying these criteria, the Court held that police services are government institutions within the meaning of section 20. Therefore, any member of the public is entitled to communicate with the police in the official language of his or her choice and to receive services in that language. However, other courts have refused to follow this interpretation.[50]

In a relatively recent decision, in the case of *Société des Acadiens et Acadiennes du Nouveau-Brunswick Inc. v. Canada*,[51] the issue of police services was again raised. This case dealt with the linguistic obligations of the Royal Canadian Mounted Police (the "RCMP") in cases where it acts as a provincial police service. Under an agreement between the Government of Canada and the Province of New Brunswick, the RCMP, a federal institution, had contracted to act as a provincial police force in New Brunswick. The issue before the Court was that of whether RCMP officers were required, when performing their duties as provincial police officers, to fulfil the language obligations imposed on New Brunswick institutions by subsection 20(2) of the *Charter*, or the lesser obligations imposed on federal institutions by subsection 20(1). [52]

According to the Supreme Court, although the RCMP retains its status as a federal institution when acting in accordance with an agreement with a province, its members are endowed by the provincial legislation with all the powers of a peace officer in that province, and they are empowered to administer justice. They therefore exercise the role of "an institution of the legislature or Government" of the province and are required to comply with the obligations laid down in subsection 20(2) of the *Charter*.

In *Charlebois v. Moncton (City)*, the Court of appeal of New Brunswick concluded that municipalities are also subject to the linguistic obligations of the *Charter*. The Court noted that municipalities are a creation of the province and they exercise governmental powers which are conferred upon them by the legislature or the government. Municipalities therefore derive their powers from public legislation. As a consequence, they are "institutions" of the province.

The succession of legislative measures adopted by the province which have sought to provide the public with access to quality services in both official languages have made the linguistic regime of this province, at least in theory, unique in Canada. In the following paragraphs, we will consider the provisions of the *Official Languages Act* that ensure bilingual services to the public by administrative authorities, including at the municipal level, as well as the right of members of the public to obtain health services in both official languages. It is important to note that in the legislative framework, as in the constitutional framework, no geographical consideration limits the exercise of language rights. Therefore, the public have the right to receive services in the official language of their choice from a provincial institution everywhere in the province. New Brunswick has, therefore, adopted a "personality" approach to its language rights. But this objective exists only in theory, as the practice clearly shows that the capacity of public offices to offer services in the minority language varies significantly from one region to another and from one office to another.

With regard to the word "communicate", the *Official Languages Act* defines it in terms of any form of communication, "whether spoken, written or electronic". In addition, the *Act* defines the term "institution" as "an institution of the Legislative Assembly or the Government of New Brunswick, the courts, any board, commission or council, or other body or office, established to perform a governmental function by or pursuant to an Act of the Legislature or by or under the authority of the Lieutenant-Governor in Council, a department of the Government of New Brunswick, a Crown corporation established by or pursuant to an Act of the Legislature or any other body that is specified by an Act of the Legislature to be an agent of Her Majesty in right of the Province or to be subject to the direction of the Lieutenant-Governor in Council or a minister of the Crown".

The provisions regarding the delivery of bilingual services to the public are covered by sections 27 to 30 of the *Act*. Section 27 provides that members of the public have the right to communicate with any institution and to receive its services in the official language of their choice. Section 28 requires that provincial institutions should be able to communicate with the public and that

the public should be able to receive the services required in the official language of their choice.

Section 28.1 refers to the concept of an "active offer" which imposes on provincial institutions the obligation to take appropriate measures to "actively" inform the public that its services are available in the official language of their choice.

Pursuant to section 29, all postings, publications and documents intended for the general public must be published in both official languages. Section 30 provides that provincial institutions must ensure that services offered by third parties on behalf of the province are available in the official language chosen by the member of the public.

Sections 31 and 32 deal with "police services". According to subsection 31(1), members of the public have the right, when communicating with a peace officer, to receive services in the official language of their choice and they must be informed of that right. Pursuant to subsection 31(2), if a peace officer is unable to provide services in the language chosen by the member of the public, the peace officer shall take whatever measures are necessary, within a reasonable time, to ensure compliance with the choice made.

Unfortunately, a lower court has accorded a very restrictive interpretation to subsection 31(2). In the case of *R. v. LeBlanc*,[53] Ms LeBlanc had been apprehended for speeding by an officer of the RCMP. She requested services in French, but was told by the peace officer that a French-speaking officer was not readily available and that she would have to wait to receive services in that language. Ms LeBlanc argued that waiting for 20 minutes for an RCMP officer who could speak French was unacceptable.

Although the Court decided in favour of Ms LeBlanc and ordered that the matter be dismissed, the interpretation that it applied to section 31 of the *Official Languages Act* raises some concerns. The judge concluded that the RCMP constable, even if he had spoken to Ms LeBlanc in English only, had made an active offer simply by being courteous and responding to her request for services in French by offering to call an agent who could communicate with her in that language. To justify his reasoning, the judge noted that the term "immediately" was not included in subsection 31(1). He also observed that, in order to enable them to communicate in French, monolingual English police officers keep a special card at hand, which translates keywords. However, the judge added that the card had not been used in this case, given that the parties were able to understand each other.

This decision reduces the obligations imposed on a police officer to a simple duty to accommodate a monolingual person. This conclusion does not conform to the jurisprudence; in particular, it is not in keeping with the decision of the Supreme Court of Canada in *Beaulac*. The Court in *LeBlanc* seems to be suggesting that language rights are based on a person's linguistic capacity and not on the right of that person to communicate in the official language of his choice, whether or not he speaks the other language. This interpretation is contrary to the purpose of the *Official Languages Act*, in particular, and to that of language rights, in general.[54]

However, the Court of Appeal of New Brunswick came to a different conclusion in another case involving section 31. In *R. v. McGraw*,[55] Mr McGraw had been apprehended by an officer of the RCMP for an offence under the provincial *Highway Traffic Act*. The police officer addressed Mr McGraw in French; and all exchanges that followed took place in that language. Mr McGraw later claimed that his right to be served in the official language of his choice had been violated. Although Mr McGraw, who is perfectly bilingual, had not expressed any objections to the use of the French language, the Court held that he had not chosen this official language as his preferred language of communication with the peace officer. When he was called upon to respond to the charges before the Provincial Court, Mr McGraw asked that they be rejected, arguing that his language rights had been violated. The trial judge disagreed. He concluded that, since Mr. McGraw was perfectly bilingual, his language rights could not have been violated.

The Court of Appeal of New Brunswick upheld the appeal of Mr McGraw, with Drapeau, C.J. declaring the following, *inter alia*:

> I would wrap up the proceedings by echoing the summary conviction appeal judge's emphasis on the importance of linguistic rights in New Brunswick, the only Province with two official languages. Language rights, whether sourced in the *Charter*, the *Official Languages Act* or [the *Provincial Offences Procedure Act*], set us apart in the Canadian federation; as time goes by, more and more of our citizens proudly view those rights as what defines them as New Brunswickers. Hopefully, the outcome of these proceedings will bring home to peace officers engaged in the enforcement of provincial legislation that language rights are infrangible.[56]

Sections 33 and 34 of the *Official Languages Act* deal with health services. Subsection 33(1) states that, notwithstanding the definition of the word "institution" in section 1 of the *Act,* "health institution" refers to the network of health establishments, facilities and programmes under the jurisdiction of the Department of Health or the regional health authorities in terms of the *Regional Health Authorities Act*.[57] This definition seems to imply that it is not the

individual hospitals that have obligations under the *Act*, but rather, the *network* of these establishments.

Subsection 33(2) 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, and he or she must also consider the language of daily operations of a hospital established in accordance with section 34. Indeed, section 34 confirms the right of a hospital to operate in only one official language, provided that it complies with its obligation to serve the public in the official language of their choice.

Municipalities[58] are covered by sections 35 to 38 of the *Act*. Pursuant to section 35, a municipality whose official language minority population represents at least 20% of its total population is required to adopt and publish its by-laws in both official languages. Cities are required to adopt and publish their by-laws in both official languages, irrespective of the percentage. Section 36 further provides that these municipalities shall also offer the prescribed services and communications in both official languages.

## 7. MINORITY LANGUAGE EDUCATIONAL RIGHTS

Section 23 of the *Charter* provides as follows:

23(1) Citizens of Canada

a. whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or

b. who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province,

c. have the right to have their children receive primary and secondary school instruction in that language in that province.

(2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.

(3) The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province

a. applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and

b. includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

Section 23 was described by the Supreme Court of Canada as "a linchpin in this nation's commitment to the values of bilingualism and biculturalism".[59] This characterisation of section 23 confirms its importance in the continuing search for linguistic equality.

The section gave rise to numerous legal challenges. The Supreme Court of Canada has, to date, been called upon to rule on section 23 on at least seven occasions.[60]

Section 23 accords to parents who are members of an official language community comprising the linguistic minority in a province, the right to have their children educated in their language. In *Mahé*, the Supreme Court of Canada indicated that section 23 refers to the "notion of equality between Canada's official language groups".[61] The Supreme Court further asserted that the purpose of section 23 is clear, namely "to preserve and promote the two official languages of Canada, and their respective cultures, by ensuring that each language flourishes, as far as possible, in provinces where it is not spoken by the majority of the population".[62]

The reference to "culture" is important, because it is an undeniable fact that any guarantee of language rights, especially in the field of education, cannot be separated from concerns for the culture associated with the protected language.[63] A language is more than a simple means of communication; it forms an integral part of the identity and culture of the people who speak it.[64] In *Arsenault-Cameron,* the Supreme Court explained that "it is clearly necessary to take into account the importance of language and culture in the context of instruction as well as the importance of official language minority schools to the development of the official language community when examining the actions of the government".[65]

Accordingly, when dealing with section 23, we must always bear in mind the close link between language, culture and education. It is this link which allows us to determine the extent of the rights provided for in this section. For official language communities in a minority setting, in addition to being educational institutions, schools also "provide community centres where the promotion and preservation of minority language culture can occur; they provide needed locations where the minority community can meet and facilities which they can use to express their culture".[66]

In *Arsenault-Cameron*, the Supreme Court of Canada further noted that "the school is the single most important institution for the survival of the official language minority, which is itself a true beneficiary under s. 23".[67]

The Supreme Court of Canada also recognised the collective applicability of section 23. Indeed, if this section recognises individual rights, in terms of which each entitled parent can claim the rights in question, there is also a collective dimension to the section, since ultimately, it is the minority language community that is the true beneficiary of the rights conferred. [68] Consequently, it would be dangerous to focus only on the individual right to education, at the expense of the minority language community's linguistic and cultural rights.

The Supreme Court of Canada also referred to the remedial nature of section 23, in the sense that it seeks to remedy the defects of various education regimes in force in the Canadian provinces and territories which affect the promotion and preservation of the language and culture of the official language minority group. The remedial nature of section 23 was clearly acknowledged by the Supreme Court in *Attorney General of Quebec v. Quebec Association of Protestant School Boards*.[69]

Similarly, in *Arsenault-Cameron*, the Court stated: "A purposive interpretation of s. 23 rights is based on the true purpose of redressing past injustices and providing the official language minority with equal access to high quality education in its own language, in circumstances where community development will be enhanced".[70]

The Supreme Court of Canada has adopted an approach that perceives in section 23 a remedial provision whose ultimate purpose is to remedy the progressive erosion of official language minorities in Canada, and which also offers a remedy that allows these communities to respond to the government's delays in the implementation of those rights. The provision envisages a novel form of legal right, quite different from the type of legal rights which courts have traditionally dealt with. Both its genesis and its form attest to the unusual

nature of section 23, which endows a group with a right that places positive obligations on a government to alter or develop major institutional structures.[71]

The Supreme Court's opinion regarding the purpose of section 23 provides a revealing indication of the general framework used for its interpretation. Its remedial character allows the courts to adopt a creative approach – an approach whose main purpose is the preservation and development of official language communities.

Since it has an explicit purpose, section 23 specifically defines the categories of persons on whom it confers its rights. Thus, the right to have their children educated in the language of the minority of a province is accorded to Canadian citizens:

1. whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside;
2. who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province; or
3. whose child has received or is receiving primary or secondary school instruction in English or French in Canada.[72]

The right of minority language parents to have their children educated, at primary and secondary school level, in the language of the English or French linguistic minority population of a province applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them of minority language instruction. This right also includes, where the number of these children warrants it, the right to receive that instruction in minority language educational facilities provided out of public funds.

In *Mahé,* the Supreme Court of Canada concluded that the right to minority language instruction and the right to receive that instruction in minority language educational facilities comprise the two poles of a range of rights pertaining to educational services that could be offered to students of the minority group.[73] By adopting the sliding-scale approach, the Supreme Court rejected the idea that paragraphs 23(3)(a) and (b) create two separate rights that cannot be invoked unless a required number of students are present. The Court concluded that the sliding-scale approach is more logical and more consistent with the intent of section 23.[74]

Therefore, the level of services that will be offered on the basis of section 23 will depend on the number of students. For that reason, it is important that a method for calculating this number should be established. In *Reference re: Public Schools Act (Man.),* the Supreme Court set this number as follows: "'what the numbers warrant' is the number of persons who can eventually be expected to take advantage of a given programme or facility".[75] This would entail a number ranging approximately between the known demand and the total number of persons who could potentially take advantage of the service. The rule of "eventual enrolment" adopted in this case by the Court is different from the rule of "actual enrolment", which is concerned with the current number of enrolments. To determine the "eventual enrolment", it is important to examine not only the number of students who have actually enrolled at the school, but also the demographic data, in order to produce a projection which will determine the number of children who could potentially take advantage of the instruction offered in the minority language.

The Supreme Court states that, once the actual number of students has been established, two factors may have an impact on the level of services to be offered:

a. the pedagogical services which are appropriate for the number of students involved, and

b. the cost of the contemplated services.[76]

The concern of the Court with regard to educational services is related to the fact that the effectiveness of some programmes and some institutions could be greatly reduced as a result of a lack of students, and this could have an adverse effect on the welfare of the students benefiting from the service. As regards the cost of these services, the Court pointed out that "it is financially impractical to accord to every group of minority language students, no matter how small, the same services which a large group of s. 23 students are accorded".[77] However, the Court also indicated that pedagogical considerations would most often be the decisive factor: "the remedial nature of s. 23 suggests that pedagogical considerations will have more weight than financial requirements in determining whether numbers warrant".[78] The Court also noted that the appropriate service level might differ, depending on whether the services are offered in an urban or a rural region.

In *Arsenault-Cameron*, the Supreme Court explained that the requirement that the numbers should warrant the service involves the consideration of the two factors enunciated in *Mahé*, but added, with regard to the first factor, that "it is important to consider the value of linguistic minority education as part of the determination of the services appropriate for the number of

students". In view thereof, the Court stated that the "pedagogical requirements established to address the needs of the majority language students cannot be used to trump cultural and linguistic concerns appropriate for the minority language students".[79]

Amongst the institutional requirements arising from section 23, consideration must be given to the important role played by the right-holders or their representatives in the management and control of the educational services in the language of the minority. In considering this matter, the Supreme Court in *Mahé* referred both to the wording of section 23 and to its underlying purpose. The Supreme Court stated that such management and control by right-holders or their representatives is vital, because a variety of management issues in education can affect linguistic and cultural concerns.[80]

In *Arsenault-Cameron*, the Supreme Court stated that section 23 is designed in part to protect the minority against the effect of decisions taken to meet the needs of the majority. The Court also acknowledged that minority language parents and their representatives are in the best position to identify the needs of their community.

But what is meant by the right of "management and control"? Subsection 23(3)(b) recognises the right to instruction in the language of the minority in "minority language educational facilities provided out of public funds". (The French version of the foregoing phrase reads: "des établissements d'enseignement *de la* minorité linguistique".) (The emphasis is mine.) The Supreme Court of Canada opined that this right necessarily includes a right of management and control. According to the Court, if the term "minority language educational facilities" is not viewed as encompassing a degree of management and control, then there would not appear to be any purpose in including it in section 23. This logical conclusion stands in opposition to the interpretation of "facilities" as a reference to physical structures only. Indeed, once the sliding-scale approach is accepted, it becomes unnecessary to focus too intently upon the word "facilities". Rather, the wording of the text of section 23 suggests that the entire term "minority language educational facilities" should be interpreted as referring to an upper level of management and control.[81]

The Supreme Court added that the English text of subsection 23(3)(b) is ambiguous: the phrase "minority language educational facilities" could mean either the facilities "of" the minority or facilities "for" the minority. The Court pointed out that the French text was clearer. The French text – which utilises the possessive, "de la" ("of the"), in "de la minorité linguistique" – suggests more clearly than the English text that the facilities belong to the minority, and hence

that a measure of management and control should devolve to the linguistic minority in respect of educational facilities.[82]

This analysis of subsection 23(3)(b) is strongly supported by a consideration of the overall purpose of the section, namely to preserve and promote the official minority's language and culture throughout Canada. It is therefore essential, in order to further this purpose, that, where the numbers warrant the provision of the relevant facilities, minority language parents should possess a measure of management and control over the educational facilities in which their children are taught. Such management and control is vital to ensure that their language and culture flourish. It is necessary, because a variety of management issues in education, e.g., curricula, hiring, expenditure, etc., can affect linguistic and cultural concerns. The Court added that it was unquestionable that the well-being and survival of the minority language and its culture could be affected in subtle but important ways by decisions relating to these issues.[83]

According to the Supreme Court, the historical context in which section 23 was enacted suggests that "minority language groups cannot always rely upon the majority to take account of all of their linguistic and cultural concerns. Such neglect is not necessarily intentional: the majority cannot be expected to understand and appreciate all of the diverse ways in which educational practices may influence the language and culture of the minority".[84]

Therefore, to comply with the object and the remedial nature of section 23, "[t]he participation of minority language parents or their representatives in the assessment of educational needs and the setting up of structures and services which best respond to them is most important".[85]

The central rule, in this regard, is that minority language education rights are not to be left to the unfettered and undirected discretion of the majority. Minority language communities must have control over those aspects of education which might have an effect upon their language and culture. As the Court of Appeal of Manitoba noted:

> To be "of the minority" ("de la minorité"), the facilities should be, as far as is reasonably possible, distinct from those in which English-language education is offered. I do not question the importance of milieu in education. In the playground and in extra-curricular activities, as well as in the classroom, French-speaking pupils should be immersed in French. The facility should be administered and operated in that language, right down to the posters on the wall.[86]

The degree of management and control will be determined by the education services warranted, on the basis of the number of children affected,[87] and by the particular situation of each province or territory.[88] However, when a minority

language commission is established to fulfil the requirements of section 23, it is the prerogative of that commission, because it represents the official minority language community, to decide what is most appropriate from a cultural and linguistic perspective. The principal role of the Minister of Education, in a section 23 setting, is to develop institutional structures and specific regulations and policies to deal with the unique blend of linguistic dynamics that has developed in the province.[89]

This control over minority language education and institutions also includes some exclusive powers vested in the minority language community's representatives and which are listed in *Mahé*. The precise degree of management and control required cannot be described in exact terms. It is not possible to provide an exhaustive list in this regard, because of the variable scale approach and the need to adapt the procedures to the particular situation of each province. However, minority language communities should at least have exclusive authority to make decisions pertaining to the provision of educational services in their language, as well as to the establishments where these services will be delivered. [90]

The province of New Brunswick, which is also governed by section 23 of the *Charter,* was the first to introduce legislation recognising linguistic duality in the education system. In 1977, five years before the adoption of the *Charter*, the province recognised the rights of parents to have their children educated in the official language of their choice. It is therefore not surprising that, for the most part, ample provision has been made in New Brunswick for the implementation of section 23, at least with regard to the language of instruction.

The *Education Act* creates two distinct educational sectors, i.e. two distinct networks of school districts that overlap and cover the whole province: one for the anglophone community and one for the francophone community.[91] In the Department of Education, parallel administrative services have been introduced, except for financial matters. The language of instruction of a school and classes is that of the district, except, of course, for the teaching of a second language.[92] The *Education Act* also provides that the educational programmes and educational services provided within a school district organised in one official language cannot be provided in the other official language for persons who already speak that other official language.[93]

With regard to enrolment in the schools of the minority language community, in addition to the three categories of eligibility described in section 23, the *Education Act* allows children of one community to be educated in the language of the other community in cases where the child has "sufficient proficiency" in

that language. However, francophone children cannot be enrolled in immersion courses offered in the English schools; but children who are sufficiently proficient in both official languages have complete freedom of choice.[191] In the case of doubt as to the language proficiency of a child, a test can be administered to assess the child's language skills.[192]

## 8. CONCLUSION

The linguistic landscape of New Brunswick, at least on a theoretical level, shows encouraging signs in respect of linguistic rights. The principle of the equality of two official languages and of official language communities should contribute to the expansion and growth of these rights. Moreover, the recognition of the fact that the protection of minorities constitutes an underlying constitutional principle[193] of the Canadian constitution should serve as a clear message that, in dealing with linguistic equality, courts and governments must take account of the impact that their decisions could have on the minority community.

But this theoretical legal recognition has not fully materialised as yet. Linguistic rights are still too easily ignored by the political and administrative authorities, leading us to conclude that although New Brunswick remains a model in respect of the recognition of legal rights on paper, this recognition largely remains symbolic in reality. Substantive equality still remains a distant – and possibly unattainable – objective.

## ENDNOTES

1. Historically forming part of a French territory known as Acadie, New Brunswick was, with Ontario, Quebec and Nova Scotia, one of the four founding provinces of Canada. Located on the Atlantic coast, its population is 33% francophone and 66% anglophone. The francophone population is strongly concentrated in the northern region of the province, which gives it a non-negligible political mass.

2 Bastarache, M. 2004. "Introduction", in *Language Rights in Canada*, edited by M. Bastarache, 26. Éditions Yvon Blais.

3 *Hunter v. Southam Inc*, [1984] 2 S.C.R. 145, at p. xix.

4 See, for example, *Jones v. New Brunswick (A.G.),* [1975] 2 S.C.R. 182; *Blaikie v. Quebec (A.G.) (No. 1),* [1979] 2 S.C.R. 1016; *Blaikie v. Quebec (A.G.) (No. 2),* [1981] 1 S.C.R. 312; *Quebec (A.G.) v. Quebec Assn. of Protestant School Boards,* [1984] 2 S.C.R. 66; and *Reference re: Manitoba Language Rights,* [1985] 1 S.C.R. 721. The "living-tree" metaphor was ignored (or "cut down") in three 1986 cases – *Bilodeau v. Manitoba (A.G.),* [1986] 1 S.C.R 449; *MacDonald v. Montreal (City),* [1986] 1 S.C.R. 460; and *Société des Acadiens du Nouveau-Brunswick v. Association of Parents for Fairness in Education,* [1986] 1 S.C.R 549 – and was later revived in *Reference re: Secession of Quebec,* [1998] 2 S.C.R. 217; *R. V. Beaulac,* [1999] 1 S.C.R. 768; *Arsenault-Cameron c. Prince Edward Island,* [2000] 1 S.C.R. 3 and *Doucet-Boudreau v. Nova Scotia,* [2003] 3 S.C.R. 3.

5 R.S.C. 1985, App. II, No. 5. Section 133 provides: "Either the English or the French Language may be used by any Person in the Debates of the Houses of the Parliament of Canada and of the Houses of the Legislature of Quebec; and both those Languages shall be used in the respective Records and Journals of those Houses; and either of those Languages may be used by any Person or in any Pleading or Process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec.

The Acts of the Parliament of Canada and of the Legislature of Quebec shall be printed and published in both those Languages."

6 Beaudoin, G.A. 1979. *Essais sur la constitution*. Ottawa : Éditions de l'Université d'Ottawa, 237.

7 See, for example, *Jones v. New Brunswick (A.G.)*, supra; *Blaikie v. Québec (A.G.) (No. 1)*, supra; *Manitoba (A.G.) v. Forest*, [1979] 2 R.C.S. 1032; *Blaikie v. Québec (A.G.) (No. 2)*, supra; *Reference re Manitoba Language Rights*, [1985] 1 R.C.S. 721.

8 *Reference re Manitoba Language Rights (1985)*, *supra*, at par. 46.

9 *Hunter c. Southam Inc* [1984] 2 S.C.R. 145, at p. 155. See also *R. c. Big M Drug Mart Ltd* [1985] 1 S.C.R. 295, at par. 11.

10 *MacDonald v. Montréal (Ville de*), *supra*.

11 *Bilodeau* v. *Manitoba (A.G.)*, *supra*.

12 *Société des Acadiens du Nouveau-Brunswick v. Association of Parents for Fairness in Education*, *supra*.

13 *MacDonald*, *supra*, at paras.103-104. See also *Société des Acadiens*, *supra*, at paras. 65 and 68.

14 See *Reference re: Bill 30, an Act to amend the Education Act (Ontario)* [1987] 1 S.C.R. 1148, at p. 1176; *Ford v. Québec (A.G.)*, [1988] 2 S.C.R. 712, at pp. 748-49; *Mahe v. Alberta*, [1990] 1 S.C.R. 342, at p. 365; *Reference re: Manitoba Language Rights*, [1992] 1 S.C.R. 212, at p. 222; and *Reference re: Public Schools Act (Man.), s. 79(3), (4 )and (7)*, [1993] 1 S.C.R. 839, at pages 850-51.

15 [1998] 2 S.C.R. 217.

16 [1999] 1 S.C.R. 768.

17 [2000] 1 S.C.R. 3.

18 *Beaulac*, *supra*, at par. 24.

19 *Beaulac*, *supra*, at par. 25.

20 *Beaulac*, *supra*, at par. 25.

21 *Beaulac*, *supra*, at par. 22.

22 339 U.S. 162 (1950), at p. 184.

23 *DesRochers v. Canada*, [2009] 1 S.C.R. 194.

24 *Beaulac*, *supra*, at par. 24.

25 A similar provision applies to the federal government and to federal institutions (see subsection 16(1)).

26 Vaz, N. and P. Foucher, "The right to receive public services in either official language", in *Language Rights in Canada*, *supra*, p. 318; Weber, C.N. 2008. "The Promise of Canada's Official Language Declaration", in *Official Languages of Canada*, edited by J. E. Magnet, 131-170. LexisNexis.

27 Magnet, J. 1982. "The Charter's Official Languages Provision: the Implementation of Entrenched Bilingualism". *Sup. Ct. L. Rev.* 163: 182.

28 S.N.B. 1981, ch. O-1.1. In 1981, the provincial government adopted this legislation, which formally recognises the existence and equality of the two official linguistic communities of the province. The Act provides as follows:

WHEREAS the Legislative Assembly of New Brunswick acknowledges the existence of two official linguistic communities within New Brunswick whose values and heritages emanate from and are expressed through the two official languages of New Brunswick; and

WHEREAS the Legislative Assembly of New Brunswick desires to recognize the equality of these official linguistic communities; and

WHEREAS the Legislative Assembly of New Brunswick seeks to enhance the capacity of each official linguistic community to enjoy and safeguard its heritage for succeeding generations; and

WHEREAS the Legislative Assembly of New Brunswick desires to affirm and protect in its laws the equality of status and the equal rights and privileges of the official linguistic communities; and

WHEREAS the Legislative Assembly of New Brunswick desires to enshrine in its laws a declaration of principles relating to this equality of status and these equal rights and privileges which shall provide a framework for action on the part of public institutions and an example to private institutions;

THEREFORE, Her Majesty, by and with the advice and consent of the Legislative Assembly of New Brunswick, enacts as follows:

1. Acknowledging the unique character of New Brunswick, the English linguistic community and the French linguistic community are officially recognized within the context of one province for all purposes to which the authority of the Legislature of New Brunswick extends, and the equality of status and the equal rights and privileges of these two communities are affirmed.

2. The Government of New Brunswick shall ensure protection of the equality of status and the equal rights and privileges of the official linguistic communities and in particular their right to distinct institutions within which cultural, educational and social activities may be carried on.

3. The Government of New Brunswick shall, in its proposed laws, in the allocation of public resources and in its policies and programs, take positive actions to promote the cultural, economic, educational and social development of the official linguistic communities.

29 (2001), 242N.B.R. (2d) 259 (C.A.).

30 *Charlebois, supra*, par. 80.

31 Green, L. 1987. "Are Language Rights Fundamental?" 25 *Osgoode Hall L.J.*, 639: 663.

32 Leckey, R. "Bilingualism and Legislation" in *Language Rights in Canada*, 2nd ed., *supra*, 48.

33 (1997), 77 D.L.R. (3d) 445, p. 454 (C.A. Man.). This decision dealt with the interpretation of section 23 of the *Manitoba Act of 1870*.

34 *MacDonald v. City of Montréal*, *supra*, at par. 67.

35 See: *Blaikie v. Québec (A.G.) (No. 1), supra*, 1016; *Blaikie v. Québec (A.G.) (No. 2)*, *supra*; *References re: Manitoba Language Rights*, *supra*; *References re Manitoba Language Rights*, [1992] 1 S.C.R. 212.

36 *Société des Acadiens du Nouveau-Brunswick Inc*, *supra*, at p. 573.

37 *Blaikie No. 1*, *supra*, at p. 1027.

38 *Charlebois*, *supra*, par. 90.

39 See *Blaikie v. Québec (A.G.) (No. 2)*, *supra*; *References re: Manitoba Language Rights*, *supra*; *References re: Manitoba Language Rights*, *supra*. For a decision that section 133 does not apply to municipalities in the province of Québec, see *Baie d'Urfé v. Québec (P.G.)*, [2001]

R.J.Q. 1589 (Sup. Ct.), add'd [2001] R.J.Q. 2520 (C.A.), leave to appeal refused, [2001] 3 S.C.R. xi.

40 *Charlebois*, *supra*, par. 11.

41 *Charlebois*, *supra*, par. 8.

42 Bastarache, M. 1991. "Language Rights in the Supreme Court of Canada: the Perspective of Chief Justice Dickson" (1991), 20 *Man. L. J.* 392, at p. 400.

43 *Société des acadiens*, *supra*, at p. 575.

44 [1986] 1S.C.R. 549, at p. 577.

45 The interpretation of this provision has given rise to some debate. Some argue (rightly, in our view) that this section requires that all decisions or final orders of a court which are of interest or importance in relation to a point of law, or in which proceedings were conducted, in whole or in part, in both official languages simultaneously, should be published in both official languages. But the Provincial Department of Justice, which is responsible for the translation of these decisions, has taken a narrower view. It considers that only those decisions which "could be useful" to lawyers should be translated. Negotiations on what this obligation really means have been going on for a number of years.

46 N. Vaz and P. Foucher, "The Right to Receive Public Services in Either Official Language", in *Language Rights in Canada*, *supra*, p. 264.

47 See *Société des Acadiens du Nouveau-Brunswick*, *supra*, at p. 575, where the Supreme Court of Canada stated that "the right to communicate [found in section 20] in either language postulates the right to be heard or understood in either language". However, as we have already seen, section 19 provides only the right "to use" one or other of the official languages, which, according to the Supreme Court, does not imply the right to be understood.

48 (1989), 101 N.B.R. (2d) 1 (Q.B.), rev'd on the interpretation of s.24(1) of the *Charter*, at (1990), 109 N.B.R. (2d) 54 (C.A.), leave to appeal refused, [1991] 3 R.C.S. viii.

49 *R. v. Gautreau*, *supra*, at par. 46.

50 See *R. v. Robinson* (1992), 127N.B.R. (2d) 271 (Q.B.); *R. v. Bastarache* (1992), 128 N.B.R. (2d) 217 (Q.B.); *R. v. Haché* (1993), 139 N.B.R. (2d) 81 (C.A.). In this last case, Rice, J.A., concluded that the police could not be treated as a "government institution" within the meaning of section 20 of the *Charter*. In dissent, Angers, J.A., argued, for his part, that police services fell within the scope of subsection 20(2) of the *Charter*. In citing his reasons, although he ultimately subscribed to Rice's decision, Ayles, J.A., agreed with Angers on the point that police services were government services within the meaning of subsection 20(2) of the *Charter*. The conclusions of Angers and Ayles therefore comprise the majority on this specific point.

51 [2008] 1 S.C.R. 383.

52 Par. 20(1) provides:

20(1) Any member of the public in Canada has the right to communicate with, and to receive available services from, any head or central office of an institution of the Parliament or government of Canada in English or French, and has the same right with respect to any other office of any such institution where

(a) there is a significant demand for communications with and services from that office in such language; or

(b) due to the nature of the office, it is reasonable that communications with and services from that office be available in both English and French.

53 2007 NBCP 30.

54 Alternatively, see *Doucet v. Canada*, 2004 FC 1444, where the Federal Court, in a similar situation in Nova Scotia, a neighbouring province of New Brunswick, pertaining to the interpretation of Canada's *Official Languages Act,* stated, at paragraph. 79: "It seems clear to the Court as well that equal access to services in both official languages means equal treatment. In my opinion, the procedure established by the RCMP […] is totally inadequate. Motorists should not have to go out of their way or use a telephone or radio when they want to address a member of the RCMP in French. Such a service, which leaves much to be desired, absolutely fails to meet the objectives stated in section 2 of the OLA and is contrary to section 16 of the Charter, which recognizes the equality of both official languages."

55 2007 NBCA 39.

56 *Ibid*., at par. 35.

57 S.N.B. 2002, ch. R - 5.05.

58 According to the *Municipalities Act*, S.N.B. 1973, c. M-22, a "municipality" means a city, town or village. A "village" has fewer than 1,500 inhabitants; a "town" between 1 500 and 10,000 inhabitants and a "city" more than 10,000. (See sections 15 and 16 of the *Municipalities Act.*)

59 *Mahe c. Alberta*, [1990] 1 S.C.R. 342, at par. 2.

60 *A.G. (Québec) v. Quebec Protestant School Board*, [1984] 2 S.C.R. 67; *Mahé v. Alberta*, *supra*; *Reference re: Public Schools Act (Man.), s. 79(3), (4) and (7),* [1993] 1S.C.R. 839; *Arsenault-Cameron v. Prince Edward Island*, [2000] 1 S.C.R. 3; *Doucet-Boudreau v. Attorney General of Nova Scotia*, [2003] 3 S.C.R. 3; *Solsky (Tutor of) v. Quebec (Attorney General)*, [2005] 1 S.C.R. 201; and *Nguyen v. Quebec (Education, Recreation and Sports)*, [2009] 3 S.C.R. 208.

61 *Mahé*, *supra*, par. 45.

62 *Mahé*, *supra*, par. 31.

63 *Mahé*, *supra*, par. 32.

64 *Mahé*, *supra*, par. 32.

65 *Arsenault-Cameron, supra*, par. 27.

66 *Mahé*, *supra*, par. 33.

67 *Arsenault-Cameron, supra*, par. 29.

68 *Doucet-Boudreau*, *supra*, par. 28.

69 *Quebec Association of Protestant School Boards*, *supra*, at p. 79.

70 *Arsenault-Cameron*, *supra*, at par. 27.

71 *Mahé*, *supra*, at p. 365.

72 More specifically, section 23 applies to the anglophone minority in the Province of Quebec and the francophone minorities in the nine other provinces and three territories.

73 *Mahé*, *supra*, at p. 366.

74 *Ibid.,* at pp. 366 and 367.

75 *Reference re Public Schools Act (Man.), supra*, at p. 850.

76 *Mahé, supra*, at p. 384.

77 *Mahé, supra*, at p. 385.

78 *Ibid.*

79 *Arsenault-Cameron*, *supra*, at par. 38.

80 *Mahé, supra*, at p. 372.

81 *Mahé, supra*, at p. 370.

82 *Mahé, supra*, at p. 370.

83 *Mahé, supra*, at p. 372

84 *Mahé, supra*, at p. 372.

85 *Reference re: Public Schools Act (Man.), supra*, at p. 862.

86 *Reference re: Public Schools Act s. 79 (3), (4) and (7)* (1990), 64 Man. R. (2d) 1 (C.A.), at p. 112.

87 *Reference re: Public Schools Act (Man.), supra*, at p. 858.

88 *Arsenault-Cameron*, *supra*, at par. 46.

89 *Arsenault-Cameron*, *supra*, at par. 43.

90 In *Mahé*, at page 377, the Supreme Court also indicated that the minority language representatives should have exclusive authority to make decisions relating to the minority language instruction and facilities, including:

expenditure of funds provided for such instruction and facilities;

appointment and direction of those responsible for the administration of such instruction and facilities;

establishment of programs of instruction;

recruitment and assignment of teachers and other personnel; and

making of agreements for education and services for minority language pupils.

91 *Education Act*, S.N.B. 1997, ch. E-1.12, subsec. 4(1) and 4(4).

92 *Education Act*, S.N.B. 1997, ch. E-1.12, subsec. 4(2), 4(3) and 4(6).

93 *Education Act*, S.N.B. 1997, ch. E-1.12, subsec. 4(5).

94 *Education Act*, S.N.B. 1997, ch. E-1.12, subsec. 5(1).

95 *Education Act*, S.N.B. 1997, ch. E-1.12, subsec. 5(2).

96 *Reference re: Secession of Quebec*, [1998] 2 S.C.R. 217.

# A LANGUAGE ACT FOR SOUTH AFRICA? THE ROLE OF SOCIOLINGUISTIC PRINCIPLES IN THE ANALYSIS OF LANGUAGE LEGISLATION

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**Abstract**

Cornelus Lourens's recent appeal to the Northern Gauteng High Court has once again focused the spotlight on the necessity or otherwise of a national language act, and has also raised questions regarding the appropriateness of the contentious South African Languages Bill (SALB) as the ultimate language act. Could a national language act prove to be a successful legal intervention in the implementation of a language policy, and if so, under what circumstances would such success be achieved? In this article it will be argued that a typology of sociolinguistic principles could be used in language legislation in order to analyse a language act in terms of its contents, with a view to determining whether it would be likely to be successful or not. Such a typology will then be developed in this article on the basis of various sets of language legislation principles, and will be tested on the basis of three representative national language acts, namely those of Wales, Canada and Estonia. Thereafter, a comprehensive review of the development of the SALB will be provided, as well as a critical content analysis of this languages bill, which was originally meant to be promulgated in 2003 as the South African Languages Act. In the analysis it is pointed out that in certain respects, the SALB does, in fact, fulfil the requirements of a national language act, but that it also contains serious deficiencies which should be rectified. It will also be argued that a case can be made for the resubmission of the SALB in an amended form in order to enable the South African government to fulfil its legal mandate concerning the regulation and monitoring of its use of the official languages.

## 1 INTRODUCTION

A national language act for South Africa is a topical issue, as a result of the summons served by Cornelus ("Cerneels") Lourens, an attorney from Brits, on 14 August 2009, in an endeavour to enforce the promulgation of the South

African Languages Bill – SALB (DAC 2003b; Lourens vs The President of the Republic of South Africa and others, 2009). The intended South African Languages Act would thereby become the South African version of a national language act.[1]

Lourens's action implicitly proceeded from the viewpoint that a national language act could play a decisive role in South Africa in the creation of a new official language dispensation that would move away from the statutory bilingualism of the past, while also curbing the growing dominance of English.

Such an expectation is not necessarily unrealistic, as can be seen in the case of other countries where a high premium is placed on the role of a national language act as a central legal mechanism in the remodelling of an undesirable language dispensation. See Hogan-Brun, Ozolins, Ramonienė and Rannut (2008, 2009) for a pertinent, recent summary, as well as Hogan-Brun (2007) and Hogan-Brun (2008) for the specific implications for education in this regard. (See also Grin 1991: 193; Schmid, Zepa and Snipe 2004: 232; Larrivée 2003; Foucher 2007: 57; Turi 2009: 128; Roller 2002: 278–83; Dunbar 2005; Huws 2006: 159; Korhecz 2008: 475; Schlyter 1998; Pavlenko 2008a; Garibova and Asgavora 2009.)

Although criticism of the language acts and other legislation of the post-Soviet states, favouring the national language at all costs (thus effectively leading to the marginalisation of those who were formerly in power) exists (see Ozolin 2003), the mentioned scholars are generally in agreement that a relative degree of success is achieved with the promulgation of a national language act in these countries.

Hogan-Brun *et al*. 2008:611) largely base their analysis of language acts on Maurais's (1991, 1997) sociolinguistic principles of language legislation. His initial set of principles focuses primarily on the content of language legislation, while the second set of principles elaborates on this content, but also includes some contextual aspects.

Taking Maurais's sociolinguistic principles of language legislation as a point of departure, the aim of this paper is to carry out a content analysis of the *SALB* as an envisaged national language act for South Africa. An analysis conducted on this basis could answer questions relating to the potential value of a South African language act as a central legal mechanism for the fulfilment of the constitutional mandate of both the national government and the provincial governments, in other words, to "regulate and monitor their use of official languages through legislative and other measures" (Section 6(4) of the South African Constitution, RSA 1996a).

## 2. NATIONAL LANGUAGE ACTS AND LANGUAGE LEGISLATION

### 2.1 Definition

A national language act is a very specific form of language legislation. According to Turi's (1993: 5–6, 8) original definition, language legislation is generally aimed at legally determining and establishing the status and use of designated languages by means of legal obligations and rights; in other words, "legal regulations concerning language". In many cases, such regulations occur in the form of language provisions contained in legislation which does not necessarily deal primarily with the status and use of designated languages – for example, in a country's constitution, or in legislation concerning education, the administration of justice, the media, etc. However, in cases where an entire act is devoted to regulations concerning the status and use of designated languages, such an act can be typified as a national language act.

### 2.2 Importance of language acts and language legislation

According to Dunbar (in Williams 2008: 174), if implemented and managed effectively, a language act can bring about changes in the linguistic behaviour of the organisations to which it is applicable and in the linguistic behaviour of the minority-language speakers themselves; enable speakers of the minority language to take action when shortcomings arise in respect of implementation; and create a normative environment which makes it possible for the behaviour of responsible institutions to be exposed to public censure.

Shohamy (2006: 59-60) attributes the importance of language legislation to the sanctions and penalisations contained in such legislation, which can ultimately ensure that policy is carried out, although the typical, stringently prescriptive nature of a language act often constrains people to behave in a certain way, whereby civil liberties are obviously restricted. A language act does not necessarily imply that people will slavishly comply with all provisions. Nevertheless, there are concrete cases where a language act has indeed brought about a turning point in the language dispensation.

### 2.3 Successes

Amongst other factors, the relative success of some multilingual areas has been ascribed to what Hogan-Brun *et al*. (2009: 75) call the legislative apparatus, including primary as well as secondary language legislation (Du Plessis 2003). Primary language legislation includes a language act and additional language legislation (specific acts on citizenship and education, containing language

provisions) (Hogan-Brun *et al*. (2009: 75). Secondary language legislation, or language legislation created by the executive pillar of government, includes regulations, ordinances and strategic documents that regulate the status and use of the designated languages in specific domains and within society in general. The language success of some states and regions can therefore not be ascribed exclusively to a national language act. The coherence of such an act with consequential legislation is of cardinal importance, but the national language act remains central. The value of the national language act as a separate means of intervention should thus not simply be disregarded. Criticism from Europe regarding the language legislation of the former Soviet states is mostly aimed, precisely, at their national language acts. This merely serves as further confirmation of the centrality of these acts within the language dispensation. The national language act thus lays down the foundation upon which further language legislation can be built up.

## 2.4 Principles

Interest in comparative language legislation (Turi 1993: 6) is on the increase as the phenomenon of legal intervention as a language-policy mechanism (Shohamy 2006: 59) continues to spread throughout the world. Comparative studies approach language legislation from different disciplinary angles, including a sociolinguistic (Maurais 1991), a legal (Turi 1993) and a linguistic perspective (Kibbee 1998). We shall focus on the sociolinguistic perspective.

Maurais's (1991) sociolinguistic approach to comparative language legislation entails the identification of principles that underlie different language acts, thereby facilitating a comparative study. He points out that a superficial, quantitatively-oriented comparison of different language acts can be misleading. However, if one approaches the comparison from Maurais's sociolinguistic perspective, and identifies the regulated fields of language use, it becomes clear that the concerned language acts are similar, to a large extent, in terms of their contents. In cases where such a comparison does, in fact, reveal differences, these differences are usually more related to the degree of completeness with which the respective language acts aim to regulate a particular field of language use. Such differences are highly significant, and provide an indication of the unique language-planning priorities of the concerned region, but probably also reflect specific language-ideological notions.

Maurais (1991) ultimately identifies five sociolinguistic principles that underlie language legislation, namely:

- The proclamation of an official language

- The issue of the language of cohesion
- The language of communication with customers and citizens
- The language of education
- Linguistic aspects of immigration.

**Table 1:** Typology of principles of language legislation

<table>
<tr><th colspan="2">Structural principles</th><th colspan="2">Contextual principles</th></tr>
<tr><td>Proclamation</td><td rowspan="4">FUNDAMENTAL</td><td rowspan="5">PLANNING</td><td rowspan="2">Need for sociolinguistic description beforehand</td></tr>
<tr><td>Linking language issue/Official bilingualism</td></tr>
<tr><td>Object of language act</td><td>Need for state intervention</td></tr>
<tr><td>Terminological issues</td><td>Domains of non-intervention</td></tr>
<tr><td>Communication with citizenry</td><td rowspan="3">OFFICIAL LANGUAGE USE</td><td>Role of time-factor in language planning</td></tr>
<tr><td>Language of education</td><td rowspan="4">IMPLEMENTATION</td><td rowspan="2">Need for visible change</td></tr>
<tr><td>Linguistic aspects of immigration</td></tr>
<tr><td>Types</td><td rowspan="3">INSTRUMENTS</td><td rowspan="3">Need for building consensus</td></tr>
<tr><td>Enforceability</td></tr>
<tr><td>Delimitation of language rights</td></tr>
</table>

The last three principles have a bearing on the regulation of language use in specific official domains, with governmental communication, education and citizenship at the centre. The first two principles can be classified as underlying or fundamental principles in language legislation. The former group of domain-oriented principles therefore seem to be more technical in nature, while the latter fundamental principles are actually more ideological. These initial five principles are largely relevant to the content or structuring of language legislation.

In Maurais (1997), the author elaborates on his original views, formulating further sociolinguistic principles pertaining to legal interventions in a language dispensation. These principles differ conceptually from the previous ones, since they refer more particularly to the context of language legislation, namely:

- *The necessity for prior sociolinguistic description*.
- *The necessity for state intervention*.
- *The need for visible change*.
- *Domains of non-intervention*.
- *Special status of bilingualism*.
- *The need to build consensus*.
- *The role of the time factor in language planning*.

We shall now develop a sociolinguistic typology of principles of language legislation, which can serve as a basis for an analysis of language legislation, whether comparative or otherwise (Table 1).

## 3 THE SOUTH AFRICAN LANGUAGES BILL

Comparatively little material that focuses on the SALB has as yet appeared in academic publications. Although some authors have mentioned the bill in publications featuring an overview of language-policy development in South Africa, no in-depth analysis has been undertaken to date.

Apart from brief references to the SALB, some authors have provided short overviews, as well as concise comments pertaining to the bill. See Desai (2001: 326–8), Beukes's (2004), Roodt (2006: 54), Alexander (2005: 13), Mwaniki (2004: 311) and Kamper (2006: 85). Although the above authors discuss aspects of the bill, and although the non-promulgation of the SALB comprises an important focal point of their discussions, no in-depth analysis of

the bill in its entirety has yet been presented. Such an analysis will be attempted in the following paragraphs.

### 3.1 Background

The *SALB* is the end result of a language-policy process that originated with the Language Plan Task Group (LANGTAG) during the early years of the post-apartheid state. Following a comprehensive process of public consultation since then the *South African Languages Bill, 2003* was released for public scrutiny on 30 May 2003, when it was published in the *Government Gazette* for comments by the public (DAC 2003b).

However, little came of follow-up work done by DAC since the bill's release. From documentation submitted by Lourens for the court case of 8 March 2010, it is clear that the Cabinet ultimately took a final decision to withdraw the SALB completely (Lourens vs The President of the Republic of South Africa and others 2010).

This decision confirms that a change of outlook occurred, and that the Department now regarded "non-legislative" alternatives to SALB as a fulfilment of the Constitution.

This shift within government circles took place unobserved, making it impossible to obtain an official standpoint in this regard in public documents. It would thus appear that the abandonment of the bill coincided with the appointment of an ANC minister, Pallo Jordan, in the DAC in 2004 – also the year during which this new department was formed (DAC 2006). Up until this point, the concerned portfolio had always been allocated to a senior member of an opposition party.

### 3.2 Contents

The discussion that follows is based on the version of the SALB published on 30 May 2003 in the *Government Gazette* for comments (cf. DAC 2003b).

In terms of the principles of language legislation above, Sections 2–4 and 9 fall under fundamental principles; Sections 5 and 8 fall under principles of official language use; while Sections 6 and 7 and 10–12 resort under principles pertaining to instruments. The ensuing discussion will adhere to this classification. Cross-references allude to the 1996 Constitution (RSA 1996a). All other references pertain to the SALB.

### 3.3 Fundamental principles

The SALB contains two cardinal sets of fundamental principles: objectives of the legislation, and a number of guiding principles.

The main objective of the bill (Section 2(d)) is to put a regulatory framework in place to facilitate the effective implementation of the constitutional obligations relating to multilingualism. Two further objectives are linked to this one: Section 2(a), to give effect to the "letter and spirit" of Section 6 of the Constitution, and Section 2(b), to promote the equal use of the official languages. Together, these objectives are largely related to the overall pursuit of official multilingualism, albeit that the concept *official multilingualism* remains vague and undefined in the bill. A third objective stands somewhat apart from these, since it is aimed at enabling South Africans to use the official language(s) of their choice, "as a matter of right" (Section 2(c)). The concerned objective is probably based on the assumption that a multilingual dispensation entails implicit rights relating to language choice.

A number of guiding principles are also spelt out, on the clear understanding that they mostly have a bearing on government institutions. These guiding principles link up with the overall objective of promoting official multilingualism and create a framework for dealing with language, within which the aspiration for official multilingualism can be realised.

The guidelines contain language-promotion principles and language-management principles. The former include the promotion of linguistic diversity and language tolerance (Section 3(1)(a)), the use of the indigenous languages (Section 3(1)(b)) and the acquisition of South African languages. The latter include mechanisms to ensure participatory multilingualism (Section 3(1)(e)), inter-governmental cooperation (Section 3(1)(f)) and the promotion of solidarity-oriented language rights (Section 3(1)(c)).

The issue of application and interpretation is the theme of a third set of underlying principles contained in the SALB. Section 4 explicitly states that the envisaged language act is absolutely binding on the state and other public institutions, and that any interpretation thereof must be made in terms of the Constitution and the SALB's own objectives (Section 2). The concerned section further stipulates that the envisaged language act shall be given preference in cases where inconsistent language provisions occur in other legislation. These provisions in the SALB are aimed at ensuring that the envisaged language act will indeed become a national language act.

A final fundamental principle relates to cooperation. Section 9 contains a few provisions in this regard. The regulations formulated therein are aimed specifically

at eliminating the duplication of functions, with particular reference to the possible duplication of the activities of Pansalb. In accordance with Section 8 of its act, Pansalb also fulfils a monitoring function with a view to the recognition of language rights and the carrying out of language policy (cf. Pan SALB 2001).

### 3.4 Principles relating to the use of official languages

Section 5 of the SALB comprises the core of the envisaged language act. In this section, more specific details addressing the question as to what is meant by *official multilingualism* are provided and more definite provisions regarding the use of official languages are formulated.

Two specific provisions are prominent in this regard, one pertaining to official language domains and the other to the rotation of official languages. As far as the official language domains are concerned, the SALB identifies the legislative, executive and judicial domains, at both national and provincial level, as targeted domains for the implementation of the envisaged – and somewhat controversial – rotation system (Section 5(5)). The intention is that at least six official languages should be used in written documentation within these domains, while the concerned minister would even be vested with the authority to classify the appropriate documentation (Section 5(6)). As far as the rotation system is concerned, the SALB stipulates that at least six official languages should always be used for written purposes within these domains. Four of the six designated languages should always be present, while the other two should be selected, on a rotational basis, from two language groups,[2] as indicated in Section 5(3).

Section 5(2) of the SALB stipulates that this semi-rotation system should only be used in cases where it is not feasible to provide government documents in all eleven official languages. However, both regulations are further moderated by the fact that, in any case, a government institution can escape these obligations by following a motivated alternative policy "in the interest of effective governance or communication".

The development of the indigenous languages of South Africa, as well as South African Sign Language(s), comprises a final principle pertaining to the use of official languages. Section 8 of the bill contains a directive to the minister to put measures in place in accordance therewith. Specific directives include the identification of areas of priority, supporting existing structures that are involved in development, starting up new structures and programmes for the concerned languages, as well as providing support to cross-border development projects.

### 3.5 Principles pertaining to instruments

Apart from the proposed introduction of the semi-rotation system for the official languages, as discussed above, references to an important legal instrument in the form of Language Units comprise a second outstanding characteristic of the SALB. Section 6 of the bill stipulates that such units should be established within five years, while Section 7 contains provisions regarding their powers and functions. The intention is that Language Units should be established in all government departments and in the provinces (in accordance with their own language legislation).

Considerable powers are allocated to the Language Units. Firstly, they are accorded an implementation function, realised through the facilitation and monitoring of the implementation of regulations (Section 7(a)) and the establishment of "effective and positive" measures for the implementation of national language policy (Section 7(b)), particularly with regard to internal and external communication (written and oral). Secondly, an evaluation function is accorded to these Units. They are tasked to conduct language surveys and audits in order to assess the suitability of existing policy and practice, with a view to corrective recommendations. Thirdly, they have a dissemination function. The Language Units are expected to inform the public about the contents and implementation of language policy within the state. Fourthly, they are generally expected to carry out any other actions that may be necessary in order to fulfil their mandate.

In addition to the Language Units, a number of remedies comprise a second important legislative instrument put forward by the SALB. Section 11 of the bill contains a set of six provisions in this regard. Any person or institution may approach the court in order to obtain an appropriate remedy in cases involving the (alleged) violation of a language right or language policy or language practice (*sic*). Such violation must have a bearing on non-compliance with obligations contained in the concerned bill and/or the *NLPF*, and/or on cases of non-compliance with Pansalb's recommendations, decisions and findings.

Regulations, the normal and logical outcome of any legislation, comprise the third instrument that is specifically mentioned in the SALB. Although the reference to this instrument in the concerned bill could be regarded as somewhat superfluous, the inclusion thereof is meaningful. Section 12 of the bill contains provisions in this regard. Firstly, as in the case of other legislation, the concerned minister may promulgate any regulations in terms of the envisaged legislation. Secondly, the minister may also promulgate, as a very specific regulation, a language code of conduct for government officials. Thirdly, the

minister may institute any other mechanisms, by means of regulations, in order to ensure the effective enforcement of the bill. The minister is only restricted in the promulgation of regulations by virtue of the fact that all the regulations, and specifically those with financial implications, must be devised in consultation with the appropriate role-players.

Reporting is a fourth envisaged legislative instrument. Section 10 of the bill stipulates that reports should be submitted to Parliament by departmental Language Units and to the provincial legislatures and the National Council of Provinces by provincial Language Units. Alternatively, such reports may be submitted to Pansalb. The crux of the concerned provisions lies in the obligation of all institutions on which the reports have a bearing to take account of the contents thereof when further implementation measures are to be introduced (Section 10(3)).

Apart from the fact that the regulations pertaining to reporting ensure proper public disclosure and transparency, the instrument is further reinforced by specific requirements relating to reporting. Reports must be submitted concerning the fulfilment of the obligations imposed by the concerned legislation, also regarding the nature of language-related complaints by the public, problems experienced and corrective action taken in respect of the implementation of the concerned legislation. Furthermore, recommendations are to be made, where necessary, and any other relevant matters regarding the promotion of (official) multilingualism must be addressed.

## 4 DISCUSSION

The SALB thus contains several of the main elements of a language act, as encompassed in the sociolinguistic principles of language legislation that are considered in this paper. Admittedly, some of the core fundamental principles are somewhat vaguely worded, and a clear and specified commitment to official multilingualism is lacking. Nevertheless, multilingualism is generally upheld as a national ideal and ideals in respect of the acquisition of indigenous languages are put forward.

A striking deficiency is that the nature of the official language dispensation is not clearly defined. A movement away from statutory bilingualism – the predominant principle applied under the previous dispensation – is apparently taking place (Du Plessis 2009), along with a shift towards a new official language dispensation in which the formerly marginalised official languages become the national languages of priority. Any definition of official multilingualism – a concept that is currently absent from the bill – should thus include a third

language from this category of languages, in addition to English and Afrikaans (Du Plessis 2004). "Official trilingualism" would be a more concrete description of the situation regarding official languages.

A further drawback in the stated objectives is the absence of a direct link between language legislation and the monitoring and regulation of the state's use of the official languages, as required by Section 6(4) of the Constitution. Instead, the regulation of multilingualism is identified as an objective – although this objective is not explicitly mentioned in the Constitution.

With regard to the principles of official language use, the cardinal domains of language use (legislative, executive and judicial) are indeed delineated, and the employment of official languages within these domains is, in fact, specified. These are domains that are linked, in part, to the principle of communication with the citizenry. The proposed formula for the semi-rotation system appears to be unfeasible. Considering that it was already difficult enough to maintain bilingualism in the previous dispensation, the goal of a six-language multilingual dispensation is even more unattainable. Semi-rotation appears to be largely in conflict with the feasible type of language dispensation presupposed in the constitutional language provisions. Any realistic interpretation of the language provisions of the Constitution is hardly likely to arrive at the conclusion that absolute multilingualism, encompassing eleven languages is envisioned in these provisions (cf. Pretorius 1999). Furthermore, the utilisation of the concerned languages in the respective domains appears to be limited mostly to written communication.

A problematic aspect of the demarcation of domains is the conspicuous absence of core domains central to language legislation, namely communication with the citizenry, the language of education and linguistic aspects of immigration. The SALB does not succeed in offering directives for any of these domains. Particularly striking is the absence of directives concerning official-language visibility. The importance of the acquisition of the official languages could also have been stated more explicitly and prescriptively. Instead, language acquisition is merely advocated as something that should be encouraged. Language requirements for obtaining citizenship are also absent.

Nevertheless, the development of the indigenous languages, including South African Sign Language, features prominently as an element of the promotion of multilingualism within official language domains. In the South African case the issue in question is the expansion and development of the national priority languages, as well as the establishment of these languages at national level, as aptly formulated in Section 3(2) of the 1993 Constitution (RSA 1993).

In the 1993 Constitution, a balance between the retention of the status of existing official languages and the enhancement of the status of the new official languages was set as a national objective, in respect of which provisions could have been included in the SALB. The SALB is thus not explicit enough as far as the furtherance of indigenous languages is concerned. Once again, the pursuit of official trilingualism as a principle could have obviated this dilemma. In view of this drawback, together with the inadequate definition of official multilingualism, the concerned bill displays serious deficiencies as a national language act as far as the fulfilment of the first two sets of principles of language legislation is concerned.

As far as principles pertaining to instruments are concerned, the SALB fares well. An implementation mechanism is incorporated in the form of Language Units for government departments and provinces. These Language Units are vested with sufficient powers and, in conjunction with Pansalb, carry out functions that can undoubtedly be regarded as equivalent to those that are fulfilled by typical central state language institutions (cf. Hogan-Brun *et al*. 2009: 79–83). The specified regulatory powers assigned to the minister concerned, together with the obligation of reporting, further reinforce the decisiveness of the SALB.

A problematic aspect relating to the first two elements, which already came to the fore during the Second Language Indaba, is the issue of the possible duplication of Pansalb's functions (cf. Beukes 2001: 91–3). In terms of a comparison of the relevant provisions of the SALB with those contained in the language acts of other countries, Pansalb more directly fits the description of a "language institution" that supervises the implementation of language policy, and also fulfils a monitoring function in respect thereof. It is self-evident that this role of a language watchdog, fulfilled by a (preferably autonomous) statutory institution with appropriate powers, holds definite advantages – including an impartial view of relevant matters – the proverbial "arm's-length" management of language matters, professional opinions, etc. The incorporation of the Language Units into Pansalb could resolve this problem, simultaneously safeguarding the position of the concerned minister, lest his/her Cabinet colleagues begin to suspect him/her of being driven by an over-zealous ambition to control the language agenda.

Despite the above-mentioned deficiencies, the foregoing analysis indicates that the ultimate language act that could arise from the SALB could definitely be regarded as a typical national language act. A considerable number of the core principles of language legislation are present in this first attempt at a South African language act, comprising an important mechanism for the implementation of a new multilingual official language dispensation in South Africa.

## 5 CONCLUSION

No detailed attention has been accorded in this paper to the contextual principles of the typology of language legislation. A further investigation should bring additional perspectives in this regard to the fore, particularly in the light of the court case regarding the SALB referred to at the beginning of this paper. For example, it would appear from the preamble to the SALB that significant shifts have occurred in decision-makers' thinking in respect of the need for state intervention and accompanying legislation in devising a new multilingual dispensation for South Africa. Furthermore, on the basis of this overview, questions come to the fore regarding the degree of consensus that exists within government circles in respect of the contents of, and necessity for, language legislation for South Africa. Apparently a certain degree of consensus regarding the need for visible change in the language dispensation exists, but the factors discussed above suggest no fixed guidelines exist as yet in this regard.

Since success has been achieved with language legislation elsewhere in the world, the inevitable question arises as to what role is played by the absence of a national language act for South Africa in the apparent shift towards a dispensation in which English is becoming a kind "unofficial official language" (Fessha 2009). The question also arises as to whether the promulgation of the SALB as a language act could indeed still bring about any changes to this state of affairs. This question is naturally relevant, given the fact that the *NLPF* contains many of the core elements of the SALB, and has effectively replaced the latter as the draft language legislation. What drawbacks, then, are linked to the implementation of the *NLPF*, which could be rectified by a language act? Questions such as these are relevant to language legislation as a language-policy mechanism, and naturally warrant further investigation.

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## ENDNOTES

1 In his ruling of 16 March 2010, the judge ultimately found that the adoption of a national language act was not a constitutional obligation. Nevertheless, he ordered the national government to regulate and monitor the use of the official languages by means of legislative and other measures (Lourens vs The President of the Republic of South Africa and others. Ruling 2010). The order naturally does not exclude the adoption of a national language act.

2 (3)(a) The languages referred to in subsection (2) are – (i) Tshivenda; (ii) Xitsonga; (iii) Afrikaans; (iv) English; (v) At least one from the Nguni group (isiNdebele, isiXhosa, isiZulu and siSwati); (vi) At least one from the Sotho group (Sepedi, Sesotho, Setswana).

# LA POLITIQUE LINGUISTIQUE FRANÇAISE: REALITES COMPLEXES ET EPAISSEUR DES DISCOURS

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**Résumé**

La communication critique certaines idées admises sur la politique linguistique française, et en tire des conclusions de méthode. A propos des langues régionales, considérer cette question comme bloquée n'est pas satisfaisant: de nombreux aspects contradictoires, et leurs rapports, expliquent – mieux qu'un quelconque machiavélisme – les incohérences et les insuffisances des politiques suivies. A propos de la norme, accompagnée d'autorité légale, qui régirait le corpus de la langue nationale, il s'agit d'une sorte de mythologie, qui a une efficience sociale, mais cache la diversité et la complexité des pratiques réelles.

Il faut donc porter notre regard sur la nature des textes: le texte de la loi, les rapports sur son application, les discours exposant les politiques linguistiques. Ces discours ne sont que des discours, qui doivent être traités en tant que tels, avec leur opacité et leur dimension pragmatique. Au total, on ne peut se passer d'une discipline comme la linguistique des discours pour étudier la politique linguistique.

**Abstract**

This paper provides a critique of certain notions pertaining to French linguistic politics, on the basis of which it draws some conclusions from a methodological viewpoint. In the case of regional languages, it cannot be regarded as satisfactory to consider this matter as a closed question: many contradictory aspects, and the interrelations between them, explain – better than any Machiavellianism – why the policies adopted lack consistency and strength. The norm, supported by the power of law, which is believed to govern the corpus of the national language, is a sort of mythology, which has a social efficiency, but which conceals the diversity and the complexity of real practice. Thus, we need to consider the nature of the texts: the wording of the law, the

accounts of its implementation, and the discourses that describe linguistic policies. These discourses are only discourses, and we must treat them as such, with their opacity and their pragmatic dimension. All things considered, any study of language politics cannot be carried out without applying a discipline such as discourse analysis.

**Mots-clés:** langues régionales – autorité linguistique – norme – loi linguistique – complexité – analyse de discours

Cette communication tentera d'opérer un retour critique sur quelques faits souvent cités, et à partir de là sur certaines notions et catégories admises. Car si les résumés simplificateurs sont inévitables, nous ne pouvons cependant nous satisfaire de commentaires ignorant la complexité des réalités.

Nous partirons donc de quelques idées reçues, à propos de deux « dossiers » différents, au sein de la politique linguistique française, en ce que les uns concernent le *corpus*, et les autres le *status* des langues. Cette opposition bien connue entre le *corpus* et le *status*[1] (Kloss 1969) comporte des limites qui peuvent être gênantes (v. aussi Daoust et Maurais 1987): par exemple, les mesures imposant une terminologie officielle appartiennent également aux deux catégories, qui sont en partie interdépendantes à maints égards. Cette opposition entre *corpus* et *status* garde cependant sa commodité, comme un outil de classement *grosso modo*.

Un troisième temps va nous amener à considérer une catégorie plus englobante, celle du discours, et à revenir sur notre façon de traiter nos données discursives. Il y a là en effet un apport propre des sciences du langage qui a été curieusement négligé, et qui entre en congruence avec la complexité – au sens d'Edgar Morin (1990) - du domaine que nous étudions.

## 1. LE BLOCAGE FRANÇAIS QUANT AUX LANGUES DE FRANCE

Commençons par les « langues régionales », sous-ensemble des « langues de »rance" aux termes du rapport Cerquiglini (1999). La France a une réputation de blocage politique complet sur ce sujet, et de faiblesse de son droit dans ce domaine. Il y a à cette réputation de bonnes raisons, par exemple le refus récent de ratifier la Charte européenne des langues régionales et minoritaires, ou encore l'espèce de religion du français national qui s'exprime dans certains discours. Tout cela n'est pas faux, mais tout cela n'est pas non plus simple: par exemple de nombreuses enquêtes indiquent que les deux tiers environ des Français se déclarent régulièrement en faveur des langues régionales, et que par ailleurs 80 ou 90 % des Français se déclarent attachés à la langue française. Autrement dit, le débat n'est pas entre les citoyens, les uns contre les autres, mais c'est un débat plus profond, au coeur même du bagage idéologique de

nombreux individus. Cela n'empêche pas bien sûr des positionnements résolus, dans un sens ou dans l'autre, et de franches oppositions. Mais en tout cas, les langues régionales et le français ne sont pas sentis, le plus souvent, comme étant en conflit.

Il faut d'ailleurs prendre encore une précaution préliminaire, par rapport à des erreurs de lecture possibles. Quand on parle des langues régionales en France métropolitaine, ces langues sont toujours « en plus », c'est-à-dire que les locuteurs du breton, du basque, du poitevin, etc., même privés de la langue régionale, ne sont pas privés de toute parole, comme il arriverait s'ils étaient monolingues dans leur langue régionale. La question se situe ailleurs, la frustration, bien réelle, se situe sur un plan strictement symbolique. On en dirait autant de ce qui concerne la parole privée, parfaitement libre y compris dans l'espace public pour les langues régionales: or on observera avec intérêt au passage que c'est une liberté peu utilisée ! Vous pouvez vivre à Toulouse ou Montpellier, par exemple, et ne jamais entendre d'occitan, alors même que les lieux et occasions possibles, autorisés, seraient innombrables.

Nous devons donc opposer au discours bien connu concernant le blocage français quelques éléments de réalité et surtout de complexité.

Le blocage est bien réel sur certains aspects très précis: par exemple il y a blocage absolu, explicite, administratif et politique, quant à l'idée d'enseignement bilingue obligatoire. On constate aussi, variablement selon les régions, de véritables refus d'appliquer les textes, de l'administration de l'Éducation nationale ou des Conseils régionaux, par exemple, qui apparemment comptent simplement qu'il n'y aura pas de la part des militants suffisant de capacité à déclencher un conflit ouvert et public. Et de fait, même là où l'on rencontre un déni d'application de la loi, il faut constater que bien souvent la dénonciation et la revendication sont assez faibles.

Mais par ailleurs certaines possibilités légales sont sous-utilisées, par exemple dans ce que dit la loi par rapport aux possibilités d'enseignement à l'initiative des Conseils régionaux.

D'après les statistiques officielles, en 2005-2006, 404 000 élèves soit 3,3 % des élèves de France métropolitaine recevaient un enseignement de langue régionale (selon des modalités très variables). Des postes d'enseignement existent, plus de 600 dans l'enseignement secondaire, mais pour six langues régionales seulement[2] (il y en a nettement plus qui n'ont aucune dotation de ce genre). On peut juger que c'est peu – il faudrait mettre cette offre en relation avec une demande, voire avec une évaluation des pratiques hors école -,

mais on ne peut pas parler d'un blocage complet. Le blocage est réel pour les autres langues de France: mais on ne voit guère les militants de ces six langues réclamer des postes pour leurs collègues des autres langues. D'ailleurs, même dans ces six langues, la demande semble limitée aux « militants linguistiques », et ne s'exprime guère, par exemple, à travers les discours syndicaux ou des partis politiques d'opposition. De plus, on ignore l'effet de cet enseignement sur le paysage linguistique: par exemple, il semble que beaucoup d'anciens élèves des écoles bilingues Calandretas en occitan ne restent pas des locuteurs actifs après être sortis de ces écoles (Boyer 2006).

Depuis 2008, la Constitution dit dans son article 75 que « les langues régionales appartiennent au patrimoine de la France »: il est frappant de constater que cet article n'a pas été obtenu par la revendication, ou alors très indirectement, de constater aussi qu'il a été peu commenté et qu'on ne lui connaît aujourd'hui aucune conséquence. Sans doute cette discrétion correspond-elle au souhait du gouvernement qui a fait passer cette disposition, mais en même temps ce silence et cet aspect de lettre morte empêchent que le gouvernement en tire le moindre bénéfice électoral – ce qui ne serait pas illégitime en démocratie.

Enfin dans le monde associatif, on vous dira partout que les militants ne sont pas assez nombreux. Ajoutons à cela qu'il existe d'évidentes contradictions à l'intérieur de l'État: par exemple la politique du Ministère de la Culture est souvent plus positive que celle du Ministère de l'Éducation Nationale - de nombreux projets trouvent là des subventions.

Quant aux politiques régionales en matière de langues régionales, elles sont parfois tout à fait consistantes, avec des budgets qui se comptent en millions d'euros, mais parfois elles sont aussi inexistantes.

Ainsi les politiques mises en œuvre sont très contradictoires: l'État est divisé, il y a des contradictions entre les ministères et les administrations; les régions peuvent faire beaucoup, or elles le font très inégalement; enfin, de façon générale, les élus politiques, même réticents, réagissent à la pression populaire: or cette pression populaire aujourd'hui se fait assez peu entendre sur le sujet (peut-être a-t-elle des sujets de préoccupation plus graves, bien entendu).

Donc, en ce qui concerne les politiques de l'État, la sociologie – celle de la revendication ou de la pression populaire - est décisive. Or, la demande des militants, souvent, est que l'État fasse le nécessaire pour les langues: cela prend souvent le nom de « réparation historique ». C'est une lecture de l'histoire bien étroite !

Car ce ne sont pas seulement l'Etat, les instituteurs, qui ont fait décliner les pratiques et la transmission des langues régionales, mais des couches sociales entières ! Ce sont des transformations sociales profondes qui ont affecté toute la société ! (cf. la thèse de Chanet 1994).

D'ailleurs, aujourd'hui encore, nous entendons beaucoup de déclarations très favorables aux langues régionales, chez des gens dont les actes ne suivent pas. Il y a en effet une ambiguïté des citoyens: par exemple, je déclare aimer ma langue, mais je ne l'impose pas à mes enfants, et au final je ne la transmets pas.

Et le droit ? Étant donné que l'application des textes est souvent déficitaire, les formulations légales paraissent parfois bien meilleures pour les langues régionales que les mesures effectivement prises, que le droit mis en application. Mais dans l'ensemble, le droit enregistre et prend en compte l'équilibre des forces, bien entendu. Et l'on doit donc constater à la fois qu'il n'y a pas dans les gouvernements français successifs de volonté forte d'agir pour les langues régionales, et en même temps il faut avouer que le sentiment populaire à ce sujet n'a jamais été de nature à contraindre un gouvernement à agir, ou du moins il n'a jamais été analysé comme tel.

Pour récapituler ce premier point, nous dirons que la sociologie politique est bien plus défavorable en matière linguistique que le droit !

## 2. LA LANGUE OFFICIELLE A-T-ELLE UNE NORME OFFICIELLE ?

Nous abordons maintenant ce qui concerne le *corpus* de la langue française. Il existe en France une croyance très répandue, probablement chez la majorité des Français, qu'il existerait une orthographe officielle, une sorte de loi orthographique; que l'Académie Française aurait un certain pouvoir légal; et que la langue normée, le bon usage, serait obligatoire sur une base légale. Tout cela est faux.

En réalité, pour préciser en quoi la puissance politique intervient sur le plan de la langue (corpus), il faut distinguer les modalités. L'État a en effet un triple rôle.

L'État est législateur, mais, en matière de corpus de la langue, la loi n'intervient que dans une très faible mesure, pratiquement nulle – dans sa mission de garant de la qualité des contrats, elle exige en effet l'usage de la terminologie officielle quand celle-ci existe (loi du 4 août 1994).

L'État est locuteur, et locuteur légitime: c'est pourquoi les discours émanant clairement de l'État ont joué un rôle important dans l'histoire de la langue (Balibar et Laporte 1974). Et effectivement, la fonction publique s'impose une

« qualité de langue » depuis toujours: tout fonctionnaire, tout élu prendra soin de sa langue – le fait qu'un Président de la République s'exprime très vulgairement est une rupture volontairement (?) scandaleuse. La « terminologie officielle », c'est-à-dire une certaine terminologie officiellement créée pour éviter l'emploi de mots étrangers, surtout anglais, est une obligation légale dans le discours de l'État aux termes de la loi du 4 août 1994 – et précédemment de la loi du 31 décembre 1975.

La difficulté, une fois posée cette norme, est l'immense diversité des discours et des énonciateurs réels, ensemble aux frontières plutôt floues (en dehors du texte légal bien sûr). On ne saurait en tout cas considérer qu'il s'agisse d'un discours monolithique: il n'y a pas d'isolat de la fonction publique, et la variation règne là comme ailleurs, les individus énonciateurs ayant évidemment leurs manières propres.

Enfin l'État est organisateur, c'est même là que réside le principal rôle linguistique qu'il joue sur le corpus de la langue; voyez par exemple la place que cet organisateur donne à la littérature dans l'enseignement, et les conséquences de ce fait sur les conceptions et les pratiques de beau langage dans la société française.

Ainsi donc, la dimension légale de l'orthographe, de l'Académie, ou de la simple correction langagière, du bon usage, tout cela est un mythe – mais nous savons aussi qu'un mythe a éventuellement une certaine efficience normative. On pourrait dire aussi que les processus normatifs sont "habillés" de croyances éventuellement juridiques: on croit qu'il y a une loi, et on obéit à une norme sociale non écrite. Il n'y a qu'un pas entre certains de ces mythes, et la dimension coutumière. On se rappelle que le français n'a pas été désigné comme langue officielle dans le droit français, jusqu'à la modification de la constitution intervenue en 1992 – où d'ailleurs le mot « officiel » n'est pas employé -: et pourtant les pratiques de l'État donnaient évidemment cette place au français, traditionnellement: la mythologie nationale est évidemment la force qui a soutenu cet élément coutumier.

## 3. REGARD SUR LES DISCOURS CONCERNANT LA POLITIQUE STATUTAIRE DE LA LANGUE FRANÇAISE

Lorsque, comme ci-dessus, nous abordons une question de politique linguistique, en l'occurrence de statut légal, nous nous trouvons au croisement de plusieurs types de discours: le texte de la loi, la « dimension coutumière », le discours de la « croyance » ou du « mythe », enfin le discours de la déclaration politique et celui de l'autorité organisatrice.

Le statut juridique de la langue française est aujourd'hui très ferme et explicite, sous la forme que lui donne l'Article 2 de la Constitution: « Le français est la langue de la République ». À cela s'ajoutent des lois qui précisent la place du français dans l'enseignement, ou les obligations d'emploi du français dans le commerce (loi du 4 août 1994). Même si leur statut est beaucoup moins ferme, les langues de France sont aussi encadrées par un certain nombre de textes – voir à ce sujet le dossier que leur consacre la DGLFLF (Délégation générale à la langue française et aux langues de France), organisme officiel chargé de coordonner l'action politique qui les concerne: http://www.dglf.culture.gouv.fr/lgfrance/lgfrance.htm.

La question qui se pose, dès lors qu'existent des normes, est celle de leur application, problématique à mi-chemin du droit et de la politique.

La loi du 4-8-1994 (modifiant celle du 31-12-1975), qui fait du français la langue du contrat, contrat commercial ou contrat de travail, comporte aussi l'obligation d'adresser chaque année un rapport au Parlement: « Chaque année, le Gouvernement communique aux assemblées, avant le 15 septembre, un rapport sur l'application de la présente loi (…) ». Ces rapports, dont la préparation incombe depuis 1994 à la Délégation générale à la langue française, sont *a priori* typiquement des rapports d'évaluation. Leur lecture pose des questions importantes (Eloy 2010). S'agit-il effectivement d'une évaluation? Certes, le rapporteur comptabilise le nombre d'infractions à la loi de 1994 relevées par le service spécialisé: une toute petite partie des rapports comporte donc une évaluation quantitative. En réalité, on sait bien que de telles statistiques, comme celles de la délinquance, nous renseignent d'abord et surtout sur la lunette utilisée pour l'observation: il est en tout cas impossible d'établir un lien causal entre ces réalités dénombrables et l'action politique. Mais dans ces rapports au Parlement, en dehors de ces données statistiques, on trouve essentiellement ce qu'il faut bien nommer une pseudo évaluation. Car il s'agit surtout de discours politique disant en substance: « Nous nous préoccupons fortement de ces questions. Nous faisons tout notre possible. Nous ne dépensons pas pour rien l'argent public ». Le résultat des actions décrites est fort peu « évalué », parce que dans l'ensemble, les réalités linguistiques évoquées échappent à ces modalités d'évaluation (annuelles, comptables, simplifiées...). Simultanément, les discours publics disent au peuple: « Bonnes gens, le sort de la langue nationale, nous y pensons, nous nous en occupons ».

À ce moment de notre exposé, le sujet de notre réflexion a donc dû se déplacer, car il s›agit maintenant d›analyser le rôle ou la nature des discours sur la langue en France. Or la loi, les règlements, les textes les plus divers entrent aussi dans la catégorie des discours, et il est peut-être utile ici de rappeler une

donnée fondamentale à propos du statut du texte juridique, ou autrement dit du statut de la norme juridique. Comme la norme de langue, dont on oublie parfois de signaler qu›elle n›agit pas toute seule, mais par une variété de processus normatifs, ce qui est décisif en matière de droit, ce sont les pratiques normatives, qui, pour l›essentiel, s›appellent une politique.

À propos du discours de politique linguistique, nous avons déjà plaidé (Eloy 1997) contre une définition toute en clarté et explicite. Les réalités peuvent difficilement être analysées comme un « processus décisionnel » de type aménagementiste. Sur la plupart des dossiers dits de politique linguistique, il n›est pas vraiment question d› « actions linguistiques », mais des aspects linguistiques de politiques plus générales: le domaine de la « politique linguistique » n›est le plus souvent qu›un chapitre de la science politique.

Une des questions centrales est la place de l'explicite. Ainsi, prenons le premier terme d'une « politique linguistique » telle que la définissent plusieurs auteurs (v. Labrie 1993), « l'exposé de politique ». Sans doute, dans une certaine mesure, annonce-t-il ce qu'il est prévu de faire. Mais c'est aussi, c'est surtout, c'est fondamentalement un discours qui agit pragmatiquement. Il peut donc viser à calmer, à cacher ce qu'on fait, à présenter des choses connues d'une façon favorable, etc. Pourquoi croire cet exposé transparent ?

Par exemple, en France, depuis trente ans, les gouvernements successifs agissent pour que tous les jeunes apprennent l'anglais. Or comment concilier cette politique avec le discours rituel de lutte contre l'hégémonie de l'anglais ? Le réglage qui a été progressivement mis au point consiste à parler de pluralité, de multilinguisme, et, au niveau des discours, à promouvoir ce qu'on appelle « les langues »; puis, dans la réalité de la gestion quotidienne, on réduit toutes les langues au bénéfice de l'anglais. Même si une telle présentation est partiale, elle rappelle au moins que les actes ne sont pas forcément, et même pas souvent, annoncés et décrits de façon univoque par les discours. Il arrive bien sûr que la politique vraiment menée soit explicitée: mais, compte tenu de multiples décalages entre la culture des « élites » et celle de l'électeur moyen, qui rendent certaines choses comme indicibles publiquement, cette explicitation se fera généralement en cercles fermés, voire très fermés.

Ainsi, que l'on examine les textes de loi, les exposés de politique, les évaluations de politique, ou tous les discours qui constituent la technologie aménagementiste, nous n'avons aucune raison de croire à la transparence des discours. Nous avons bien dit « croire », car il s'agit bien de croyance dans ces discours. La cohérence des textes juridiques, l'adéquation aux réalités, la rationalité des programmes politiques, sont des idéaux: elles sont parfois absentes sans que cela invalide

les textes et les actions, elles sont parfois présentes sans que les textes en soient mieux appliqués, bref, ces qualités fondamentales ne sont pas décisives à elle seules.

C'est pourtant un vrai problème de démocratie, laquelle suppose qu'on dise (au moins un peu) la vérité aux citoyens.

De même, « l'État de droit » suppose qu'on applique les lois et implique donc que ce soit possible (au regard de la cohérence du droit et de la compatibilité avec les réalités économiques et sociales), qu'il y ait une volonté de le faire (*versus* corruption ou autre raison), et que ce soit contrôlable par les citoyens.

Or tout ce que nous savons du discours – depuis la rhétorique classique – vient dénoncer une certaine naïveté: le discours n'est jamais tout transparent, le discours est une action, le discours est toujours polysémique et indexical. Mais pouvons-nous renoncer intégralement à cette naïveté ?

Poser la question ainsi renvoie à une autre interrogation: existe-t-il donc un « discours vrai » ? Cette expression ne peut désigner qu'un discours consensuel: on accepte alors sa manipulation, son interprétation suggérée, c'est le fondement du pouvoir dans nos démocraties: ce consensus, c'est le consensus des discours.

Haugen (1972:143) formulait en terme d' « atmosphere » ce que nous préférons appeler « consensus des discours » : « About all the government can do is to create an atmosphere favorable to certain kinds of linguistic change, and recognize that there are forces that escape government regulation. »

Mais si ce point de vue concerne la politique linguistique, il concerne aussi, plus profondément, les objets de cette politique. Ce n'est pas par hasard que cette notion de consensus est également centrale dans la définition des langues (Eloy 2008) – et de maintes autres notions dans le domaine des sciences humaines. Car en bref, qu'est-ce qu'une langue ? C'est ce qu'on s'accorde à considérer comme une langue …

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## ENDNOTES

1 Nous gardons le terme de *status* dans sa forme latine, ce qui nous permet de réserver le terme français de *statut* aux aspects juridico-politiques, bien plus étroits que le *status*.

2 Basque, breton, catalan, corse, occitan, créole.

# THE RIGHT TO LINGUISTIC AUTONOMY IN CANADIAN CONSTITUTIONAL LAW

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## Abstract

Short of independence, federalism is the system that accords the highest degree of autonomy to a minority within a state, as long as it can control its language policies. Jurisdiction over language in Canada is divided between the central and provincial governments, and is not absolute, since it is constrained by constitutional rights. Constitutional language rights have an object and purpose different from that of human rights, and are proper to Canada's history. Formulated as individual rights, they are nevertheless interpreted as having a collective dimension pertaining to the maintenance and development of a linguistic minority. Courts therefore play a prominent role in enforcing these rights and imposing orders on governments that do not take the necessary action. With regard to municipal institutions, these are local government organisations where a form of linguistic autonomy can be exercised, but in Canada, there is no right to linguistically homogeneous municipalities. In the education sector, there is a high degree of linguistic autonomy, which is constitutionally protected; and local minority language school boards are constitutionally entitled to orient their school system in accordance with their own culture. Finally, in the area of health care, linguistic autonomy is developing, although no concrete rights have been entrenched as yet. To conclude, autonomy is a desirable goal for any national minority.

## Résumé

À défaut d'indépendance et du statut d'état souverain, le fédéralisme est le système qui assure le maximum d'autonomie à une minorité nationale, pourvu qu'elle puisse contrôler sa politique linguistique. Au Canada, la compétence sur la langue est divisée entre le palier fédéral et les provinces, et comme elle est contrainte par la garantie de certains droits linguistiques constitutionnels, elle n'est pas absolue. Ceux-ci ont un but et un objet différents

des droits fondamentaux classiques, et sont propres à l'histoire canadienne. Formulés comme des droits individuels, ils sont interprétés néanmoins dans leur dimension collective, soit le maintien et le développement des minorités linguistiques. Les tribunaux sont donc très actifs et rendent des ordonnances contre les gouvernements récalcitrants. Par ailleurs, les municipalités sont des endroits où une forme d'autonomie linguistique peut s'exercer, mais il n'y a pas de droit à des municipalités linguistiquement homogènes au Canada. L'enseignement est un secteur ou le droit constitutionnel à l'autonomie est reconnu, et les conseils scolaires de la minorité ont le droit d'orienter le système éducatif en fonction de leur culture. Enfin, les services de santé sont un secteur où se développe un certain droit à l'autonomie linguistique. Pour conclure, l'autonomie est un but souhaitable pour toute minorité nationale.

## 1. INTRODUCTION

In any multilingual state nowadays, language planning and language policy require some legal interventions, in response to nationalist pressures. Short of secession and independence, the state must take decisions with regard to language use in the public and private spheres. Concerning the official use of a language, state neutrality is an illusion. Even when the government does not adopt any piece of legislation regarding official languages, or even if it does identify some languages as official, it still has to use one or more languages in its internal functioning, legislative activity, court decision-making and public services. The language that is actually used for these purposes reveals a great deal about the value that the state attributes to a particular language. Indeed, language planning teaches us that status, as exemplified by a declaration of official languages, comprises a powerful symbolic recognition of the importance of a language for national cohesion. But modern states, such as Canada, India, Belgium and the new South Africa, are not monolingual. They are faced with the reality of diverse communities composing their populations. They are multinational states – and they are multilingual states. Therefore, they are striving to find equilibrium between individual human rights and collective language rights.

Minority status entails both objective and subjective aspects, such as a distinctive language and culture, the fact of being less numerous than the rest of the population, a common history, and the will of the minority group to keep its distinctive features alive. According to Kymlicka, since a national minority usually has not chosen to be in the state in which it is located (as a result of having been integrated by a redemarcation of the boundaries, or of having been conquered or colonised), and/or has accepted citizenship of the state in exchange for promises – usually enshrined in the constitutional text – that its

distinctive features will be preserved and promoted, such a minority group has a moral basis for gaining some language rights or some power to impose language use (Kymlicka 1995). Furthermore, the state itself, for political reasons, might want to move in that direction.

There is a theory in Canadian sociology, called "institutional completeness", in terms of which the best way to preserve a linguistic minority is to provide it with monolingual institutions where its language will be the common language, and where its culture will direct its decisions (Breton 1964: 103-205). Such institutions are usually developed in the administrative realm; but sometimes, political institutions may even be granted to national minorities (as was done in Spain through the establishment of autonomous communities, or in Great Britain by means of devolution).

The present paper explores the possibility of the entrenchment of access to autonomous institutions as a constitutional right for French language minorities outside Quebec. This paper will not concern itself with the right to self-determination of aboriginal peoples, or their language rights (although it is my opinion that power over aboriginal languages is an ancestral right, thus protected under section 35 of the *Constitution Act, 1982*[1]). It will also touch upon the federal structure of the Canadian state and the presence of Quebec as a province. It will not consider the question as to whether there is, or could be, or should be a right pertaining to the participation of official language minorities in national institutions.

Autonomy is not a state-of-the-art concept in law. It may be defined as the extent to which a linguistic community is exclusively empowered to take decisions in a particular field of activity. Autonomy is the power to adopt one's own rules and decisions. It should be distinguished from sovereignty, which entails an unfettered power to legislate on any subject matter within a given territory. In modern times, sovereignty is not absolute; in a federation, it is divided between a central government and state governments. It is also constricted by human rights, which are usually guaranteed in a charter of rights and freedoms. But it is more plenary in nature than autonomy. In this contribution, autonomy will be understood as referring to the product of devolution of power. Federalism is a way of creating the most advanced form of autonomous political institutions; and once these institutions are in place, only the constitutional courts may presume to nullify legislation adopted by federated states – and then only in cases where a contravention of the constitution has occurred to necessitate such action.

There are degrees of autonomy. Concerning language matters, autonomy might mean that an institution has the authority to use a minority community's language and to impose it upon others. In terms of a more limited form of autonomy, the institution may have the power to take decisions on various issues, but only within a linguistic framework that is already established in legislation or in the constitution.

Autonomy may be based on a territorial division, or on a functional one, according to a specific criterion, or both. We will thus firstly consider Canadian federalism, after which we will discuss the right to autonomous institutions for French language minorities elsewhere in Canada.

## 2. FEDERALISM AND LANGUAGE IN CANADA

Federalism is a state structure in terms of which sovereignty is divided between a central government invested with powers pertaining to issues concerning the whole of the population, and state governments, which are responsible for local matters. In the Canadian case, federalism was a choice mandated by the French population of Quebec and its representatives. Quebec had been an independent colony between 1608 and 1760, and then again between 1791 and 1840. The majority of its population was French and Catholic. The Supreme Court of Canada acknowledged the fact that one of the purposes of federalism was to ensure the recognition of cultural differences, as exemplified by the resolutions that were adopted and later incorporated into the *Constitution Act, 1867*:

> These included guarantees to protect French language and culture, both directly (by making French an official language in Quebec and Canada as a whole) and indirectly (by allocating jurisdiction over education and "Property and Civil Rights in the Province" to the provinces). The protection of minorities was thus reaffirmed. (Re: Secession of Quebec 1998: 38)

Although the Court was not explicitly referring to cultural and linguistic matters, it explained the "raison d'être" of federalism:

> The principle of federalism recognizes the diversity of the component parts of Confederation, and the autonomy of provincial governments to develop their societies within their respective spheres of jurisdiction. The federal structure of our country also facilitates democratic participation by distributing power to the government thought to be most suited to achieving the particular societal objective having regard to this diversity. (Re: Secession of Quebec 1998: 58)

Thus, federalism is an answer to linguistic and cultural diversity; and the very fact that the state is of a federal nature is a consequence of this situation:

> The principle of federalism facilitates the pursuit of collective goals by cultural and linguistic minorities which form the majority within a particular province. This is the case in Quebec, where the majority of the population is French-speaking, and which possesses a distinct culture. This is not merely the result of chance. The social and demographic reality of Quebec explains the existence of the province of Quebec as a political unit and indeed, was one of the essential reasons for establishing a federal structure for the Canadian union in 1867. […] The federal structure adopted at Confederation enabled French-speaking Canadians to form a numerical majority in the province of Quebec, and so exercise the considerable provincial powers conferred by the *Constitution Act, 1867* in such a way as to promote their language and culture. It also made provision for certain guaranteed representation within the federal Parliament itself. (Re: Secession of Quebec 1998: 59)

One of the functions of a federated state is therefore to "promote language and culture". Quebec did so by adopting the *Charter of the French Language,* an ambitious piece of legislation aiming to impose French as the mainstream language in education, in public services and also in the workplace and in commercial matters. The power of provinces to legislate upon language matters was recognised in two Supreme Court decisions. Since "language" *per se* does not constitute an enumerated legislative power in either section 91 or section 92 of the *Constitution Act*, 1867, the Court decided that it was a shared jurisdiction – an accessory to a main issue (Jones 1975). Therefore, both the federal *Official Languages Act of Canada*[2] and any provincial legislation pertaining to language constitutionally fall within each jurisdictional power, provided that the legislative assembly is otherwise competent with regard to the main issue (for example, criminal law, civil service, commercial signs (Jones 1975; Devine 1988)).

But this provincial autonomy over language matters is not absolute. It is constrained by constitutional language rights or obligations, which will be discussed in the next section.

Nevertheless, this still means that, beyond constitutionally protected rights, legislatures may adopt any language measure whatsoever. This would be the consequence of the *Jones* and *Devine* cases, although par. 16(3) of the *Canadian Charter of Rights and Freedoms* has sometimes been invoked as encompassing a "ratcheting" principle. Par. 16(3) reads: "Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French". It was argued that this section, properly interpreted, meant that any legislative measure or governmental programme could not be disregarded or abolished unless the government could provide a proper justification for doing so. In two Appeal Court cases, this argument was rejected, mostly because – according to the courts – it would amount to adding constitutional language rights without modifying the Constitution

(Lalonde 2001: 90-95; Baie d'Urfé 2001: 144). But the matter has not been resolved completely. In *Jones*, as well as in terms of subsection 16(3), it is affirmed that legislatures can adopt laws to "advance linguistic equality" beyond what is provided in the Constitution. As we will see, there are other cases in which legislative assemblies are prevented from abrogating constitutionally entrenched linguistic rights. So the notion that a legislative assembly can impose the exclusive use of one language without infringing the principle set out in subsection 16(3) still remains to be tested in the Supreme Court of Canada.

Quebec is not the only jurisdiction that has enacted legislation on languages. New Brunswick is officially bilingual[3]. Nunavut has exercised the power that was accorded to it in the Nunavut Act[4] by adopting both its *Official Languages Act*[5] and, more importantly for the Inuit majority, the *Inuit Language Protection Act*.[6] The Inuit languages have been made co-official along with French and English, and their use will become mandatory for territorial institutions, municipalities and some aspects of private-sector activities, in accordance with a gradual scheme of implementation, monitored by the Office of the Languages Commissioner of Nunavut. Although, strictly speaking, Nunavut is not a province, it has most of the usual provincial powers.

At least three other provinces have adopted a *French Language Services Act*[7] in terms of which some designated services are available in French in designated areas. (Ontario has the most comprehensive law in this regard, since over 200 private institutions, which are publicly funded and which are providing services to the population, are designated under the Act.) Manitoba has a language policy modelled on these laws, but has yet to enact it in legislation (Manitoba French Language Service 1999). These measures, albeit partial, do effectuate the recognition of some linguistically homogeneous institutions where the minority can exercise a measure of autonomy over specific matters.

Finally, a word must be said about the federal *Official Languages Act*. Even though it adopts the personality principle as its main operating feature[8] and deals mostly with public services,[9] it contains some elements of a true minority language protection regime, since, firstly, it enjoins the federal institutions to ensure that the official languages of the population of Canada are proportionately represented amongst their personnel; but more importantly, it provides for a federal, judicially enforceable obligation to take positive measures for the development and advancement of minority language communities across Canada.[10] So far, this obligation has not led to any major upheaval in the way in which the federal government delivers its services; but in the future, it may lead to transformation in the ways in which the federal government operates. For instance, it might mean that the government will have to co-manage, or

delegate to minority language institutions the power to manage, public funds for the delivery of some federal public services relevant to language and culture (Cardinal *et al*. 2009: 209-233; Forgues 2007).

Thus, federalism in Canada has provided a means to create local majorities and empower them in respect of some issues related to language and culture. This did not come about naturally, but rather as a result of political compromises, forming the basis of the national social contract. It has opened the way for the recognition of autonomous structures. But as pointed out earlier, this autonomy is never full nor complete. Beyond the mere political power at play in federal-provincial relations, it is legally constrained by the constitutional division of powers, since legislative power pertaining to a particular issue must exist in order to enable the federated state to legislate upon the linguistic aspect of the issue. There is also another more sensitive constraint, flowing from the constitutional rights and freedoms entrenched in the *Canadian Charter of Rights and Freedoms* – both the individual human rights and the special, constitutionally entrenched language rights. It is the latter rights that will now be examined briefly in their relation to federalism.

## 3. CONSTITUTIONAL LANGUAGE RIGHTS AND OBLIGATIONS IN CANADA

Having control of a federated state and of its language policy provides a linguistic community which happens to comprise a majority within the federated state with a measure of political autonomy, but this autonomy is not tantamount to full sovereignty.

In the case of Canada, human rights and constitutionally protected language rights and obligations act as a barrier to a full and free exercise of legislative authority. Basic human rights are not really negotiable; and many of these rights have a linguistic component. But language rights represent a political compromise; and even though this factor should not influence their interpretation by courts of law[11] (Beaulac 1999: 25), their legitimacy is derived from the fact that they were agreed upon by all parties. They might sometimes run contrary to the will of a minority exercising its constitutional authority as a provincial majority, where the minority in question has adopted measures contrary to these rights in the name of the preservation of its endangered language. This is why courts of law must always strike a delicate balance between individual human rights, collective language rights and the constitutional power of a national minority with regard to language.

As mentioned earlier, in the case of *Jones*, the Supreme Court of Canada acknowledged that both the federal Parliament and any provincial legislature may legislate on language rights, provided that they are competent regarding the principal issue. Apart from this case, it is only in Quebec that language legislation has been challenged on constitutional grounds, although in the field of education, many provincial legislatures have been ordered by courts to enact legislation in order to implement minority language education rights.

In Quebec, the *Charter of the French Language* imposed French as the only language to be used on commercial signs and in advertisements, apart from a few minor exceptions. In two major decisions (Ford 1998; Jones 1975), the Supreme Court of Canada found that this obligation represented a breach of freedom of expression, guaranteed by both section 2b) of the *Canadian Charter of Rights and Freedoms* and section 3 of the *Quebec Charter of Rights and Freedoms*. Under section 1 of the *Canadian Charter* and section 9.1 of the *Quebec Charter*, fundamental rights may be subject to reasonable limits. In the Court's opinion, evidence showed conclusively that the French language was in jeopardy in Quebec, and that imposing its use on commercial signs to procure a French linguistic landscape, as language planning theory demonstrates, was a legitimate way to promote it. However, the Court also opined that no evidence had conclusively proved that it was necessary, in order to convey the message that French should be prominent in Quebec, to completely forbid any other language. Other less drastic measures could have been taken.[12] The conclusion that the total prohibition of any other language was a breach of freedom of expression, as protected under section 19 of the International Covenant on Civil and Political Rights,[13] was confirmed by the covenant's international monitoring committee, the Human Rights Committee (Ballantyne *et al*. 1993). Thus, the defence of a minority language cannot go to the extreme of unreasonably infringing on classical human rights.[14] Linguistic autonomy has its limits.

Language rights are different in nature from human rights: they are the product of a national compromise and have a different object and purpose. Although language rights must not be interpreted more narrowly than other constitutional rights, their true object must be ascertained in order to give them meaning. This object, according to the Supreme Court of Canada, is the development of official minority language communities across the country (Beaulac 1999). French and English receive special, differential treatment in the Canadian Constitution, so that no allegations of linguistic discrimination – whether from official language minorities (Mahe 1990) or from other linguistic groups trying to gain the same rights – will need to be entertained by the courts (Ballantyne *et al*. 1993).

The *Canadian Charter of Rights and Freedoms* contains six specific language rights and one truly collective right. The language rights are comprised of the following:

- a declaration that French and English are the official languages of Canada and that they have equal status, rights and privileges regarding their use within federal institutions (section 16);
- the right to use either language in the parliamentary and legislative houses (section 17);
- the obligation to adopt and publish laws in both languages, each version having equal and official status (section 18);
- the right to use either language in court proceedings (section 19);
- the right to public services in one's official language of choice in various circumstances (section 20);
- the right, granted to three categories of Canadian citizens, to have their children educated in their official minority language (section 23).

The collective right is the right of the Francophone and Anglophone communities in New Brunswick to have their own institutions.

Sections 16 to 20 concern the federal jurisdiction and the province of New Brunswick (the right to public services under section 20 has no limitation there, contrary to its federal counterpart). Section 23 applies everywhere in Canada where numbers warrant. All these rights are formulated as individual rights, but their true purpose, as pointed out earlier on, is collective. They are thus hybrid rights (Nguyen 2009). Focusing exclusively on their individual nature can lead to results contrary to their real purpose. For instance, the question arose as to whether the right to use English or French in Court proceedings included an obligation for the Court to hear the case without the aid of an interpreter. In *Société des Acadiens* (Société des Acadiens 1986), the majority of the Court, focusing on the individual nature of the right and the fact that it reflected a political compromise, ruled that this right extended to any participant of the judicial proceedings, including the author of a judicial order, the judge, or the state prosecutor. The result runs contrary to the true purpose of this right, which is, obviously, to ensure equal access to the justice system for members of the minority language community. It means that one has the right to speak one's language in court, but this does not imply a concomitant right to be understood by the court! This interpretation renders the right meaningless, and no different from the right to a fair trial and an interpreter; but for a minority language speaker, it effectively means more costs and more delays, and a filter between the judge and the party to the trial. In *Société des Acadiens*, Justice Beetz said

that, in terms of subsection 16(3), it was up to legislative bodies to increase the right; this was done at the federal level, as well as in New Brunswick and Ontario.[15] In *Beaulac*, the Court insisted that the fact that the accused was bilingual had no relevance to his right to a trial in his own language, since the object of that right was the assertion of his linguistic identity, and not the fulfilment of his right to a full and fair defence (Beaulac 1999: 47). But that case rested on a specific right to a judge who speaks the language of the accused under the Criminal Code; another case has reinterpreted the right to use one's language before a court as including the right to be understood directly by the court (Pooran and Vaillant 2011).

Any victim of a violation of these rights may obtain, under section 24 of the said *Charter*, an "appropriate and just remedy" under the circumstances. Judicial orders in this regard have been frequent; but what is extraordinary is that the Supreme Court validated a judicial order in a case where the trial judge had retained jurisdiction *after* his order was issued, and forced the government to report to him as to how it was implementing the order (Doucet-Boudreau 2003). Structural injunctions of this kind, frequent in American constitutional law, are rare in Canadian jurisprudence. Furthermore, courts have gone as far as ordering the legislature to adopt laws (*Association des parents francophone de Colombie-Britannique* 1996), or ordering the government to modify its regulations (Donnie Doucet 2005) in order to implement minority language rights.

In 1890, Manitoba declared that English was its only official language and that it would enact legislation in English only. Quebec followed suit in 1977. In two lawsuits, the Supreme Court found that this was contrary to the constitutional obligations, and ordered these provinces to join the rest of Canada in adopting legislation in both French and English[16] (Forest 1979; Blaikie 1979). Neither province could comply with this order by means of legislation alone; a constitutional amendment would be required. And when faced with the obvious but quite dramatic consequence that all acts passed in English only in Manitoba were unconstitutional, the Supreme Court did not shy away from its duty: it declared all Manitoba legislation to be invalid (Re: Manitoba Language Rights 1985). But in order to preserve the Rule of Law, it ordered the province to translate and readopt its legislation, and suspended its own declaration of invalidity for the time required to complete the task of translation.[17]

These few examples prove that provincial autonomy over language is strictly constrained by constitutional rights and obligations and that the Courts in Canada do not hesitate to reassert these rights and give the proper orders when they find governments or legislatures to be in violation of them. The most common situation arises when a province (or the federal government)

fails to take any action to implement language rights, which are positive rights requiring governmental intervention in order to be realised in practice (Beaulac 1999: 24). This leads the courts to take a more proactive stance and to use their judicial powers to their fullest extent.

But what about official language minorities elsewhere in Canada? Since only Quebec's French majority – and the Inuit majority in Nunavut – were willing and able to enact legislation in order to defend and promote their language (with both of these languages being in a minority position in their national state), can French language minorities at least aspire to autonomy in the areas where they are endowed with language rights? We will focus on municipalities, education, health care services and the provision of governmental services to ascertain whether these French language minorities can also gain autonomous institutions where they will be able to function in their language and impose its use.

## 4. MUNICIPAL INSTITUTIONS

Municipalities in Canada are a provincial responsibility.[18] As local institutions, many of them are comprised of a linguistically homogeneous population. They are entrusted with responsibilities which are of great importance to the ordinary life of their residents, such as land planning, water and sewerage services, electricity delivery (in some cases), roads, parks and recreational facilities, zoning, business development, etc. They could thus act as autonomous institutions. However, in terms of the country's current constitutional law, there are no rights to linguistically oriented municipalities. When the Quebec government adopted legislation to force municipalities to amalgamate, some of them took the government to court, alleging that this legislation was unconstitutional. Municipalities whose population was predominantly Anglophone claimed that their inclusion in a city where they would be in the minority amounted to a violation of their constitutional rights. The Quebec Court of Appeal made it very clear that there was no right to linguistically homogeneous municipalities, since municipalities were public bodies whose demography could and would change over time, and that they were under the sole and total jurisdiction of the provincial legislature (Baie d'Urfé 2009). But a different situation may prevail in New Brunswick. At a time when the possibility of amalgamating Dieppe – a predominantly Acadian municipality – with its Anglophone neighbour, Moncton, was being considered, it was argued in some quarters that section 16.1 of the *Charter* could prevent the government from going ahead with its plan, since municipalities could be regarded as institutions where social activities take place. In any event, the government backed down and did not proceed with its plan.

But it is still true that municipalities are sub-state institutions where cultural identity may be reinforced in cases where the municipal territory coincides

with a minority's historical local homeland (Bourgeois 2007: 631-655; Herb and Kaplan 1999: 1-6). Thus, two paths can be followed with regard to municipalities, and they are not mutually exclusive. For one thing, municipalities may be subjected to linguistic obligations aimed at reflecting the presence of a minority language population residing within the municipal boundaries. This was the route taken by New Brunswick, Quebec, Ontario and, to a lesser degree, Manitoba. In Quebec, the Supreme Court ruled that municipal by-laws were not "Acts of the Legislature", and that the obligation imposed on Quebec in 1867 to adopt legislation in both French and English therefore did not extend to municipalities, as the historical context of the adoption of the measure demonstrated[19] (Blaikie 1981). But in the case of New Brunswick, the Court of Appeal for the province came to a different conclusion. Considering that the province is officially bilingual, and on the basis of section 16.1 – and also considering the historical context and new rules of interpretation of language rights – the Court decided that municipal by-laws in New Brunswick could be included in the expression "Acts of the Legislature" in subsection 18(2) of the *Charter*, and that they should therefore be adopted in both official languages (Charlebois 2001). Instead of appealing to the Supreme Court of Canada regarding this case, the government of the day decided to modernise its *Official Languages Act* and include a section on municipalities. Under the new provincial rules, linguistic obligations are imposed on any provincial city (with 10,000 inhabitants or more[20]) – and any other municipality – whose minority population speaking the other official language comprises 20% or more of its population, according to the last census. Obligations range from the adoption of by-laws to the right to services in English or French, as well as the right to signs, notices, permits and licences in either of these languages, and the right to use either language during meetings of the city council.

Quebec uses a designation system, in terms of which a municipality may be designated if more than 50% of its population are speakers of the English language. Designation enables a municipality to use English in its communications, in its internal functioning and in its services, as long as French is also provided for.[21] In Ontario, municipalities have the option of incorporating this legislation into their legal frameworks and declaring themselves to be subject to the obligation to provide designated services in French.[22] So far, it seems that more than 100 municipalities have secured designation under the legislation.

Finally, the Charter of the City of Winnipeg, the capital city of Manitoba, includes a chapter listing the linguistic obligations of the City within certain designated areas.[23] The Court of Appeal of the Province has ruled that the obligations arising on the basis thereof are to be interpreted in the same manner as the constitutional language rights, and that real equality must be observed

(Rémillard 2009). However, these obligations do not go beyond the need to provide some services in French.

Another way to enhance minority community status and empower minority communities is to confer upon municipal governments the power to regulate the use of language within their own territory. Some municipalities in Ontario have decided to impose the use of French on commercial signs within their territory; and the Superior Court has subsequently confirmed that municipal law in Ontario entitled these municipalities to do so (Galganov 2010). In New Brunswick, some municipalities[24] have also asserted this power, and no judicial challenge to these by-laws has been launched.

It is unfortunate, though, that a by-law is needed in order to induce businesses to put up commercial signs in French, when their constitutional freedom of expression already allows them to do so. This is symptomatic of the attitude of a population in a minority context. What is even more disturbing is that, even when municipal governments have the power to intervene in some aspects of language matters, they are reluctant to do so. Institutional autonomy is therefore not necessarily a panacea that ensures language promotion: a power is useless if it is not exercised.

## 5. EDUCATION

Education was one of the first sectors in which the need for administrative autonomy was not only recognised, but also construed as a constitutional right. Section 23 of the *Charter*, as mentioned earlier, guarantees the right to minority language education to three categories of Canadian citizens. The right to exercise management and control of this education and of the minority language schools is not explicitly mentioned. Nevertheless, the Ontario Court of Appeal (Re: Minority Language Education Rights 1984), followed by the Supreme Court of Canada (Mahe 1990), acknowledged that, to achieve its true object, section 23 had to include a right of management and control. The Court relates this right to the text of section 23, but even more importantly, to its purpose:

> That purpose, as discussed earlier, is to preserve and promote minority language and culture throughout Canada. In my view, it is essential, in order to further this purpose, that, where the numbers warrant, minority language parents possess a measure of management and control over the educational facilities in which their children are taught. Such management and control is vital to ensure that their language and culture flourish. It is necessary because a variety of management issues in education, e.g., curricula, hiring, expenditures, can affect linguistic and cultural concerns. I think it incontrovertible that the health and survival of the minority language and culture can be affected in subtle but important ways by decisions relating to these issues. To give but one example, most decisions

> pertaining to curricula clearly have an influence on the language and culture of the minority students (Mahe 1990).

There are also some practical reasons for granting a minority language community the right to its own school management boards:

> Furthermore, as the historical context in which s. 23 was enacted suggests, minority language groups cannot always rely upon the majority to take account of all of their linguistic and cultural concerns. Such neglect is not necessarily intentional: the majority cannot be expected to understand and appreciate all of the diverse ways in which educational practices may influence the language and culture of the minority. In commenting on various setbacks experienced by the Francophone minority in Ontario, the Court of Appeal of that province noted that "[l]ack of meaningful participation in management and control of local school boards by the Francophone minority made these events possible" (*Reference re: Education Act of Ontario*, *supra*, at p. 531). A similar observation was made by the Prince Edward Island Court of Appeal in *Reference re: Minority Language Educational Rights (P.E.I.)*, *supra*, at p. 259:
>
> It would be foolhardy to assume that Parliament intended to leave the sole control of the program development and delivery with the English majority. If such were the case, a majority language group could soon wreak havoc upon the rights of the minority and could soon render such a right worthless (Mahe 1990).

There are now minority language school boards throughout Canada, including five English language ones in Quebec and thirty-one French language ones outside Quebec. These boards run minority language schools, but the powers at their disposal differ from one province to another.[25] According to the Court in *Mahe,* these boards should, at the very least, have exclusive control over the following: the recruitment and hiring of teaching and administrative staff; the curriculum, in its relation to language and culture; the expenditure of funds reserved for minority language education; and agreements with other institutions pertaining to the delivery of services in the minority language.

French school boards play a vital role in the promotion of the language and culture. They are considered so important that arguments are now being put forward to the effect that section 23 of the *Charter* should be deemed to include pre-school and post-secondary education. Furthermore, courts have recognised that schools serve as cultural centres and should therefore be established within communities. The right to decide on the opening and the location of a school should fall within the competencies of minority language school boards:

Where a minority language board has been established in furtherance of s. 23, it is up to the board, as it represents the minority official language community, to decide what is more appropriate from a cultural and linguistic perspective. The principal role of the Minister is to develop institutional structures and specific

regulations and policies to deal with the unique blend of linguistic dynamics that has developed in the province (Arsenault-Cameron 2000: 43).

In the case in question, the board had decided to open a school in a town, whereas the Minister had refused to grant this option, and offered transportation to an existing school in a village instead. The Court vindicated the school board's decision. It emphasised the fact that a school acts as a cultural centre, and thus comprises one of the most important institutions on which a minority can rely in order to express its identity.

The autonomy of a minority language school board in respect of pedagogical considerations and cultural matters is therefore one of the most complete forms of autonomy in Canadian law. The provincial government retains an interest in the quality of education and the attainment of provincial objectives, but with regard to the manner and form of the education, it is up to the minority language school boards to put the programmes and the means in place in order to attain the objectives. Proper resources and adequate funding must be provided to that end; and it is on that front that future litigation is likely to develop.

## 6. HEALTH CARE

There is no specific right to receive health care services in the minority language in Canada. But case law, using the institutional completeness theory, has paved the way for the establishment of such a right.

As mentioned earlier on, under the *French Language Services Act* of Ontario, non-governmental institutions receiving public funding may ask for and obtain, by way of a government regulation, a designation empowering them to offer services in the French language. The Montfort hospital, located in Ottawa, Canada's capital, had obtained such a designation. But in the early 1990s, the provincial government, faced with financial constraints, decided to shut the hospital down. When the Francophone community vehemently protested, the Restructuring Commission proposed to relocate most of the services to a bilingual hospital in Ottawa, without adopting a regulation to that effect and without really considering the real impact of Montfort among the community. Technically, the Court of Appeal of Ontario set aside the decision on the grounds that it was in violation of the provisions of the Act; but the Court also commented at length on the role that Montfort played among the community, over and above the provision of health care (Lalonde 2001). It based its analysis on the unwritten constitutional principle of protection of minorities (Re: Quebec Secession 1998: 79-82): "This appeal calls for careful consideration of the appropriate weight, value, and effect to be accorded to the respect for and protection of minorities

as one of the fundamental principles of our Constitution" (Lalonde 2001: 115). Using the constitutional principle to interpret the Act, the Court acknowledged that designation could not be easily removed:

> Montfort's designation under the F.L.S.A. includes not only the right to healthcare services in French at the time of designation but also the right to whatever structure is necessary to ensure that those healthcare services are delivered in French. This would include the training of healthcare professionals in French. To give the legislation any other interpretation is to prefer a narrow, literal, compartmentalized interpretation to one that recognizes and reflects the intent of the legislation. (Lalonde 2001: 162)

The Court went on to circumscribe the Minister's administrative discretion and to emphasise the role played by Montfort, *as an institution*, amongst the minority community:

> We agree with the Divisional Court, at pp. 65-66, that the language and culture of the francophone minority in Ontario "hold a special place in the Canadian fabric as one of the founding communities of Canada and as one of the two official language groups whose rights are entrenched in the Constitution". If implemented, the Commission's directions would greatly impair Montfort's role as an important linguistic, cultural and educational institution, vital to the minority francophone population of Ontario. This would be contrary to the fundamental constitutional principle of respect for and protection of minorities. (Lalonde 2001: 181)

Thus, although this decision does not, *per se*, recognise the right to obtain a minority language health care facility, it does seem to imply that the crucial importance of linguistically homogeneous institutions, where decisions regarding health care can be taken autonomously by the minority representatives themselves, is so fundamental that when such institutions have been provided, they cannot be scuttled for vague administrative or budgetary reasons.

Some provincial governments seem to have taken careful note of *Lalonde*. The new *Official Languages Act* of New Brunswick recognises that each citizen has the right to receive health services in his or her language of choice, but that the Minister acknowledges and respects the usual language of functioning of specific hospitals.[26] When the province restructured all of its Health Boards and merged them into two, it initially created bilingual institutions; but, faced with a court challenge based on subsections 20(2) and 16.1 of the *Charter* and the unwritten principle of protection of minorities, it finally yielded to the pressure and established two health authorities, one Francophone and one Anglophone.[27] These authorities respect the usual language of the hospitals; but the territory of each authority covers either French or English hospitals, with

the result that, in effect, there are two health systems in the province – as is the case with regard to education.

In Ontario, health authorities were not established on a linguistic basis, but planning authorities were appointed to assist them in developing services,[28] after intense pressure from the community and the issuing of a special report by the French Language Services Commissioner (French Language Services Commissioner 2009). Five consulting units have been put in place to help local health authorities to plan and deliver French language health services. Furthermore, health clinics are included amongst the many organisations and institutions designated under the *French Language Services Act*.

Finally, in Quebec, some health institutions have been designated under the *Charter of the French Language*.[29] Health authorities must prepare plans for the delivery of services in English.[30] There are therefore some institutions that are able to deliver services to the minority language community.

Elsewhere, health institutions organised on a linguistic basis depend on administrative organisations. There is no constitutional right to linguistically oriented health services or institutions; but it seems that such a right could eventually emerge from the unwritten principle of protection of minorities.

## 7. CONCLUSION

There is a conceptual difference between linguistic autonomy, understood as the power to regulate language use within an institution, and autonomy in general, which is the power to regulate any activity, within certain parameters. Autonomy is never absolute. For one thing, it is constrained by the Rule of Law and the obligation to respect the limits of legal authority, subject to judicial review. For another, autonomy may vary in nature and degree. Financial, political and administrative constraints may reduce the full autonomy of any institution entrusted with a public mission.

But the fact remains that autonomy is a desirable goal for any linguistic community in order to best preserve and promote its language and culture, as well as to administer its own affairs, especially in matters that have a strong cultural component (education, health, arts, media, etc.). In Canada, it is only in education that autonomy has been extended to include the right to autonomous institutions. But there are signs that in municipal governance as well as in health services, decentralised institutions legislatively entrusted with the appropriate powers may play an important role in achieving this objective, even if the system maintains a semblance of neutrality and autonomous institutions are not perceived as a right, but only as the outcome of a political or administrative

decision. Autonomous institutions represent spaces where a linguistic minority can express itself and run its own affairs according to its own priorities. Short of federalism, autonomy is a means to an end, the affirmation of diversity and of the moral obligations of a state towards its national minorities. Politics is not the only field where autonomy may be gained. A subtle but persuasive link between rights, legal obligations and political realities can lead to the creation of autonomous institutions which will contribute to the vitality of a minority.

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## ENDNOTES

1 Subsection 35(1) reads: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed". *Constitution Act, 1982* (U-K).

2 *Official Languages Act*, (Can.).

3 *Official Languages Act*, (N-B).

4 *Nunavut Act*, (Can.).

5 *Official Languages Act*, (Nun.).

6 *Inuit Languages Protection Act*, (Nun.).

7 *French Language Act*, (Ont.); *French Language Act,* (P.E.I); *French Language Act*, (N-S).

8 In language rights theory, the personality principle postulates that each citizen has the right to choose his or her official language and may therefore receive services from the state in that language anywhere within the territory. The exercise of the right does not depend upon the area. Territoriality means that one and only one language is official within a territory.

9 Language of legislation, official announcements, court proceedings and decisions, language of work of the civil service.

10 *Official Languages Act*, section 41 (Can.).

11 *R v. Beaulac*: "Language rights must *in all cases* be interpreted purposively, in a manner consistent with the preservation and development of official language communities in Canada".

12 Section 58 of the *Charter of the French Language* (Que.) now authorises the use of other languages on commercial signs, provided that French is predominant.

13 *International Covenant on Civil and Political Rights*, (U.N).

14 It has been concluded in at least one decision that the imposition of a language on commercial signs was not even a violation of freedom of expression in a minority context: *Galganov v. Russell*, on appeal. See our discussion on municipal institutions, *infra*.

15 *Official Languages Act of Canada,* section 16*; Criminal Code of Canada*, section 530-530.1; *Official Languages Act of New Brunswick*, sections 19-22; *Courts of Justice Act,* sections 125-126 (Ont.).

16 *Forest v. Attorney General for Manitoba*, implementing section 23 of the *Manitoba Act of 1870* (Can.), ratified by the *Constitution Act of 1871* (U-K); *Blaikie v. Attorney General for Quebec*, implementing section 133 of the *Constitution Act of 1867* (U-K).

17 In Quebec's case, translations in English were readily available, so the province merely had to adopt an *omnibus* bill retroactively reenacting the English versions of its statutes.

18 *Constitution Act of 1867,* subsection 92(8) (U-K).

19 *Blaikie v. Attorney General for Quebec*. The conclusion is also valid for Manitoba, since the constitutional obligation was adopted at about the same time.

20 There are presently eight cities that fulfil this criterion: Moncton, Dieppe, St-John, Fredericton, Miramichi, Bathurst, Edmunston and Campbellton.

21 *Charter of the French Language,* sections 22.1, 23, 24, 26 and 29.1 (Que.).

22 *French Language Services Act of Ontario,* section 14.

23 *Charter of the City of Winnipeg*, Part IX (Man.).

24 The first one to do so was Dieppe – the city that resisted amalgamation with its Anglophone neighbour, Moncton.

25 Under section 93 of the *Constitution Act, 1867* (U-K), education comprises a provincial jurisdiction.

26 *Official Languages Act of New-Brunswick*, sections 33-34.

27 *Regional Health Authority Act*, section 18.1 (N-B).

28 *Engagement with the Francophone Community under Section 16 of the Act,* Ontario regulation under the *Local Health System Integration Act* (Ont.).

29 *Charter of the French Language,* section 29.1 (Que.).

30 *An Act respecting Health and Social Services*, sections 15, 125, 348 (Que.).

# L'INTRODUCTION DES LANGUES AFRICAINES DANS LE SYSTÈME ÉDUCATIF AU MOZAMBIQUE SIGNALE-T-ELLE LE DÉPASSEMENT DE L'ASSIMILATION?[1]

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**Résumé**

En Afrique noire, loin des arguments d'ordre pédagogique, les attitudes face au rôle éventuel que devraient jouer les langues locales dans l'éducation restent largement conditionnées par le passé colonial. C'est le cas au Mozambique où les langues africaines ont été longtemps ignorées par les autorités successives, la politique de modernisation du Frelimo, au-delà d'un habillage différent, emboîtant le pas de celle de l'assimilation promue par le gouvernement portugais. L'introduction expérimentale de l'éducation bilingue depuis le début du millénaire suscite à rebours l'enthousiasme de nombreuses communautés rurales qui insistent pour être incluses. Ce mouvement, renforcé par les pratiques dans les pays frontaliers et le renouveau de l'idéologie afro-centriste, a entraîné un revirement du discours de l'élite dirigeante, ce dont témoigne puissamment l'engagement d'une réflexion en vue d'une altération de la constitution pour faire place aux langues africaines, ce qui alignerait, si cela est finalisé, le pays sur ses voisins. Il est encore tôt pour déterminer si ce changement drastique marque le crépuscule de l'hégémonie culturelle jusque-là sans partage de la bourgeoisie urbaine et lusophone de Maputo, et une réconciliation, tardive, avec l'africanité du pays, ou s'il s'agit seulement d'apparence et/ou d'opportunisme de l'élite dirigeante.

**Abstract**

In Sub-Saharan Africa, far from being grounded in a pedagogical rationale, attitudes regarding the role that should be played by local languages in formal education largely reflect colonial legacies – directly or otherwise. This is the case in Mozambique, where African languages have been consistently ignored. Frelimo's post-independence modernisation policy, despite being articulated in terms of a different discourse, is very much in keeping with the assimilation policy of the former Portuguese colonial government. In this context, the modest experiment in bilingual education carried out since the beginning of

this century has been welcomed by many rural communities, with some even demanding to be included in the project. This socio-political statement, coupled with the example of neighbouring countries and the renewed momentum of the Africanist ideology, has led to a dramatic about-turn in the discourse of the dominant elite, as is clearly demonstrated by the fact that an amendment to the constitution is being considered, in order to create space for African languages – a course of action which, if carried through to its conclusion, would eventually align the country with its neighbours. Time will tell whether this turnabout signals the downfall of the cultural hegemony that Maputo's Portuguese-speaking middle-class has so far exercised, leading to an acceptance – albeit belated – of the African nature of the nation, or whether it is mere window-dressing and/or opportunistic positioning on the part of the ruling elite.

**Mot clefs:** Mozambique, politique coloniale, politique linguistique, éducation, langue africaine, assimilation

De façon presque unique en Afrique, l'histoire coloniale *et* postcoloniale du Mozambique se caractérise par une politique de dénigrement des langues et cultures locales. L'idéologie dite de 'l'assimilation', caractéristique de la politique coloniale portugaise, qui visait à promouvoir une micro-élite à qui certains avantages étaient concédés en échange de l'adoption de la langue et du mode de vie portugais et, du moins dans sa version tardive, plus élaborée, du renoncement aux pratiques africaines, fut, dans la première décennie après l'Indépendance obtenue en 1974 et au-delà de motivations différentes, largement appropriée par le *Frente de Libertação de Moçambique* (Frelimo) au nom du progrès et de la modernité érigée en principe intangible.[2] Il fallut attendre l'ouverture démocratique des années 1990 dans la foulée des accords de paix qui mirent fin à la guerre civile pour voir se développer des programmes éducatifs utilisant les langues locales. Mais les réticences demeuraient. A l'exception d'une expérience pilote extrêmement limitée, cette stratégie fut initialement restreinte à l'alphabétisation d'adultes délaissée par l'état. Ce n'est qu'en 2002 qu'un modèle « d'éducation bilingue » faisant de plus d'une dizaine de langues locales les langues de première alphabétisation fut initié dans des écoles pilotes. Malgré ses nombreuses failles, et à la surprise, sinon la déception, de certains, ce programme suscita l'adhésion de nombreuses communautés rurales, ce qui assura non seulement son maintien mais aussi son extension. Ce programme a ainsi eu un impact sur l'ensemble du corps social au point d'entraîner une inflexion majeure du discours de légitimation de l'élite au pouvoir. Faut-il y voir les prémices de la reconnaissance, si longtemps différée, de la nature africaine du pays ?

Nous revenons sur les aspects clefs de ce processus en partant de l'histoire coloniale, examinant notamment l'assimilation dans sa complexité, car les attitudes actuelles ne peuvent se comprendre sans prendre en compte cette évolution.

## 1. INGÉNIERIE SOCIALE DURANT LA PÉRIODE COLONIALE: L'ASSIMILATION[3]

La colonisation du Mozambique se fit en deux périodes principales.

Dès le 16ème siècle, la couronne portugaise établit quelques places fortes sur le littoral centre nord ainsi que dans l'estuaire et le long du cours du Zambèze, se substituant aux réseaux swahili. L'île de Mozambique fut élevée au rang de capitale, les divers établissements étant rattachés à la vice-royauté de Goa. Au cours des siècles suivants, le Portugal chercha à étendre sa présence, en ouvrant des échelles, essentiellement sur la côte, nouant des relations de troc avec les chefs locaux. Ce n'est qu'à la fin du 19ème siècle que, mis au pied du mur par la compétition entre puissances coloniales pour le partage du continent, le Portugal, au bout de longues campagnes de pacification, parvint à établir son autorité sur l'ensemble du Mozambique actuel.[4] Ce territoire immense qui comprenait trois grands ensembles - le Nord et le Centre, chacun avec son hinterland, et le Sud, quasiment réduit à une bande côtière – ne correspondait à aucune entité politique préexistante (voir Newitt 1995). Non seulement les divers groupes présents n'avaient eu que peu d'interactions entre eux longitudinalement, mais la ligne frontière traversait de nombreuses unités ethnico-politiques. De plus le Portugal n'avait guère les ressources de ses ambitions. L'administration portugaise, aiguillonnée par les prétentions britanniques et cherchant à asseoir sa présence, fut alors amenée à céder de vastes parties du nord et du centre à des compagnies concessionnaires. Jusqu'au milieu du 20ème siècle, seul le sud, où en 1901 le port de Lourenço-Marquès (rebaptisé Maputo après l'Indépendance) avait été promu au rang de capitale, se trouvait sous son autorité directe.

Militairement, économiquement et démographiquement faible, le Portugal n'avait d'autre choix que de se gagner un soutien au sein de la population. Il joua d'une véritable ingénierie sociale, concédant à une petite frange de la population de notables avantages, parmi lesquels la dispense du travail forcé, la liberté de circulation, la responsabilité devant les tribunaux portugais (et non devant la justice traditionnelle) et, surtout, l'accès pour leurs enfants aux écoles européennes (Honwana & Isaacman 1988:81 & 91; Moreira 1997:46). En contrepartie, les bénéficiaires devaient dans l'ensemble adopter le mode de vie portugais et professer loyauté au régime. Le groupe des assimilés était composite et l'assimilation elle-même, trait unique à la colonisation portugaise selon ses chantres (Moreira 1997:92), évolua au cours du temps jusqu'à son abolition en 1961. Les pratiques linguistiques en référence aux langues africaines évoluèrent aussi en fonction de la position des assimilés dans la société coloniale, la question n'étant sans doute pas entièrement jouée d'avance.

Les assimilés comprenaient des descendants de Goanais,[5] des métis de Portugais et de femmes locales, surtout dans les zones de colonisation ancienne de la vallée du Zambèze, ainsi que des Africains, souvent fils de chefs locaux. Les uns comme les autres avaient dans l'ensemble fréquenté des écoles missionnaires et – à l'exception d'une petite minorité musulmane d'origine indienne - professaient le christianisme. A partir du début du 20ème siècle, la plupart des assimilés se rencontraient dans le Sud. Les assimilés monopolisaient les emplois de commis dans l'administration ou les firmes privées, jouant souvent le rôle d'intermédiaires entre les patrons blancs et la main-d'œuvre africaine.

Durant une première période, que Rocha (2006:124) appelle 'l'assimilation uniformisatrice' (*'assimilação uniformizadora')*, les assimilés étaient dans une grande mesure acceptés par la société européenne, certains d'entre eux assumant même des fonctions importantes au sein de la colonie.[6] A cette époque, leurs attitudes face aux langues africaines étaient ouvertes. Ainsi, la connaissance et la pratique du ronga, langue africaine dominante dans la région, qu'ils avaient apprise enfants, était-elle courante chez ceux du Sud, métis comme Africains, et ils ne rechignaient pas à le parler. Mieux, beaucoup étaient à même de le lire et de l'écrire. Les missions protestantes actives dès la deuxième moitié du 19ème siècle dans le Sud, dont la Mission Suisse (voir Harries 2007), avaient, selon leur stratégie bien rodée (voir Coquery-Vidrovitch 1985 ; Said 2000 : 350), instrumentalisé les langues ou variétés africaines locales, suscitant une petite élite alphabétisée bilingue, sinon biculturelle, estimée, dès 1896, à env. 900 individus (Rocha 2006:99). Cette élite constituait le noyau des assimilés. Il ne faut pas attendre chez ceux-ci toutefois de revendication d'un nationalisme linguistique. Au contraire, certains critiquaient même l'accent mis par les missions protestantes sur l'alphabétisation en langues locales, car seule la connaissance du portugais ouvrait les portes de la société coloniale, mais leur pratique restait ouverte. A preuve, les quelques feuilles que publiaient à l'époque les associations politico-culturelles dites 'nativistes' qui regroupaient les assimilés étaient souvent en partie bilingues. Ainsi *O Africano*, organe du *Gremio Africano* de Lourenço Marquès, lancé en 1908, exhibait-il un sous-titre en ronga (fac-simile in Rocha 2006:115), et certains articles apparaissaient dans cette langue. Il en fut de même de *O Brado Africano* qui prit sa suite en 1918 (Rocha 2006:148, 151, 197). Mieux, dans les années 1920, une scission du *Gremio* fit paraître *Dambu dja Africana*, Le Soleil Africain, entièrement en ronga (Honwana et Isaacman 1988:20, 96 & 110; Moreira 1997:86; Rocha 2006: 26, 52, 34, 121 & 123 ; infopedia http://www.infopedia.pt/$o-brado-africano, visité en juillet 2010). Mais bientôt, dans une réaction protectionniste face à la domination économique, politique et culturelle britannique, le pouvoir colonial métropolitain réduisit considérablement la marge de manœuvre des missions protestantes 'étrangères'. Soucieux de ménager le voisin britannique où les

missions représentaient un lobby puissant, et conscient de sa propre faiblesse, le gouvernement portugais agit à travers des directives concernant la langue d'instruction, ce qui était plus difficilement contestable.

En 1907, l'usage d'autres langues que le portugais dans les écoles fut cantonné aux trois premières années du primaire. C'était en fait l'usage de l'anglais qui était visé car les missions protestantes s'appuyaient sur les ressources humaines des missions anglophones de même obédience situées dans les territoires voisins, le Transvaal et la colonie du Natal essentiellement. Les langues africaines restèrent toutefois autorisées pour les enseignements religieux.

Mais bientôt l'arrivée de nouveaux colons du Portugal et leur inquiétude devant un groupe qui menaçait potentiellement la supériorité sociale que leur conférait leur couleur de peau amena l'administration coloniale à imposer peu à peu des mesures vexatoires. En 1913 les assimilés durent arborer un brassard (*chapa do assimilado*) et en 1917 ils devaient justifier du certificat d'études. La frustration engendrée chez les assimilés par ces mesures, qui venaient à l'encontre des promesses implicites d'égalité, radicalisa les mouvements 'nativistes', notamment le *Gremio,* animé par l'une des plus brillantes individualités de l'époque, João Albasini, lui-même métis (Honwana & Isaacman 1988: 12-13, 28, 55 & 209; Moreira 1997: 49, 96, 103; Rocha 2006). Mais rien n'y fit et les conditions se resserrèrent. Les assimilés durent expressément renoncer aux aspects les plus saillants des pratiques africaines traditionnelles, notamment la polygamie et la *lobolo* (paiement des épouses), les initiations, la participation aux cérémonies liées aux ancêtres. L'assimilation devint même révocable si le sujet et sa famille ne répondaient pas, ou plus, à certains 'critères de civilisation'.[7] Les assimilés étaient ainsi coupés de leur milieu d'origine, comme le dénonça Mondlane (1979:43). "*Être assimilé c'est ressembler aux blancs*" commente Moreira (1997:50, 103), référant au premier quart du 20ème siècle.

Continuant dans la même voie, en 1929, après l'instauration de *l'Estado Novo* par Salazar au Portugal, l'écrit en 'langue bantoue' se vit banni (Moreira 1997:47; Cahen 2000:4; Stroud & Tuzine 1998 in Cumbe & Machanga 2001 ; Linder 2001:159) et dans les années 1930, alors que le régime se repliait autour d'un nationalisme étroit, la plupart des écoles des missions protestantes furent transférées à l'église catholique, plus docile, avec laquelle un concordat fut signé en 1940. Le programme de ces écoles n'accordait aucune place aux langues africaines. « *Les écoles pour les Africains sont tout d'abord des agences pour la diffusion de la langue et de la culture portugaise* » pouvait observer Mondlane à leur propos (1979 :54). Cette évolution sonna le glas de l'appropriation de l'écrit en vernaculaire qui, à l'image de ce qui se passait concurremment en Afrique du Sud, paraissait alors en bonne voie.[8] Ainsi, alors que les opportunités

d'apprentissage formel des langues africaines se réduisaient, leur usage public pouvait désormais entraîner la déchéance du statut d'assimilé car signe de relaps, soit de retour à la barbarie associée aux cultures africaines.

L'usage formel des langues africaines pâtit finalement de l'évolution des rapports de force sur la scène régionale.

Par l'adoption du mode de vie portugais chrétien allant désormais de pair avec la pratique exclusive du portugais, une fraction de la population se voyait élevée au-dessus de la masse indigène, accédant à un statut proche de celui des colons et fonctionnaires venus de métropole. Si l'importance démographique des assimilés resta faible – moins de 5000 en 1950 selon Mondlane (1979 :33) - cette politique suffit à asseoir, tant chez cette élite que parmi la masse des Africains à leur contact qui aspiraient à échapper à un sort peu enviable, non seulement le prestige de la culture occidentale portugaise mais surtout le dédain, voire le mépris, envers les pratiques locales, perçues comme barbares et arriérées, et qui se trouvaient de plus en plus associées à la pauvreté et à l'exploitation accablant les populations rurales. L'abrogation de l'assimilation et de son corollaire l'indigénat en 1961, allant de pair avec l'abolition du travail forcé et l'extension de la citoyenneté à toute la population (Gomez 1999 :54 ; O'Laughlin 2000), contribua en fait à en généraliser l'idéologie, même si nombre des pratiques qui la caractérisaient, dont l'alphabétisation, restèrent peu répandues. À la veille de l'Indépendance à peine un tiers des enfants était scolarisé (Gomez 1999: 70-71) et le taux d'alphabétisation (en portugais) de la population restait inférieur à 10% (Lopez 1998: 465) alors que le portugais n'était langue maternelle que d'environ 8% de la population.

## 2. INDÉPENDANCE : RUPTURE DANS LA CONTINUITÉ

### 2.1 La modernité, nouvel habit de l'assimilation

Dès la période de la lutte de libération, le Frelimo opta pour l'usage exclusif du portugais. Ce choix était à l'évidence dicté par des raisons pratiques et, dans une certaine mesure, opportunistes. Nombre de cadres, assimilés eux-mêmes, étaient, du fait de leur parcours personnel marqué au fer de l'assimilation, mal à l'aise face aux langues et cultures africaines qu'ils connaissaient peu ou pas du tout. Citons Cahen (2006:122), qui analyse ce groupe : « *La micro-élite mozambicaine fut ainsi le produit presque exclusif des caractéristiques de la colonisation portugaise du XXè siècle. Situés pour l'essentiel à Lourenço-Marques, ces petits noyaux d'élite étaient socialement, culturellement, ethniquement et même le plus souvent religieusement extérieurs à la population*. » En outre le portugais paraissait était la seule langue commune à des militants qui

provenaient de régions diverses et éloignées, sans lien entre elles autre que celui créé par la colonisation, comme le remarqua Mondlane (1979:96).[9] Cette même stratégie fut poursuivie et amplifiée à l'Indépendance, le portugais se voyant proclamé d'entrée de jeu 'langue de l'unité nationale'. Il s'agissait naturellement de renforcer le sentiment national dans un pays particulièrement instable (Stroud 1999:345) tout en maintenant, comme aux temps coloniaux, une frontière linguistique face aux voisins anglophones (Rothwell 2001). Il est à noter que, à l'instar de la plupart des pays d'Afrique noire,[10] aucune langue africaine ne s'étant généralisée à l'ensemble du pays, seul le portugais pouvait en tenir lieu – et de fait on assista à des tentatives de localiser ('mozambicaniser') le portugais (Stroud 1999). Mais à ce pragmatisme au demeurant largement partagé sur le continent vint s'ajouter une obsession singulière pour la modernisation. Le régime d'inspiration marxiste qui avait instauré le parti unique s'attela à la construction de 'l'homme nouveau'. Les pratiques traditionnelles jugées antinomiques d'une vision du progrès réduit à la simple adoption des modes de vie occidentaux se virent niées dans leur réalité même et, dans une résurgence du passé, cette vision vint à inclure les langues. Pour les cadres du Frelimo et de l'appareil d'état, *« les langues et cultures africaines [restaient] l'expression de l'obscurantisme et des sources possibles de division tribale »* (Balegamire et al., 2004). Le recours exclusif au portugais devint acte de loyauté envers le parti (Stroud 1999 :354). L'usage des langues africaines, regardées péjorativement comme 'dialectes' à la manière portugaise, car seul le portugais avait droit au statut de langue (voir Langa et Chambale 2000 :219), fut proscrit lors de toute circonstance officielle, y compris dans les tribunaux, au Parlement et à l'école (Isaacman 1983:115 ; Firmino 2006: 142). Selon Stroud (1999: 365, 375), afin que les langues africaines ne puissent être utilisées en classe, les enseignants étaient en principe affectés *hors* de leur région d'origine, rendant impossible ou difficile toute alternance codique en classe.

Il paraît peu contestable que cette attitude de dénigrement systématique des pratiques africaines au nom du modernisme ne provienne d'une appropriation à sens unique par la classe urbaine et la bureaucratie d'état de l'idéologie de l'assimilation. "*(…) Le modernisme du Frelimo était ancré dans la politique de l'assimilation qui refusait la diversité culturelle et linguistique du pays. Elle visait à créer l'homme nouveau, un homme socialiste (…) supposé émerger dépourvu de toute culture et histoire, à l'exception d'une perception du passé comme hostile*" écrit Mudiue (1999:37). Geffray parle à ce propos de l'idéologie de la 'page blanche' (in Hall & Young 1999 :219) qui visait à nier, finalement, toute réalité culturelle et politique antérieure à la colonisation.

Pour concrétiser son projet et 'élever' le niveau culturel du peuple, le régime mit en place un programme extensif d'éducation dont l'alphabétisation des adultes,

qui, du fait de la confiscation des propriétés de la plupart des Églises (Hall & Young 1999:86) était désormais assumée principalement par l'état, était partie intégrante (décrit dans Veloso 2000). Bien entendu, l'ensemble de ces activités éducatives recourait exclusivement au portugais. Newitt (1995 :547) note avec ironie que le Mozambique indépendant fit davantage d'efforts pour diffuser le portugais que le Portugal ne l'avait jamais fait.

## 2.2 Les excès d'une vision univoque

Une fois estompé l'enthousiasme provoqué par la défaite de la puissance coloniale et la proclamation de l'Indépendance, des difficultés de tous ordres ne tardèrent pas à assaillir le jeune état.

Alors que le départ massif des Portugais,[11] en l'absence de personnel local formé, menaçait la viabilité du pays, fut créé en 1976, avec le soutien des services secrets Rhodésiens (Hall & Young 1998: 117 & seq.), un mouvement d'opposition armée, la *Resistancia Nacional Moçambicana* (Renamo), dans le but d'abattre ou du moins d'affaiblir un régime susceptible de soutenir les mouvements de libération des pays voisins d'Afrique australe encore dominés.[12] L'insécurité s'installa sur la majorité du territoire, la Renamo ayant su capitaliser sur le mécontentement populaire provoqué par le socialisme et la 'modernisation' imposés par le Frelimo, en particulier dans les zones marginalisées durant la colonisation, au nord et centre. La Renamo s'acharna à détruire les infrastructures et les écoles, perçues comme instruments de l'état frelimiste, furent des cibles privilégiées. L'accès à l'instruction primaire régressa. En 1992, seules 3384 écoles primaires fonctionnaient alors qu'on en dénombrait 5730 en 1980 (Matusse 1994 : 548). En outre, au milieu des années 1980, tant du fait de l'insécurité, de la désorganisation généralisée de l'état que de la chute de l'enthousiasme, les campagnes d'alphabétisation, dépendantes du volontariat de la jeunesse et des travailleurs, prirent quasiment fin. Ainsi, en 1998 à peine 42% de la population était considéré comme alphabétisée (en portugais) (*Recenseamento geral da população* de 1997, d'après le website de *l'Instituto de Estatistica*, mai 2007).

La Renamo réclamait un retour aux pratiques traditionnelles bannies par le Frelimo, ce qui lui assura le soutien de chefs traditionnels et de communautés rurales. Elle faisait par ailleurs largement usage des langues africaines. Le ndau, langue de la majorité de ses cadres, était ainsi couramment utilisé dans les communications (Stroud 1999:360; Hall & Young 1999:174).

### 2.3 Aggiornamento ; acceptation timide des langues africaines

Devant l'impasse politico-militaire, après la mort de Samora Machel et l'accession au pouvoir de Joachim Chissano à la fin des années 1980, le gouvernement entama des négociations avec la Renamo (Hall & Young 1999:189 & seq) au terme desquelles fut promulguée en 1990 une nouvelle constitution qui admettait le multipartisme. Cet aggiornamento infléchit la doctrine officielle concernant la politique linguistique. Tout en maintenant le portugais comme seule langue officielle, la nouvelle constitution mentionne timidement les langues africaines que l'état s'engage à reconnaître et à valoriser (art. 9, cité in Lafon 2008b).[13] Cela se traduisit aussi dans l'éducation. D'une part, prenant acte de l'échec des campagnes antérieures, l'usage des langues africaines fut admis désormais dans l'alphabétisation d'adultes, comme en témoigne le programme pilote mené par l'*Instituto Nacional de Desenvolvimento da Educação* (INDE) (voir Heins 1999).[14] En outre, ce champ fut largement abandonné aux opérateurs non-étatiques et les églises protestantes y trouvèrent l'occasion de renouer avec leur pratique antérieure alors que d'autres confessions et des ONG emboîtaient le pas. D'autre part, de 1993 à 1997/98 fut menée, avec le soutien de la coopération suédoise, une expérience d'éducation bilingue, le Pebimo (*Programa de Escolarização Bilingue em Moçambique*). Malgré son caractère extrêmement limité puisque n'impliquant que 350 élèves distribués en deux zones linguistiques, le nyanja et le changana, dans les provinces de Tete et de Gaza respectivement,[15] cette expérience fut jugée positive (voir Benson 2000 & 2001). En 1997, à l'issue d'un séminaire convoqué par l'INDE l'extension de l'expérience à l'échelle nationale fut annoncée pour la rentrée 2002, la période intermédiaire devant être consacrée à sa préparation (Lopes 1998: 462 ; Matsinhe 2005:128).

Le modèle retenu pour ce qui est de l'enseignement bilingue est un modèle 'transitionnel à sortie rapide' (*early exit transitional model*),[16] la langue locale étant utilisée comme langue d'instruction durant les trois premières années avant d'être remplacée à partir de la 4ème par le portugais, introduit à l'oral dès la 1ère année. Cette stratégie rejoint une recommandation exprimée au niveau régional de la SADC (*Southern African Development Community*) (Balegamire et al. 2004) car la plupart des pays membres voisins du Mozambique (Zimbabwe, Malawi, Swaziland, Afrique du Sud) mènent depuis longtemps des politiques semblables.[17]

Là comme ailleurs, la justification essentielle est l'échec scolaire : de 1992 à 1998, le taux moyen de redoublement dans les 5 premières années reste ancré à un quart de l'effectif (Balegamire et al. 2004). Peu contestent que la méconnaissance de la langue d'instruction dans les zones rurales, non seulement par les enfants mais aussi par les professeurs, soit au cœur du

problème. "*La question de la langue est un facteur déterminant dans l'activité éducative [o processo de ensino-aprendizagem], (...) dans la mesure où la majorité des élèves mozambicains (...) parlent une langue maternelle différente de la langue d'enseignement*" notent Conceição et al. (1998). Le Plan Stratégique d'Éducation 1997-2001, publié en 1998, le reconnaît implicitement (p 21). C'est aussi la thèse de Dias, qui identifie le portugais comme vecteur d'inégalités scolaires, dans un ouvrage qui connut à sa sortie un certain retentissement (Dias 2002).

Cette nouvelle orientation va de pair avec la localisation d'une partie des contenus dans le cadre du renouvellement des programmes (*Novo Curriculo*) introduit en 2003, les communautés locales étant expressément invitées à intervenir à l'école au titre des « capacités pour la vie » dans la proportion de 20% des contenus (*Governo de Moçambique* MEC 2006). Plus généralement elle s'inscrit dans un vaste mouvement de décentralisation administrative partiellement impulsé de l'extérieur qui voit les échelons locaux (municipalités puis districts) assumer des responsabilités croissantes dans tous les domaines, y compris la planification et le développement.[18]

Au-delà du discours éducatif, ce changement de cap est une véritable révolution dans un pays où la langue coloniale avait été érigée en symbole et instrument de l'unité nationale. Il bouleverse les croyances et les pratiques d'un personnel éducatif endoctriné dans le catéchisme de l'inadéquation des langues africaines pour la modernité. Il suscite d'ailleurs le scepticisme d'une grande partie des élites urbaines. Indice des fortes réticences qu'il rencontra et rencontre, il est stipulé que l'éducation bilingue reste optionnelle, les parents étant toujours libres de demander le transfert de leur enfant vers une classe monolingue.

## 3. L'ADHÉSION POPULAIRE EMPORTE LA DÉCISION

### 3.1 Succès non démenti

Sept langues avaient été initialement retenues à raison de deux par province, le programme devant toucher 22 écoles-pilotes situées dans des zones rurales linguistiquement homogènes, sur les quelques 10 000 que comptait alors le pays. Il devait se diffuser « par expansion verticale », avec chaque année l'ouverture d'un niveau supérieur, la 4ème année devant être atteinte à la rentrée 2006, et de deux nouvelles premières classes dans chaque école concernée.

Or, d'entrée de jeu, l'expérience suscita l'enthousiasme des communautés concernées au point d'entraîner son élargissement initial de 7 à 16 langues d'une part, et de 22 à 32 écoles de l'autre. Les langues reprenaient celles identifiées par le *Núcleo de Estudos das Línguas Moçambicanas* (Nelimo) lors de

son second séminaire tenu en 1999 auxquelles fut ajouté le mwani (Matsinhe 2005:131; V. Bisque, INDE, interview July 2010).[19] Le ndau, initialement retenu dans les seules provinces de Manica & Sofala, fut également considéré dans celle d'Inhambane (A Dhorsan, com. pers.). Ainsi, en 2005, le programme d'éducation bilingue touchait environ 4200 élèves, davantage qu'initialement prévu mais en tout état de cause une proportion infime de l'effectif total.

Mise en place dans un contexte de pénurie de ressources humaines, logistiques et financières, aggravée par une extension considérable de l'accès à l'enseignement primaire,[20] cette expérience novatrice dut faire face à de nombreuses difficultés. Notons en particulier des contestations autour de l'instrumentalisation des langues – choix des langues et des variétés,[21] décisions orthographiques - et des terminologies ; la carence de matériel pédagogique – jusqu›à la rentrée 2010, aucun manuel n'était disponible pour de nombreuses langues, les enseignants devant recourir à des photocopies du manuel pilote partiellement périmé ; la formation des enseignants laisse grandement à désirer, les capacités de l'INDE étant largement dépassées par le succès même du programme.[22] Il est juste de mentionner que, dans les dernières années pour ce qui est des manuels tout au moins, les écoles utilisant le portugais n'étaient pas non plus exemptes de ces difficultés (voir Chimbutane 2005:7). Certaines se résolvent ponctuellement et régionalement grâce à l'intervention d'ONG éducatives, en particulier Progresso dans les provinces de Cabo-Delgado et Niassa et moindrement UDEBA-LAB (*Unidade de Desenvolvimento da Educação Básica em Gaza – Laboratório*) dans celle de Gaza.[23]

Malgré ce, l'adhésion populaire dans les zones rurales ne s'est pas démentie. Le processus d'extension non prévue ('*expansão selvagem*' dans le jargon de l'INDE) s'est même accéléré une fois que le programme a été connu. D'après une enquête chiffrée de 2009 de l'INDE (communiquée par V. Bisquet) plus de 200 écoles sur un total d'environ 12 000 seraient désormais concernées, impliquant quelque 28 000 élèves, les responsables éducatifs aux échelons des districts et des provinces s'attachant en général à satisfaire les demandes populaires.

Cet enthousiasme démontre une nouvelle fois que, comme le suggère Ricento (2006 :8), les choix linguistiques à l'école recouvrent bien davantage que la langue per se. Au Mozambique rural, ils procédèrent non pas tant de meilleurs résultats scolaires ou professionnels, qui, au demeurant, tardent à se vérifier, que de la satisfaction de voir sa langue et sa culture enfin reconnues par un système qui les a si longtemps niées. Ce programme signale en effet l'acceptation longtemps différée par les autorités politiques de l'identité africaine plurielle du pays. De fait, devant la popularité du programme, le discours et les pratiques officielles ont changé, et ce, dans et au-delà de l'éducation.

### 3.2 Impact sur le corps social

D'une part, le programme se voit maintenu et doit même être intégré de plein droit à la politique éducative à partir de 2011, l'éducation bilingue, désormais avalisée comme option (et non plus comme simple expérience), devant être prise en charge directement par le Ministère (A. Dhorsan, INDE et E. Sequiera, Progresso, juillet 2010, Maputo). La linguistique bantoue, qui a désormais droit de cité à l'Université, est devenue partie intégrante de la formation des maîtres. Toutefois, l'extension du programme aux zones urbaines, qui devrait en découler, paraît problématique, aucune adaptation ou modalité d'application particulière n'étant envisagée pour des zones multilingues. D'autre part, le programme est accompagné de mesures réelles et symboliques, certaines potentiellement de grande ampleur. Cela est important. Comme le récent recueil de Hornberger le démontre (voir Edwards 2011), l'école ne saurait à elle seule 'sauver' les langues autochtones menacées mais il semble bien qu'au Mozambique elle ait servi de catalyseur et d'outil de légitimation (Stroud 2003:18 ; Chimbutane 2011). Sur le plan idéologique, on voit ainsi dans la presse des critiques sévères de la politique passée du « tout portugais », inimaginables auparavant (par exemple Lopes 2007). Les media, notamment la radio nationale, ont accru leurs émissions en langues africaines et les publications en langue locale se répandent, renouant, pour certaines langues, avec une tradition ancienne. On assiste par ailleurs à une revalorisation générale des pratiques culturelles, y compris celles qui furent bannies auparavant, auxquelles les journaux consacrent souvent des pages entières. Par exemple la fête "Guaza Muthini" à Marracuene est désormais à l'honneur (S Matsinhe, com. pers. oct 2011). Enfin et surtout, il semble qu'une révision de la constitution soit envisagée, de façon à reconnaître véritablement les langues africaines, la constitution en vigueur, promulguée en 2004, soit après le début du programme, reprenant à l'identique les dispositions linguistiques minimales de la précédente (*Governo de Moçambique* 2004). En 2008 le Ministère de la Culture a nommé un groupe de travail sur ce thème et un séminaire *ad hoc* a été présidé par le Ministre en personne en avril 2010 (Esteve Filimão, com. pers., juillet 2010, Maputo).[24] Ce changement de mentalités est apparu lors d'une réunion des pays de la communauté lusophone (PALOP) tenue à Maputo en 2011, le document officiel qui en émane, *Carta de Maputo*, reconnaissant la situation multilingue des pays lusophones et appelant à un développement linguistique (Esteve Filimão, interviews, juillet 2010, octobre 2011; http://www.iilp.org.cv/, consulté octobre 2011).

Faut-il en déduire que se met en place un nouvel équilibre social, où la voix des masses rurales se ferait mieux entendre? Cela, naturellement, ne découle pas automatiquement d'un changement de ton du gouvernement qui vise aussi à aligner le pays sur ses voisins où les langues africaines ont de longue date droit

de cité, et, de façon opportuniste, à ne pas se distancier de la *vox populi*. Les limites de l'adhésion à ce nouveau discours africaniste chez la classe urbaine aisée se note, peut-être, dans l'absence de demande pour l'apprentissage des langues africaines comme matière, prévu dans la réforme de 1997 dans l'enseignement monolingue portugais, et qui ne s'est pas concrétisé.[25] Mais le processus est engagé et le gain en matière d'estime de soi parmi les populations rurales est indéniable.

## 4. CONCLUSION

Les réactions populaires positives à l'introduction des langues africaines à l'école au Mozambique tranchent avec les attitudes dominantes en Afrique du Sud où, bien que les langues africaines soient placées sur le même pied que l'anglais et l'afrikaans et disposent comparativement de ressources significatives, leur usage à l'école, dans la mesure où il apparaît comme réminiscence de la *Bantu Education* honnie imposée par le régime d'apartheid, est dans l'ensemble peu apprécié des familles.[26] Cela confirme une nouvelle fois qu'en ce domaine le politique prime sur les considérations pédagogiques. Dans un cas comme dans l'autre, la population montre la volonté de rompre avec un passé d'imposition.[27] Au Mozambique, cela joue clairement en faveur des langues africaines et, de façon quelque peu inattendue, la force du mouvement a fait que cette reconnaissance est sortie du domaine éducatif pour pénétrer l'ensemble du champ social, promouvant, pour la première fois, une vision multilingue et multiculturelle de la nation (cf. Tupas (2010 :108) à propos des Philippines). Une modification de la constitution dans le sens d'une reconnaissance des langues et cultures africaines et d'une affirmation des droits linguistiques a été envisagée, même s'il ne semble pas que cette question ait été inscrite dans le processus de consultation populaire ouvert en septembre 2011. Si cela devait se concrétiser, il se pourrait que les diverses communautés, désormais munies d'instruments légaux, se sentent en meilleure position pour revendiquer leur juste place sur la scène politique.

Comme l'adage de Pline le soulignait déjà, *ex Africa sempre aliquid novo.*

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## ENDNOTES

1 Mon intérêt pour l'éducation bilingue au Mozambique date de mon séjour dans ce pays comme coordinateur de projet pour l'ONG italienne CIES de 1995 à 2000. Les activités incluaient l'alphabétisation d'adultes en langue locale et, dans la dernière période, l'introduction de l'éducation bilingue. J'ai pu depuis en suivre les développements grâce aux contacts établis à l'époque qui me valurent en particulier une mission d'expertise pour l'ONG *Progresso* en 2003. Je remercie chaleureusement T. Veloso, alors à l'INDE (*Instituto Nacional de Desenvolvimento da Educação*) et à *Progresso*, I. Draisma alors à l'Université Pédagogique de Beira, S. Patel de l'INDE puis de l'Université Ed. Mondlane, A. Dhorsan de l'INDE, E. Seguiera directrice de *Progresso*, de m'avoir toujours ouvert leurs portes pour d'enrichissantes discussions et confrontations d'idées.

2 Le Frelimo créé en 1962 a conduit la lutte de libération et assume le pouvoir depuis l'Indépendance.

3 On se reportera à Newitt (1995) pour une vue d'ensemble de l'histoire du pays. Sur l'assimilation, nous sommes redevable à Mondlane (1979), Moreira (1997) et Rocha (2006). L'autobiographie de Raúl Honwana commentée par Isaacman (Honwana & Isaacman 1998) contient de précieuses informations. Stroud (1999) propose une analyse détaillée du rôle du portugais dans la construction nationale postindépendance.

Les traductions de l'anglais et du portugais sont nôtres.

4 A l'exception du Transvaal indépendant et de l'Afrique de l'Est allemande, les territoires environnants (Afrique du Sud, Rhodésie du Nord et du Sud (Zambie et Zimbabwe), Nyassaland (Malawi), Swaziland), étaient, directement ou non, sous la férule de Londres. Après la conférence de Berlin de 1881, les frontières terrestres du Mozambique (et de l'Angola) furent scellées par un accord entre le Portugal et la Grande-Bretagne en 1890, après que celle-ci eut rejeté les prétentions portugaises sur les territoires joignant ce qui devaient de ce fait devenir deux territoires distincts.

5 L'immigration en provenance de Goa et des Indes, initiée dès la première période de colonisation, se poursuivit jusqu'au 20ème siècle.

6 L'administration coloniale comptait dans ses strates élevées des 'non-blancs', Goanais, Cap-Verdiens mais aussi originaires du territoire (Rocha 2006:40, 71).

7 Les contrôles étaient mesquins. Lors de visites domiciliaires impromptues, les inspecteurs vérifiaient le mobilier, les manières de table, la tenue vestimentaire, etc. Il convenait de manger assis à table, avec des couverts, de porter des jupes (pour les femmes) et des pyjamas la nuit (pour les hommes), etc.

8 On pense à Jabavu, Plaatje, Dube, etc. (voir Ndletyana 2008).

9 Du fait de son hébergement à Dar-es-Salaam et de la présence de nombreux militants originaires des zones frontalières avec la Tanzanie, le swahili, que Nyerere avait promu au rang de langue nationale, fut un moment considéré.

10 Rares sont les pays, tels la Tanzanie, Madagascar, dans une certaine mesure le Mali et le Zimbabwe, où il est possible de parler de langue nationale africaine.

11 En 1975 près de 60% des colons dont le nombre était estimé à 120 000 avaient quitté le pays (Hall & Young 1997:45).

12 La Rhodésie était alors dirigée par le régime illégal de Ian Smith après la proclamation de l'indépendance unilatérale (UDI) en 1963. La guerre de libération avait commencé en 1974.

13 Il n'est pas clair qu'il y ait eu une constitution formalisée auparavant.

14 Fondé en 1978, l'ÌNDE est chargé de la recherche en éducation, en particulier de la conception des programmes.

15 Le choix des langues est sans doute dû à l'existence de matériel pédagogique dans les pays voisins (Malawi et Afrique du Sud) où ces mêmes langues sont utilisées dans les premières années de scolarisation.

16 Alidou et al. (2005) expose et évalue les différents modèles.

17 Le cas de la Tanzanie qui recourt à une langue africaine – le swahili – mais non aux langues locales étant différent.

18 Les organismes internationaux (Banque Mondiale, Union Européenne) ainsi que les coopérations allemande et autrichienne sont particulièrement impliquées dans ce processus qu'elles soutiennent financièrement.

19 Le Nelimo sis au sein de l'Université Ed. Mondlane avait tenu un séminaire fondateur sur cette question en 1988, dont les conclusions avaient été avalisées par les plus hautes autorités. Voir Nelimo (1989).

20 Entre 1997 & 2003, l'effectif scolaire passa de 1,7 à 2,8 millions (*Governo de Moçambique* MEC 2006) entraînant, de l'aveu même des autorités, la détérioration d'une qualité au demeurant modeste.

21 L'ethnologue recense une quarantaine de langues dans le pays (http://www.ethnologue.com/web.asp. juin 2010), chiffre ramené à une vingtaine par des chercheurs locaux, notamment Balegamire et al. (2004), Firmino (2005:49), Patel et al. (2008). Il reste que l'inventaire du Nelimo ne saurait être exhaustif.

22 Aspects discutés dans Lafon (2004).

23 Progresso, fondé dans les années 1990 pour appuyer les activités éducatives dans les deux provinces du Nord à l'époque particulièrement isolées, fournit un soutien significatif à l'éducation bilingue dont bénéficient cinq langues (voir Lafon 2003). Sur UDEBA-LAB, voir Draisma (2010).

24 L'auteur a eu l'honneur d'être invité à ce séminaire.

25 Cette attitude, bien entendu, n'est pas propre au Mozambique.

26 Sur la politique de langue dans l'éducation en Afrique du Sud, voir textes et références in Lafon (2006, 2008a et sous presse b).

27 Pour une comparaison avec l'Afrique du Sud, voir Lafon (2011).

# LANGUAGE RIGHTS IN THE CONSTITUTION: THE "UNBORN" LANGUAGE LEGISLATION OF SUBSECTION 6(4) AND THE CONSEQUENCES OF THE DELAYED BIRTH

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**Abstract**

The legal framework within which the South African multilingual language dispensation needs to find its feet, has been dealt with in broad terms in section 6 of the Constitution, Act 108 of 1996. The question as to whether it is merely a multilingual phantom, and whether the language skeletons of bygone days will continue to haunt us, will be considered in terms of the constitutional and other legislative measures. Multilingualism as the cornerstone of a democratic state comprises an essential added value and vision of the Constitution.

**Abstrak**

Die juridiese raamwerk, waarin die Suid-Afrikaanse veeltalige taalbestel sy voete moet vind, is geraamtelik in artikel 6 van die Grondwet, Wet 108 van 1996 mee gehandel. Die vraag of dit 'n veeltalige spook is en of die taalgeraamtes van vergange se dae vir altyd by ons gaan spook, sal te midde van die grondwetlike en ander wetgewende maatreëls beskou word. 'n Wesenlike waarde-toevoeging en visie van die Grondwet is veeltaligheid as hoeksteen vir die demokratiese staat.

## 1. GENERAL REMARKS

### 1.1

Firstly, it is essential not to make the general mistake of overlooking the fact that the section on language forms part of the founding sections of the Constitution. This section is consequently not subject to the limitations imposed by section 36 of the Constitution concerning fundamental rights – which are relative, and not absolute, rights. The content of section 6 comprises the setting down of the social contract between the various language speakers of the Republic. It

is important to note that the government as such – at any level – was not party to this social contract. It was drafted by a constitutional assembly, comprising elected national representatives; and it was in that capacity that these persons constructed the section on language in the Constitution. The social contract between the citizenry and the government of the day can consequently be enforced.

**1.2**

Section 6 thus creates a constitutional framework for the state, within which state organs of every sphere are required to act, and affords no option to implement arbitrary unconstitutional policies beyond this framework. This is thus the agreed-on framework within which action may be taken.

**1.3**

The content of section 6 is a legal framework, which places an obligation on the various spheres of government, namely the executive, legislative and judicial authorities, to heed this language dispensation and give effect to the practical application thereof. In terms of the rights and lawful expectations of the people, who comprise various language communities (and various language speakers), the state must respect the social contract that this language regulation has effectuated. Indeed, it is the duty of the state to observe the source document, namely the Constitution, upon which the state is founded. Should it be called into question by the government of the day, mechanisms have been built into the Constitution to lawfully amend the social contract. If the Constitution is amended by omission, and/or by means of another practice without formal amendment, disrespect for the law and the Constitution is the result. This can give rise to anarchy, since it undermines the principle of constitutionality and the Rule of Law. In this regard, the wise words of the famous Judge Brandeis come to mind:[2]

> In a government of laws, [the] existence of the government will be imperilled if it fails to observe the law scrupulously… Government is the potent, omnipresent teacher. For good or for ill, it teaches the whole people by its example… If the government becomes a lawbreaker, it breeds contempt for the law, it invites every man to become a law unto himself; it invites anarchy.

The principle of constitutionalism, which essentially imposes a particularly stringent obligation of respecting and observing a constitutional provision on those who are subject to the Constitution, is being negated by the current government's implementation of its policy of promoting English. This situation

can be described in George Orwell's terms: all eleven languages are equal, but one, namely English, is more equal than the others.

### 1.4

The "virus" contained in section 6 of the Constitution is linked to the fact that the eleven official languages are not all developed to the same higher level of functionality. An analogous situation would occur if one were to place boxers who were categorised according to various divisions of mass, into a single mass division. Granted, in the formulation of subsection 6(2) and the qualifying provisions of subsection 6(3) and subsection 6(4), read together with the obligation of the Pan-South African Language Board (PanSALB), as reflected in subsection 6(5), it is acknowledged that the languages are not equally developed. The "lightweight boxers" (in this case, the indigenous languages) are therefore accorded constitutional support – in other words, they have received an undertaking of support – in order to prevent them from being "knocked out". The context of the section on language is thus crucial, but is conveniently ignored.

### 1.5

Moreover, the further hermeneutic principle pertaining to the interpretation of the law – namely that the Constitution should be interpreted in its entirety – is also important, and must be taken into consideration when interpreting the section on language.

## 2. SECTION 6(1) AND THE NOTION OF OFFICIALISM

### 2.1

In terms of section 6(1) of the Constitution, official status is accorded to eleven languages.

By definition, an official language is a language of a country that has been selected by the state for use in its official activities. In this regard, I refer to the finding of the United Nations Human Rights Committee in *JGA Diergaart et al./Government of Namibia*,[3] **in which commissioners[4] in their minority judgement put it that "the choice of an official language is a prerogative of the State and […] it is not within the power of the Human Rights Committee to dictate what official language a State should adopt".** The commissioners then proceeded to make the following observation:

Once a State party has adopted any particular language or languages as its official language or languages, it would be legitimate for the State party to prohibit the use of any other language for official purposes and if the State party does so, its action cannot be branded [as] being in violation of article 19, paragraph 2.[5]

The converse argument logically follows from the above observation, with the implication that, when a State has selected an official language, the executive authority can neither directly nor indirectly forbid and/or neglect the use thereof, whether by means of legislation or by own practice. To do so would undermine the principle of the Rule of Law.

## 2.2

I contend that conferring official status upon a language in a constitutional state is meaningless unless the outcome of granting such a status indicates that the State's use thereof as an official communication medium is constantly confirmed in practice. This requires the language or languages in question to be employed in the central spheres of the state's official activities, namely in the legislative, executive and judicial domains. Since this approach does not mean that all the official languages must be used in every conceivable instance of communication between government and citizens, it is essential that a language policy should spell out the quintessential aspects of the government's activities in the said three spheres; and to this end, a National Language Act is required.

## 2.3

In the first Constitutional Court Certification Decision delivered on 11 October 1996, it was stated in paragraph 212 that all eleven official languages are equal by implication. The relevant section is quoted below:

> ... A separate objection goes to the status of Afrikaans in the NT (New Text). That objection did not allege the violation of any particular CP (Constitutional Principle). Rather it was that NT6 must be given content by reading it alongside IC (Interim Constitution) 3(2), (5) and (9), which, *inter alia*, require that the status of Afrikaans as an official language should not be diminished. It appears to be the contention that the status of Afrikaans is diluted under NT, relative to the IC. But NT6, like the rest of that document, must be tested against the CPs, and not against the IC. *(105) In any event, the NT does not reduce the status of Afrikaans relative to the IC: Afrikaans is accorded official status in terms of NT 6(1). Affording other languages the same status does not diminish that of Afrikaans.[6]

This decision confirms that any allegation that the Constitution of 1996 can be interpreted in the light of the Interim Constitution of 1993 is unfounded.

With respect, it must be pointed out that the Constitutional Court expressed an opinion here without the obviously essential testimony of language sociologists and experts on language law, which is a field of specialisation requiring expert testimony. The practical implication of a state with limited powers and serious developmental needs (as set out in the Reconstruction and Development Plan (RDP)) being encumbered with the duty of according eleven official languages the status of national official languages – read together with the obvious failure of nine African languages to satisfy all or any of the so-called higher functions of an official language – was, with all due respect, ill-considered, on account of the lack of expertise of the Constitutional Court. In my opinion, this was an incorrect finding by the Constitutional Court; but we are now bound to it, and the damage could be limited by means of a National Language Act. The unequivocal granting of official status to eleven languages in Section 6 is consequently irreconcilable with an interpretation that excludes the use by the state of one or more preferential languages and reduces the rest to minority languages.

## 3. THE STATE'S OBLIGATIONS IN RESPECT OF PREVIOUSLY MARGINALISED LANGUAGES

In accordance with subsection 6(2), the state is obliged to promote the status and use of the indigenous languages, in the context of the historical curtailment of their use and status, by means of practical and substantial measures. The use of the term "state", which remains undefined in the Constitution, includes all levels of government and all three spheres of the state, while subsection 6(4) deals only with the national and provincial governments. The most serious language-related omission in South Africa is the state's scandalous neglect of its duty in terms of subsection 6(2) of the Constitution referred to above. PanSALB should approach the High Court for a mandamus in order to compel the state to honour this constitutional obligation. Such a mandamus could be held over until 15 March 2012 to determine the extent to which the national government will honour this obligation to the benefit of the state.

## 4. SUBSECTION 6(3)(a)

The provisions of subsections 6(3)(a) and 6(3)(b) of the Constitution will not be considered in detail here. It should be noted at this point that the national and provincial governments *must* use a minimum – and not a maximum – of two official languages for purposes of government. This principle is subject to the qualifying considerations of the "usage, practicality, expense, regional circumstances and the balance of the needs and preferences of the population as a whole or in the province concerned". A minimum requirement for

municipalities is not prescribed in subsection 6(3)(b); but municipalities are obliged to take the language usage and preferences of their residents into consideration. In my opinion, this use of official languages by all three spheres of government should be defined in a more specific format in national and provincial legislation.

## 5. SECTION 6(4)

### 5.1

The introductory sentence of subsection 6(4) reads as follows, with my italics:

> The national government and provincial governments, by legislative and other measures, *must regulate and monitor* their use of official languages.

It is important to note the use of the word "must" here, which implies that this is a provision that is enforceable on the national and provincial governments, obliging them to establish legislative and other measures in order not only to regulate, but also to monitor, their use of the official languages. What actually happened in practice is that a protracted consultation process for establishing an umbrella act, known as the South African Languages Bill, took place. The Bill was dated 4 April 2003. Owing to the lack of political will on the part of the government of the day, it subsequently began to gather dust.

On 25 July 2007, under the leadership of former President Thabo Mbeki, the cabinet took the following decision:

> The Minister of Arts and Culture must consult further with the Minister of Justice and Constitutional Development with a view to exploring alternative non-legislative ways of dealing with the matter and to assess the intended and unintended consequences of the various options. The Bill should not be forwarded to Parliament as a Bill and it will have to be removed from the Portfolio Committee of Arts and Culture programme as a Bill.

The constitutional obligation to regulate and monitor their use of the official languages by means of legislative measures was therefore deemed unimportant by the executive powers. The *de facto* negation of this obligation was formalised as a resolution by this decision. The costs that would arise from the implementation of the draft language act, as a possible motivation for failing to promulgate the said act, were dismissed as immaterial in a report issued by Emzantsi Associates. This organisation is an independent entity that undertook the costing for the implementation, on the instruction of the Department of Arts and Culture. The cost of implementation would have amounted to only 0,18% of the budget.[7] The language policy would also have been phased in over a number

of years. Nevertheless, the national government has no right, in any case, to negate this constitutional provision – even on the grounds of affordability. The principle that budgetary considerations cannot be cited as an excuse was already clarified as follows by the Constitutional Court in the case of *Minister of Health v. Treatment Action Campaign.*[8] I have emphasised the relevant aspects by means of italics. The role of the court in enforcing constitutional provisions is also clearly stated:

> Even simple declaratory orders against government or organs of state can affect their policy and may well have budgetary implications. Government is constitutionally bound to give effect to such orders whether or not they affect its policy *and has to find the resources to do so*."

It is important to note that this case dealt with a relative right in the Charter of Fundamental Human Rights. It is my contention that the founding provisions, under which section 6 falls, are cast in proverbial stone – subject to the limiting subprovisions found in section 6 itself, namely in subsection 6(3)(a), in the second sentence in subsection 6(4) and, of course, in the provision for the amendment of the Constitution.

The respondents' chief argument in the opposing statement in the case of *Lourens/President of the RSA* et al.[9] pertained to capacity: there was an alleged capacity problem, which was put forward as the reason for the failure to promulgate a National Language Act up to that point.

The principle of constitutionality was essentially ignored here. The government thus amended, or attempted to amend, the rights of the people as contained in the Constitution – which the government may not do without lawfully amending the Constitution. The postponement and/or omission of an obligation amounts to a failure to fulfil an obligation.

## 5.2

The answer to the question: "When should the national and provincial governments have fulfilled their respective legislative obligations concerning language in terms of subsection 6(4)?", is to be found in the Constitution. The unwillingness of the national and the majority of the provincial governments to comply with the constitutional obligation in terms of subsection 6(4) is possibly demonstrated by the exclusion of a deadline or target date[10] in item 21 of schedule 6. Item 21 stipulates that legislation that is required by the Constitution must be enacted within a reasonable period. In addition, section 237 requires all constitutional obligations to be met diligently and without delay. The term "reasonable period" is a relative concept; for example, 18 months was

deemed a "reasonable period" by the Constitutional Court in the particular case of *Minister of Justice/Ntuli.*[11] Venter submitted that the enactment of language legislation later than 1998 could be deemed unreasonable in terms of item 21 of schedule 6.[12]

## 5.3

The nature of a constitution is illustrated in subsection 6(4), as in other sections – for example, subsection 9(4), as well as sections 32 and 33 of the Constitution – namely, that it introduces the "embryo" provision, with the prospect of more specific legislative measures that have no place in the constitution itself. Other amplifying legislative measures necessitate the principle of the agreement of the people, as contained in the Constitution, in order to allow for a more detailed interpretation. Of course, such amplifying legislation may not be in conflict with the Constitution;; but it is anticipated that, barring the Constitution, times will change and legislation will therefore be more easily adjusted. A *special relationship* exists between the Constitution and this type of legislation, and holds consequences for the interpretation and application of both. Furthermore, the provisions of a subordinate legislative Act – similarly to other legislation, naturally – must be interpreted in such a manner that concrete content is provided concerning the spirit, scope and purpose of the Charter of Rights, and specifically concerning the spirit, scope and purpose of this specific legislative provision. However, no provisions in such legislation may also be permitted to minimise the scope of the protection provided to that legislative section, or to infringe upon any other legislative right. Du Plessis pertinently states that subordinate constitutional legislation holds a *weighty*_status, and fulfils a special role in achieving vital constitutional objectives. According to him, such legislation is an "indispensable ally" of the Constitution. It must be borne in mind that a litigant who cites an alleged violation of a constitutional right in respect of which a subordinate act has more extensive effect, cannot circumvent the subordinate act by attempting to rely directly on the constitutional right provided in the Constitution.[14]

## 5.4

If the foregoing is applied to the failure of the executive authority to finalise the legislative measures, as provided for in subsection 6(4) of the Constitution, it is clear that the executive authority's omission caused the constitutional dispensation in the RSA, with particular reference to the multilingual language dispensation provided therein, to fail. The question is whether there is any manner in which the existing vacuum, which was created by the failure to promulgate the subordinate constitutional language legislation in terms of

subsection 6(4) within a reasonable period, can be corrected. The envisaged language legislation in respect of the use of the official languages by the national and provincial governments is thus restricted only by the delayed "birth" of the prescribed legislation. In natural life, the delayed birth of a child necessarily has consequences for both the mother and the child. Either the mother or the child may die, or both may suffer permanent damage and/or be disabled.

As a result of the vacuum caused by the failure of the national and provincial governments to legally regulate the use of the official languages, the "heavyweight boxer", English, has begun to drive the others from the ring. The only other boxer, Afrikaans – which *would* be able to take a stand against English – has been and is being suppressed. Notwithstanding a constitutional state dispensation, the mistakes of 1822[15] and 1976[16] are being repeated by *de facto* language imperialism. In a constitutional state, citizens have the right to turn to the courts to counteract the non-observance of the Constitution.

## 5.5

In the case of *Lourens/President of the RSA,* et al*.,* the Honourable Justice Ben du Plessis issued the following order on 16 March 2010 against the Minster who represented the executive authority at the time:[17]

1. Dit word verklaar dat die nasionale regering in versuim is om ingevolge artikel 6(4) van die Grondwet van die Republiek van Suid-Afrika, 1996 deur wetgewende en ander maatreëls die nasionale regering se gebruik van amptelike tale te reël en te monitor. [It is declared that the national government has failed, in terms of section 6(4) of the Constitution of the Republic of South Africa, 1996, to regulate and monitor the national government's use of the official languages by means of legislative and other measures. – *Own translation.*]
2. Die nasionale Minister van Kuns en Kultuur, Wetenskap en Tegnologie, in haar hoedanigheid as die verantwoordelike lid van die uitvoerende gesag, word gelas om die gemelde verpligting binne twee jaar vanaf datum van hierdie bevel na te kom of toe te sien dat dit nagekom word. [The national Minister of Arts and Culture, Science and Technology, in her capacity as the responsible member of the executive authority, is ordered to fulfil the said obligation, or to ensure that it is fulfilled, within two years of the date of this order. – Own translation.]

As a result, the cabinet decision of 25 July 2007 was declared to be *ultra vires*; and subsection 6(4) had to be complied with before 15 March 2012. The court did not wish to compel the executive authority to comply with legislative

measures by drafting an umbrella act or a multiplicity of legislative provisions. I was present in court when the Honourable Justice Ben du Plessis remarked – justifiably, in my opinion – that he was unable to see how it could be achieved meaningfully, other than in a single Act. However, he refrained from being prescriptive, since the courts are reluctant to interfere with the executive authority, where this can be avoided.

It is extremely important that the national government should realise that it must finalise all the legislative measures – that is, not only the Act, but also the regulations in terms thereof – before 15 March 2012, in order not to be found in contempt of this court order. The fact that a deadline was set for the national government by this court order, does not exonerate the national government from the charge of being in violation of the constitution. On the grounds of the principle of constitutionality, rectifying the breach of the constitution necessitates an urgent approach, which is currently clearly absent.

Apart from legislative measures, this order correctly states that *other* measures should also be established in order to regulate and monitor the use of the official languages by the national government. In my opinion, a proper language policy should exist in each department by 15 March 2012, together with a functioning language policy committee tasked with the regulation and monitoring thereof.

In view of the fact that the national government will have taken from 4 February 1997 until 15 March 2012 to accomplish the aforementioned – a period of approximately 15 years – and should the required action not have been effected by 15 March 2012, any non-compliance should be met with a strict order of contempt. To my mind, the vacuum created by this deliberate omission requires additional corrective legislation as envisaged in section 9(2) of the Constitution. I am aware of the fact that this provision was aimed at providing for the empowerment of the previously disadvantaged persons who were financially and politically affected by apartheid. However, this subsection's embryonic provision for legislative measures for affirmative action has no time constraint. Any discriminatory practice, including any such practice in terms of language, should be rectified by legislative measures. In my view, the consequences of the delayed birth of the South African Language Act can be rectified only by provisions in that Act, or in further legislation that accords parity of esteem to the official languages and eliminates the unfair treatment of the past and present.

**5.6 The qualifying provision of subsection 6(4) reads as follows:**

***5.6.1***

"Without detracting from the provisions of subsection (2), all official languages must enjoy parity of esteem and must be treated equitably."

Professor Koos Malan previously addressed this aspect and its subjective character, as well as the scope for a discretionary approach; and I agree with his approach in principle.

***5.6.2***

The phrase, "Without detracting from the provisions of subsection (2)…", sheds an interesting light on this qualifying provision. In my opinion, this phrase implies that in the compliance process, the state – except in the case of Afrikaans and English, which do not fall under subsection 6(2) – would therefore have to do more to promote the esteem and fair treatment of the indigenous languages. The justification for this implied requirement to "do more" to promote the indigenous languages is contained in this phrase. A complaint that Afrikaans and English are being unfairly discriminated against in favour of the indigenous languages in order to establish parity of esteem and equitable treatment, could be countered in terms thereof. The use of only English thus has no justification on the basis of this argument.

**5.6.3**

The phrase, "*must* enjoy parity of esteem and must be treated equitably", is balanced by a corrective against subjectivity in the anti-discriminatory provision in subsection 9(3) of the Constitution, which prohibits unfair language-based discrimination by the state. When the possibility of complaints regarding the unfair development of the various official languages in respect of the so-called higher functions is taken into consideration, the qualifying reference to subsection 6(2) in subsection 6(4) is understandable. However, it does not permit the elevation of a "heavyweight boxer" – English – in terms of a non-existent legal provision on the "language of record". A heavyweight boxing champion is generally held in higher esteem than a paperweight one. Should an official language be elevated above the others, there is no parity of esteem – only inequality of esteem, and therefore unfair treatment – and consequently, unfair language discrimination. Esteem goes hand in hand with status.

**5.7**

It is interesting to note here that Parliament, in its published policy on the preparation and publication of legislation, considered itself to form part of the national government, as referred to in subsection 6(3)(a).[18] Naturally, Parliament cannot selectively regard itself as part of the national government for the purposes of the use of the official languages – especially concerning the minimum requirement of two official languages, as stipulated in subsection 6(3)(a) – while at the same time not considering itself to be bound by subsection 6(4). What I mean is that Parliament's use of the official languages should also be contained in a South African Languages Act. Currently, the old bill makes no provision for this; and this could potentially result in a lacuna in the interpretation of Parliament's view of section 6. However, in my opinion, owing to the official nature thereof, Parliament should treat all official languages equally and should publish laws in all the official languages, since Parliament does not comprise part of the national government as such. A practical arrangement as to how and when the legislation should be adopted and published, should be written into the proposed South African Languages Act.

**5.8**

Such an arrangement would close the escape route that has opened the way for the free rein of subjectivity and anarchism, which have begun to raise their monstrous heads as a result of the current lack of the specific judicial prescripts that are necessary in a legislative structure – a structure that was envisaged in the "embryo" clause 6(4) of the Constitution.

In such a case, officialdom would know the language framework within which it should move, and citizens would also be able to enforce their (better-defined) rights. The proverbial muscles would be flexed in order to supplement officialdom's pseudo-legislation or policy documents with extensive details, in order to provide daily guidance with a view to their unambiguous interpretation in the implementation of the Constitution's multilingual language model.

**5.9**

Finally, the question may be raised as to whether the constitutional requirement of legal language measures will result in false or true rights for the citizens. A false right is an empty right – or, indeed, a "paper" right, as opposed to a true right, which is rich in content and can be enjoyed by citizens. The answer lies partly with the executive authority, which was previously loath to establish the legal structure; and it remains to be seen whether it will budget for the

necessary finances to allow for the effective implementation of the legally established structure that is needed for a proposed South African Language Act.

## 6. UNFAIR LANGUAGE DISCRIMINATION

### 6.1

In addition to section 6, it is important to remember the corrective to any notion of unfair discrimination based on language, as contained in subsection 9(3). Here, language as a forbidden basis of discrimination, together with other often occurring reasons for discrimination, such as race, religion, etc., is specifically called by name. In terms of subsection 9(5), it is suspected that unfair discrimination has occurred, or is occurring, when a discriminatory practice is indicated; and it is then necessary for the discriminating party to prove that the alleged discriminating practice was not, or is not unfair. In terms of subsection 9(4), this prohibition also applies to individuals and legal entities. In terms of subsection 8(2), read together with subsection 9(4) of the Constitution, this right not to be discriminated against is also applicable in any dealings or interaction between natural persons and legal entities.

### 6.2

In subsection 9(4), an obligation is created to enact legislation in order to prevent and prohibit discriminatory practices. This was the embryo provision for the Promotion of Equality and the Prevention of Unfair Discrimination Act.[19] On 4 February 1997, the Constitution came into effect, and in terms of item 23 of schedule 6 thereof, a specific cut-off date, being three years after its commencement, was set for its enactment. It is interesting that this Act is a product of its times, in the sense that, owing to the context of the time and era in which it was drafted, it is effectively disabled, since it does not devote much attention to language discrimination. It concentrates more on the other grounds of discrimination, although language is referred to in the definitions and falls under the general provisions. In terms of this Act, an Equality Court system is established as an enforcement mechanism.

### 6.3

In terms of subsection 20(5)(a) of the Equality Act, the Equality Court is authorised to refer a complaint to the Pan-South African Language Board for settlement. What should immediately be borne in mind here is that PanSALB only has jurisdiction in respect of state organs. Consequently, it is not possible

to refer a complaint to PanSALB if the complaint does not involve a state organ. In such a case, the Equality Court will have to make a finding.

### 6.4

Owing to the imperialistic conduct of the Afrikaans-dominated government of 1976 with regard to language, as well as the emotional perception of Afrikaans as a symbol of a politically oppressive system, the political prejudice is deeply entrenched in the subconscious of the transformed judiciary. Any attempt to promote language rights is regarded as a camouflaged attempt to revive the prominence of Afrikaans, harking back to the privileges it enjoyed during the previous dispensation. This approach also derives its origin from the current ANC government's language policy, which preceded the Constitution, namely that English should be accepted as the official language. The multilingual model, as contained in section 6, was thus a political compromise; that is to say, it is the result of the negotiated social contract. The appointment of trained, expert and language-sensitive judges is thus an important requirement.

### 6.5

In my opinion, the Equality Review Committee, established in terms of section 32 of the Equality Act, should include an additional paragraph, pertaining to unfair language discrimination practices, in the Illustrative List of Unfair Practices in certain sectors, in terms of subsection 29(5) of the Equality Act. The disregard of the language rights of language communities and institutions, as well as the disregard by and of the language rights of language communities and institutions, is not only limited to unfair language discrimination, and the SA Language Act will have to make provision for such instances. Such legislation and the Equality Act could thus be employed in a complementary manner.

## 7. WHAT IS THE POSITION OF THE PAN-SOUTH AFRICAN LANGUAGE BOARD INSTITUTED IN TERMS OF SUBSECTION 6(5) OF THE CONSTITUTION?

In the case of *Lourens/President of the RSA* et al., the argument put forward by the respondents in opposition to the application for a court order instructing the national government to promulgate legislative measures in accordance with subsection 6(4), was that the adoption of the Pan-South African Language Board Act[20] (the PanSALB Act) effectuated the necessary compliance with subsection 6(4). This argument was duly rejected by the court. PanSALB has no part in the obligation of the national and provincial governments to regulate and monitor *their own* use of the official languages by means of legislative and other measures.

To my mind, the Pan-South African Language Board would be overstepping its authority should it act in a capacity other than that of its fundamental objective as set out in subsection 6(5) of the Constitution. It *must promote* the development and use of, and *create the circumstances for* the development and use of the official languages, as well as of the Khoi, Nama and San languages, in addition to Sign Language. Moreover, it must also ensure *respect* for, and enhance a number of other listed languages.

The "Alliance Act" of subsection 6(5) of the Constitution, affording PanSALB the necessary ligaments and muscle, is the aforementioned PanSALB Act. It is thus a constitutionally aligned Act that derived its origin from the Interim Constitution; and, in my opinion, the Act necessitates the refinement of the amendments to the section on language in the final Constitution of 1996, since this Act came into existence prior to 10 December 1996. However, I shall not go into the details of this aspect.

In accordance with subsection 8(1)(a) of the PanSALB Act, PanSALB must make recommendations on the proposed language legislation; and I am not certain as to whether the Department of Arts and Culture is mindful of this provision. Compliance with this obligation could give rise to a further delay in formulating the language legislation.

PanSALB also failed in its obligation in terms of subsection 8(1)(j)(i), namely to "monitor the observance of the constitutional provisions regarding the use of language".

PanSALB should actually have taken the state to court on the issue of compliance with the legislation in terms of subsection 6(4). PanSALB's objective of promoting knowledge of and respect for those provisions and principles of the Constitution which directly or indirectly have a bearing on language matters, as stated in subsection 3(d), is underscored by its total failure to fulfil its obligations when the South African language bill was shelved. In this regard, in terms of subsection 8(5) of the PanSALB Act, PanSALB could – in any sphere of government – have initiated and conducted an investigation, and made recommendations to any legislature (and thus also to parliament) or government body concerning *the provisions of the Constitution* that directly or indirectly deal with language.

The procedure for dealing with conduct and/or omissions that violate language rights, by way of negotiation, reconciliation and/or mediation, is to be found in section 11 of the Act. Amidst the published decisions in terms of subsection 11(7) of the PanSALB Act to which no effect has been, or is being given, it is clear that section 11 is a toothless provision. PanSALB's limited budget further

restricts its ability to play any significant role. My conclusion is thus that the initial perception that PanSALB would play a prominent role in establishing a multilingual dispensation, with the necessary powers of enforcement, was a misguided one. The prevailing occurrence of language discrimination also confirms this misconception. After the legislation in terms of subsection 6(4) has been adopted, PanSALB will be able to perform its function as a watchdog more effectively.

## 8. WHAT SHOULD AN UMBRELLA LANGUAGE ACT CONTAIN?

### 8.1

In terms of section 6 of the Constitution, ownership of the challenge which multilingualism presents must be taken in respect of the road ahead. The obligation of adding ligaments and – ultimately – flesh to the language skeleton will have to be met. By "ligaments" I mean a proper judicial structure – as envisaged in subsection 6(4) – which is contained in a general Language Act. The proverbial muscle, or "flesh", will have to be manifested in eminently practical measures, such as, for example, language policy documents. In particular, it is enforcement mechanisms and the practical application of these – and not merely the *corpus* of such an Act – that are envisaged here.

### 8.2

Within the framework of the general Language Act, each national government department should, by way of the legislation, be accorded specific obligations within the context of the multilingual constitutional model. Here, the embedded limitations of subsection 6(3)(a), *supra*, can be taken into consideration; and I believe that the practicalities of all eleven languages could be dealt with by employing the language demographics of a region or district as a departure point in the legislation.

### 8.3

A practical point of departure with a view to the proposed legislation should therefore be that of the language demographics of a specific region. Measures that geographically preserve languages in order to maintain the language demographics of a particular region should also be incorporated in the legislation. Migration tendencies undermine the language rights of language communities. French serves as an example in this regard. In certain parts of Canada, English is a threat to French, while French, in turn, poses a threat

to Flemish in Belgium. A local example pertains to the migration of IsiXhosa speakers from the Eastern Cape to the Western Cape. Owing to the preference of these migrants for English, the SAPS has adopted English as its language of communication in the area. This should not be the case. Moreover, the appointment policy of the SAPS there should take the linguistic competence of the inhabitants of the specific region into consideration.

**8.4**

A national census is to be held in 2011; and in such a census, the language demographics of South Africa could be used for language planning purposes. The envisaged census must be credible, and the method of determining the statistics must uphold scientific standards. The outcomes of the census regarding language demographics can only be reliable if the survey includes this aspect as a pertinent focus point.

**8.5**

In order to be able to render an effective service to citizens, as contemplated in section 195 of the Constitution, the national and provincial governments will have to take the demographics of a region into account in the policy pertaining to the appointment of officials. Language-proficient persons who are able to speak a number of official languages would benefit from such an appointment policy, by being capable of rendering services to all those who come to reside in an area. In terms of such a policy, it would not be possible for race to be the only criterion for representivity, upon which the current policy is based.

**8.6**

Owing to the national implementation of policy in terms of such legislation, the national government departments would also have to make all official forms available in all eleven languages within a reasonable period, or alternatively, within the framework of a prescribed period plan. The minimum requirement in terms of which the national government *must* use at least 2 (two) official languages, must not negate the fact that the national government *must* serve the entire country, otherwise the limiting factors would also come into play, and these factors would thus affect the use of a specific official language in a specific language demographic region. In the application of this principle, the national government would have to use English and Tshivenda in the northern region of Limpopo Province, for example, while it would have to use Afrikaans and Setswana in the Northern Cape.

**8.7**

The right to enforcement in courts has become a luxury; and for the ordinary citizen, it does not comprise a true right. Enforcement is an exception to the rule, and should not be the rule. A leaf should be taken from the book of the consumer industry, which reflects the current legal tendencies. Enforcement should thus be easy, quick and effective – and naturally, affordable – for the citizenry in order to enable them to enjoy it as a true right. Direct damages and costs orders against bureaucrats who infringe upon citizens' constitutional and other rights and make unfair demands or claims on them, will likely have the most immediate and effective impact in terms of preventing arbitrary applications and abuses. In the case of *Jacob Coetzee/The National Commissioner of Police,* et al.,[21] Acting Judge R du Plessis ordered that the individual public servants were to pay the plaintiff's costs from their own funds on a special scale, and that should they fail to do so, only then would the National Commissioner or the Minister of Police be responsible for the costs. I therefore submit that, in the enforcement of language rights, the most effective measure for enforcing respect for language rights would be the issuing of direct orders against members of the executive authority.

**8.8**

The fact that the National Languages Act will apparently be tabled in Parliament in the second semester of 2011, and that its effect on the language rights of the language communities will become known only over the medium term, means that it will take some time to determine whether a language community will ultimately be able to claim constitutional damages from the state, owing to any breach of the language clause in the Constitution.

**8.9**

The stipulation of subsection 6(4) is not restricted to regulation only, but also to monitoring. For this reason, the need to provide for a monitoring functionary or committee is crucial in any prescribed legislation.[22] The effectiveness of such a provision will also depend upon the easy and affordable accessibility of such a functionary or committee. It is interesting that the state went to great lengths to establish a consumer protection dispensation – with consumers enjoying affordable enforcement[23] – but has thus far failed to consider and implement a similar dispensation pertaining to language, despite the fact that the Constitution demands a multilingual dispensation.

**8.10**

A language ombudsman[24] should be appointed to resolve language complaints within a limited period, in accordance with the legislation. Alternatively, complaints should be automatically referred to the language tribunal. The latter could serve as a sifting institution in order to eliminate language rights violations that are perpetrated mainly as a result of ignorance regarding language rights, and thereby promote language harmony. A "private language ombudsman" for Afrikaans, under the auspices of the ALB, could be instituted in order to offer an auxiliary service. A helpline for Afrikaans could comprise part of the office that refers language complaints to specific organisations where such complaints are the focus. The concerned language ombudsman could liaise with the official language ombudsman and assist language speakers to direct their complaints along the correct channels.

**8.11**

In terms of the new Consumer Protection Act, consumers' complaints can be referred to a consumers' tribunal. In my opinion, the new South African Languages Act must make provision for affordable and easy access to expert courts or tribunals, in order to protect and enforce language rights. Only one such tribunal/court needs to be instituted. The establishment of an extensive, country-wide tribunal system or language court system in order to enforce compliance with language legislation would not be cost-effective. The solution lies in extending the powers of the Equality Court – which is already being established across the entire country and which relies on the lower and higher courts – by means of additional training. The crucial aspect is the presence of expert presiding officers who have knowledge of language rights. The ordinary courts lack this expertise. I seriously question the ability of the presiding judge in respect of his expertise on language rights issues. The Equality Court presiding judges should first have to undergo special training in terms of section 16(2) of Act 4 of 2000 before being permitted to act as such. To my knowledge, language rights' training does not form part of their curriculum. This comprises a real deficiency in the current system. A judge or magistrate who is unable to, or does not wish to deal with a complaint in terms of the Equality Court could then, in terms of an amendment to section 20(5)(a), refer the complaint to the language court or language tribunal, instead of referring it to PanSALB. This would require an amendment to section 20(5)(a) of the Equality Act, and the authority of such a court would have to be set forth in the umbrella legislation. Such a court would also deal with non-discriminatory language rights disputes, since the Equality Court only has anti-discriminatory jurisdiction. Alternatively, the enforcement division could allocate extended powers in respect of language

rights enforcement measures to the courts that are acting as equality courts. In that case, these courts would not deal only with unfair language discrimination cases, but would handle other disputes as well.

## 9. CHARTER OF LANGUAGE RIGHTS

Since the proposed South African Language Act makes provision only for patent compliance with subsection 6(4) of the Constitution, and since it currently makes no provision for, *inter alia*, a charter of language rights, authorised in terms of section 234 of the Constitution, I am of the opinion that the various language communities should collaborate collectively to establish a charter of language rights. A request could then be submitted to obtain legislative sanction for this charter, in terms of section 234 of the Constitution.

## 10. CONCLUSION

What if the SA Language Act is not promulgated – or what if it is presented in a diluted form, with the result that it remains nothing more than a legally restrained constitutional infant? This is a question that the various language communities could begin to debate. Five constitutions were adopted during the previous century, and it can safely be assumed that the current constitution will not have a shelf-life of one hundred years. Various forces, powers and claims from communities and individuals will exert pressure on it; and language communities must evaluate tendencies proactively and creatively, and plan accordingly, in order to implement protective action.

However, during the existence of a constitutional dispensation, only legal and constitutionally acceptable protest measures must be used. Legal protest refers to various court applications in order to obtain or enforce rights. In my opinion as a jurist, the increasing language discrimination practices of the government could force the Afrikaans language community, in particular – following the exhaustion of local remedies – to turn to the United Nations' Human Rights Committee in the future.

Without endorsing language imperialism – and we are only too familiar with the sensitivity concerning this issue – it should be pointed out that the Afrikaans language community, which possesses a considerable intellectual capacity at various levels of linguistic development, could play a leading role in allowing the treasure trove of other official and unofficial languages of South Africa to be mined and developed. In this way, the plural diversity proposed in section 31 of the Constitution could be promoted.

Without effective enforcement measures, the multilingual language dispensation of South Africa is merely a pipe dream and a subject of debate at conferences. Furthermore, the lack of such measures will undermine the constitutional state and respect for the Constitution.

The current language anarchy can thus only be prevented by a considered South African Language Act for the national government and for each individual province (following the example of the Western Cape and Limpopo), and for Parliament and the courts, with a Charter of Language Rights that will impact on the private sector as well. Amidst the language anarchy, the wave of English hegemony is advancing, and is overwhelming and impoverishing South Africa. Without a Language Act and, ultimately, without legal breakwaters – in other words, enforceable legislation – only Anglo-Africans will remain in South Africa. An enforced legal "Caesarean section" in order to enforce the Language Act was thus a necessity; and the continued legal siege of the executive authority will probably be necessary in the foreseeable future in order to enforce language rights.

## ENDNOTES

1 See section 239 of Act 108 of 1996.

2 *Mohamed and Another v. President of the RSA & Others* 2001 (3) SA 893(CC) op [68].

3 Human Rights Committee Communication No. 760/1997 (Views adopted on 20 July 2000, sixty-ninth session). (Applicant won the case against the Namibian government.)

4 PN Bhagwati, Lord Colville and Maxwell Yalden, on p. 154.

5 Paragraph 6 on p. 154; 19.2 of the UN International Convention on Civilian and Political Rights.

6 *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Republic of South Africa, 1996 1996 (4) SA 744 (CC).*

7 Emzantsi Associates: "Costing the Draft Language Policy and Plan for South Africa", p 46.

8 2002 (5) SA 72 (CC).

9 NGPD Case Number: 49804/2009 of 16 March 2010.

10 See items 1 and 4 of Schedule 6.

11 1997 3 SA 772 (CC) (par. 39).

12 See F Venter: "The Protection of Cultural, Linguistic and Religious Rights: the Framework Provided by the Constitution of the Republic of South Africa". (SA Public Law 1996, Vol. 13 No 2, 1998: pp. 438-459.)

13 LM du Plessis: Paper read at the First Konrad Adenauer Foundation and Faculty of Law (North-West University) Human Rights Indaba on "The role of Local Government and the

Lower Courts in realising Socio-economic Rights in North-West, Northern Cape and Free State Provinces", held at the Feather Hill Spa, Potchefstroom, on 29 October 2010, p 7.

14 *MEC for Education: KwaZulu-Natal and Others v. Pillay and Others 2008* (2) BCLR 99 (CC); 2008 (1) SA 474 (CC). Cf. also *South African National Defence Union v. Minister of Defence and Others* 2007 (8) BCLR 863 (CC); 2007 (5) SA 400 (CC) par. 51.

15 The memory of the anti-Afrikaans group is very short. They have forgotten Proclamation 17 of 1822 – which became effective on 5 July 1822 in the Dutch-speaking Cape, and which instituted English as the only language for law and government – as well as the Cape Education Act of 1865, which enforced only English in schools.

16 The Soweto uprising occurred as a result of the institution of Afrikaans as the language medium for certain school subjects.

17 *Supra* n9.

18 Language Policy for Parliament, amended 1 August 2003.

19 Act 4 of 2000 as amended by Act 52 of 2002, which came into effect on 15 January 2003.

20 Act 59 of 1995 as amended by Act 10 of 1999.

21 Unreported judgement of Justice Roelof du Plessis in the NGPD delivered on 11 October 2010 under case number: 70261/2009.

22 A provincial language committee, instituted in terms of Section 8(8)(a) of the PanSALB Act, does not have effective powers without further legislative enforcement rights.

23 Section 69 of the Consumer Protection Act, Act 68 of 2008.

24 See VN Webb (ed.), "Afrikaans na Apartheid".

# THE OFFICE OF THE LANGUAGE COMMISSIONER, IRELAND. THE IMPACT OF THE COMMISSION ON IRISH LANGUAGE POLICY AND OFFICIAL STRATEGY

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**Abstract**

The Irish language is recognised in the Constitution as the national first official language; and provisions to support the language are to be found in 160 specific stipulations in Irish legislation. In 2003, the President of Ireland signed the Official Languages Act 2003 into law, following its passage through both Houses of Parliament. The Act is organised under five main parts: Part 1, sections 1-4: Introduction and Definitions; Part 2, sections 5-8: Houses of the Oireachtas (Parliament), Acts of the Oireachtas, the Courts; Part 3, sections 11-18: Language Schemes; Part 4, sections 20-30: The Language Commissioner; Part 5, sections 31-35: Place Names.

The duties of An Coimisinéir Teanga, as specified in Part 4, sections 20 - 30 of the Official Languages Act, are as follows:

- To monitor compliance by public bodies with the provisions of the Official Languages Act and to take all necessary measures to ensure compliance by public bodies with their duties under the Act.
- To conduct investigations on his own initiative, on request from the Minister for Community, Rural and Gaeltacht Affairs or pursuant to a complaint made to him by any person in cases where public bodies are considered to have failed to fulfil their duties under the Official Languages Act. An Coimisinéir Teanga also has the right to investigate any valid complaint in which it is alleged that the provisions of any other enactments relating to the status or use of Irish have been contravened.
- To prepare a report in writing in respect of each investigation.
- To provide advice to the public regarding their language rights under the Official Languages Act.

- To provide advice to public bodies regarding their language duties under the Act.
- To provide an annual report on the work of the Office of An Coimisinéir Teanga to the Minister for Community, Rural and Gaeltacht Affairs to be laid before the Houses of the Oireachtas.
- To submit annual financial accounts by the Office of An Coimisinéir Teanga to the Comptroller and Auditor General and to the Minister to be laid before the Houses of the Oireachtas.

This paper reviews the work that the Office of the Commissioner has carried out since the Commissioner, Mr Seán Ó Cuirreáin, was appointed by the President of Ireland on 23 February 2004 for a six-year term of office.

In particular, the paper will focus on the following aspects:

- Organisational structure
- Staff profiles and role definitions
- State funding for the Office
- Public profile
- Complaints procedures
- Investigations
- Annual public reports.

The paper concludes with a brief assessment of the impact of the An Coimisinéir Teanga in relation to Irish language policy and official strategy; and, by implication, will offer resonant lessons for other analogous cases, most notably Northern Ireland, Scotland and Wales in the UK, and Galicia and the Basque Country in Spain. The paper also refers to the review of the Act recently announced by the Irish Government.

**Résumé**

Reconnue comme la première langue officielle au niveau national dans la constitution de l'Irlande, la langue irlandaise est étayée dans la législation nationale par non moins de 160 dispositions particulières. En 2003, le Président de l'Irlande a promulgué une loi sur les Langues Officielles (*The Official Languages Act, 2003*) suite à son adoption par les deux chambres du Parlement irlandais. Cette loi s'organise en 5 sections principales: Section 1, articles 1-4: Introduction et Définitions; Section 2, articles 5-8: Les chambres

de l'*Oireachtas* (Parlement), les lois de l'*Oireachtas*, les tribunaux; Section 3, articles 11-18: Programmes linguistiques; Section 4, articles 20-30: Le commissaire de la langue irlandaise; Section 5, articles 31-35: Toponymie. Les fonctions d'*An Teanga Coimisinéir* (en langue irlandaise « commissaire de la langue irlandaise »), telles que les précisent les articles 20 à 30 de la Section 4 de la loi sur les langues officielles sont les suivantes:

- S'assurer que les organismes publics respectent les dispositions de la loi sur les Langues officielles et prendre toutes les mesures nécessaires pour s'assurer que les organes de l'État se plient aux obligations qui leur incombent en vertu de cette loi.
- Mener des enquêtes de sa propre initiative, à la demande du ministre de la Communauté et des Affaires rurales et gaéliques ou suite à toute plainte portée par une personne dans les cas où les organismes publics sont considérés comme ayant manqué à leurs obligations en vertu de la loi sur les Langues officielles. Le commissaire de la langue irlandaise a également le droit d'enquêter sur toute plainte valide alléguant que les dispositions de tout autre texte portant sur le statut ou l'usage de l'irlandais n'ont pas été respectées.
- Préparer un rapport écrit à l'égard de chaque enquête.
- Fournir des conseils au public sur les droits linguistiques stipulés dans la loi sur les Langues officielles.
- Fournir des conseils aux organismes publics au sujet des obligations linguistiques qui leur incombent en vertu de cette loi.
- Présenter un rapport annuel sur les travaux du bureau du commissaire de la langue irlandaise au ministre de la Communauté, des Affaires rurales et gaéliques, pour être soumis aux chambres du Parlement irlandais (*Oireachtas*).
- Soumettre les états financiers annuels établis par le bureau du commissaire de la langue irlandaise au contrôleur et vérificateur général et au ministre pour être présentés aux chambres du Parlement irlandais (*Oireachtas*).

Ce document passe en revue les travaux que le bureau du commissaire a effectués depuis la nomination du commissaire, M. Seán Ó Cuirreáin, par le Président de l'Irlande le 23 février 2004, pour une durée de 6 ans.

Le document met en exergue les aspects suivants :

- Structure de l'organisation

- Profils du personnel et définitions des rôles
- Financement public
- Profil public
- Procédures de plainte
- Enquêtes
- Rapports publics annuels

Le document se termine par une brève évaluation de l'impact du bureau du commissaire de la langue irlandaise sur la politique relative à la langue irlandaise et la stratégie officielle et, par voie de conséquence, offre des enseignements pertinents pour d'autres cas analogues, notamment pour l' Irlande du Nord, l'Écosse et le Pays de Galles au Royaume-Uni, et pour la Galice et le Pays basque en Espagne. Enfin, le document fait également allusion à l'examen de la loi récemment annoncé par le gouvernement irlandais.

## 1. INTRODUCTION

Official language policy in many advanced democratic societies has been largely predicated on continued goodwill and an undue reliance on the statutory education system to reproduce target languages, both as subjects and as mediums of instruction. In many respects, such promotional policies have succeeded in growing the numbers capable of speaking a target language such as Irish, Catalan or Welsh. But they have been less successful in changing the socio-political character of the state or, indeed, in guaranteeing basic services to the citizens in the language of their choice. Consequently, in contexts as different as Canada, Catalonia, Ireland and Wales, there have been consistent attempts to challenge the arguments of those claiming that the official bilingual policy has been a failure.

Linguistic duality, the revitalisation of official language communities and the enactment of language rights have all been trumpeted as new and essential initiatives to realise government policy as social fact. In an era of strategic planning and increased regulation, attempts made by governments to foster a supportive climate for official language revitalisation have relied more and more on action plans, twenty-year language strategies and new legislation. All of these comprise attempts at social engineering, whereby government intervention seeks to create new opportunities and spaces within which the target language and its speakers may enjoy some degree of recognition, sustenance and equal treatment. Such reforms are rendered all the more urgent as society becomes more plural, culturally diverse and fragmented. For many

involved in official language promotion, a commitment to linguistic duality, as in Canada, is regarded as a source of social reinforcement.[1]

Within contemporary language regimes, the role of Language Commissioners is becoming increasingly central to the implementation of language acts and securing access to social justice. Canada is recognised as having a mature, well-developed system by which both official languages are regulated; but even here – as the most recent OCOL Annual Report (2010) testifies – lately, "progress has been minimal with regard to official languages, and there has even been a decline regarding language of work" (2010, p. 13). Thus, constant pressure is required to safeguard the gains made and to extend language awareness to the wider population, especially those who do not necessarily value the core attachment to linguistic duality.

Ireland offers a more recent illustration of an attempt to reinforce a commitment to linguistic duality, through its enactment of the Official Languages Act, 2003 and its establishment of the office of a Language Commissioner. However, language-related legislation has characterised the Irish socio-legal system since the foundation of Saorstát Eireann in 1922. At that stage, the Irish language acquired an official status under the Constitution Act of 1922. The revised Constitution of Ireland, 1937 recognises the Irish language as the native language of Ireland and the country's first official language. The English language is recognised as another official language. Article 8 of the Constitution sets out the status of the Irish and English languages as follows:

> Article 8.1 The Irish language as the national language is the first official language.
>
> Article 8.2 The English language is recognised as a second official language.
>
> Article 8.3 Provision may, however, be made by law for the exclusive use of either of the said languages for any one or more official purposes, either throughout the State or in any part thereof.

Data from the Census of Ireland 2011 indicates that 1.77 million people claim the ability to speak the Irish language (total population 4.8 million). This is an increase of 7.1 per cent on the 2005 census figures.

Many citizens of Ireland seeking redress in respect of language rights issues over the years have had recourse to these provisions; and as a result, there is a considerable amount of case law concerning language issues. The necessity for citizens to approach the Supreme Court in order to seek redress for language rights violations led to demands from language activists to include language provisions when primary legislation was being drafted; and consequently, there are stipulations to support the language in approximately 160 specific

provisions in Irish primary legislation. Notwithstanding these provisions, there was a perceived gap between the status afforded the language in the Constitution and the *de facto* rights afforded by the Irish state to its Irish-speaking citizens.

Language activists and legal experts have long pointed out the need to supplement the case law and to encourage the government to introduce a bill of rights or language legislation. These attempts came to fruition in 2003 when the President of Ireland signed The Official Languages Act, 2003 into law, following its passage through both Houses of Parliament (Rigg, Ó Laoire and Georgiou, 2010).

The Official Languages Act is considered to be influenced by international experience, and particularly by the Official Languages Acts of Canada of 1969 and 1988, and the Welsh Language Act, 1993.

The Act is organised into five main parts:

Part 1, sections 1-4: Introduction and Definitions;

Part 2, sections 5-8: Houses of the Oireachtas (Parliament); Acts of the Oireachtas; the Courts;

Part 3, sections 11-18: Language Schemes;

Part 4, sections 20-30: The Language Commissioner; and Second Schedule;

Part 5, sections 31-35: Place Names.

This paper does not present a comprehensive overview of the Official Languages Act. Instead, it focuses on the Office of the Language Commissioner and considers the impact that that Office has had on Irish language policy and official strategy.

The Official Languages Act was enacted in 2003, filling the gap between the constitutional position and service provision by the state. The Act greatly enhanced the legal position of the language, building on constitutional case law and provisions in other major pieces of legislation, e.g. the Education Act of 1998 and the Planning and Development Act of 2000. The Act grants some fundamental rights to Irish language speakers. It ensures the right to use Irish in the Oireachtas (Houses of Parliament) and in all its committees. Simultaneous publication in Irish and English of all Acts of Parliament is also secured. The right to use Irish in any court is confirmed; and the state must use the language chosen by the other party in civil cases. All witnesses are free to give evidence in their language of choice; and the state may not subject any citizen to any extra

costs as a result of his or her language choice. Simultaneous or consecutive translation must be provided by the Court, if necessary.

The Act imposes a number of direct obligations on all public bodies:

> The citizen has the right to receive a reply in the original language of correspondence, be it Irish or English, including electronic correspondence. Specified defined key documents shall be published simultaneously in Irish and English, e.g. annual reports and accounts, including certain strategic documents. Signage, stationery, mail shots and recorded public announcements shall be in Irish or in Irish and English.

## 2. LANGUAGE SCHEMES

The Act's principal mechanism for the delivery of bilingual services is its system of agreed-on language schemes, as adapted from the Welsh model.

The Minister responsible for language affairs may require any of the approximately 650 public bodies to prepare and agree on a language scheme. When the head of the public body agrees on a scheme with the Minister, the document becomes a statutory language plan for that organisation for a set period of three years, or until a new scheme is agreed on. Schemes must indicate the level of services provided through the medium of English, through the medium of Irish, or in both Irish and English. Schemes must also indicate how the provision of services in Irish will be improved in the following three years, or until a new scheme is agreed on. Language schemes are negotiated between the head of the public body and officials of the Department of Arts, Heritage and Gaeltacht Affairs, with commitments being entered into in order to ensure the use of Irish in relation to the following: (i) forms, brochures and other publications; (ii) first point of contact – reception staff; (iii) service provision on the telephone; (iv) one-to-one service provided by front-line staff; (v) services and advice provided electronically, as in websites and other electronic media; (vi) interactive services; (vii) services in Gaeltacht areas. Language schemes, once agreed on between department officials and the head of the organisation, are legal contracts creating rights for the citizen and obligations for the organisation. When a scheme has been agreed on and ratified by the Minister, it cannot be renegotiated, and must remain in place for the life-span of the scheme, or until it is replaced by a new scheme. Schemes must show particular regard for the provision of services through Irish to Gaeltacht areas (Irish-speaking areas defined by law). Once the scheme has been agreed on and ratified, it passes from the Department of AHGA to the office of the Language Commissioner, who is charged with the responsibility of ensuring that the scheme is fully implemented.

Oifig Choimisinéir na dTeangacha Oifigiúla [The Office of the Official Languages Commissioner – our translation] is established under Part 4 of the Official Languages Act, and forms a key part of the implementation structures of the Act. While negotiation and agreement in respect of language schemes is the responsibility of the Department of Arts, Heritage and Gaeltacht Affairs, the Language Commissioner is responsible for the monitoring of compliance and the investigation of complaints. The cross-border body established under the Good Friday Agreement of 1999, charged with the promotion of the language, Foras na Gaeilge, has no formal role under the Act. This would seem to reflect an attempt to separate the functions of language rights and obligations from the role of language promotion. This also reduces the possible tension that could arise between the regulatory and promotional aspects of language policy and provides, at the very least, a clear line of division in respect of reporting and of accountability, a feature not so fully appreciated in several other language regimes.

The Minister provides a written annual report to the Houses of Parliament, specifying the extent to which the Act has been implemented, and the details pertaining to the implementation.

The Language Commissioner is appointed by the President of Ireland on the advice of the government and the approval of the Houses of Parliament. Mr Seán Ó Cuirreáin was appointed as the first Language Commissioner by the President on 24 February 2004 for a six-year period, as set out in the legislation. He is a native speaker of Irish and held the position of Deputy Director of Raidio na Gaeltachta (a national radio station broadcasting primarily in the Irish language) at the time of his appointment. The Commissioner was reappointed for a second six-year term on 23 February 2010, after receiving the full support of all political parties in Parliament.

The functions of the Language Commissioner are set out in Part 4, section 21 of the Act, as follows:

- to monitor the compliance by public bodies with the provisions of the Act;
- to take all necessary measures within his or her authority to ensure compliance by public bodies with the provisions of the Act;
- to carry out investigations, whether on his or her own initiative, on request by the Minister or pursuant to a complaint made to him or her by any person, into any failure by a public body to comply with the provisions of the Act that he or she or, as appropriate, the Minister, considers may have occurred;

- to provide advice or other assistance to public bodies regarding their obligations under the Act;
- to carry out an investigation, whether on his or her own initiative, on request by the Minister or pursuant to a complaint made to him or her by any person, to ascertain whether any provision of any other enactment relating to the status or use of an official language was not or is not being complied with.

The general powers of the Commissioner are detailed in Section 22 of the Act:

- the Commissioner may require any person who has, in the opinion of the Commissioner, relevant information for his or her functions under the Act to attend before him or her for that purpose and the person shall comply with the requirement (this does not apply to information relating to decisions or proceedings of the Government or information or records subject to legal privilege);
- a person to whom a requirement is addressed under this section shall be entitled to the same immunities and privileges as if he or she were a witness before the High Court;
- a person who fails or refuses to comply with this requirement under this section or hinders or obstructs the Commissioner in the performance of his or her functions shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding €2000 or to imprisonment for a term not exceeding 6 months or both;
- where an offence has been committed by a body corporate and is proved to have been committed with the consent or connivance of, or by neglect on the part of any director, manager, secretary or other similar officer, that person as well as the public body shall be guilty of the offence and liable to be proceeded against and punished;
- proceedings for an offence under this section may be brought and prosecuted by the Commissioner;
- the Commissioner may pay travel and subsistence costs to a person attending before him or her;
- a statement of admission made by a person shall not be admissible as evidence against that person in any criminal proceedings.

The Commissioner is also endowed with powers to conduct investigations; and these powers are detailed later in this paper.

These functions and duties of the Commissioner are threefold, and may be summarised as follows: (i) Compliance agency; (ii) Ombudsman service; (iii) Advisor on rights and obligations.

**(i) Compliance agency:** It is the duty of the Commissioner to monitor and ensure compliance by public bodies with the provisions of the Act. Complaints are received by email, telephonically or by post, and are frequently resolved by advising the complainant. Between 2004 and 2009, the office handled approximately 3 000 complaints from members of the public. Many complaints arise from misunderstandings as to what is and what is not covered by the legislation in the Act. In other cases, the complaint warrants investigation, but can be resolved by reaching an agreement without following the formal investigation route.

However, where such an agreement cannot be reached, the Commissioner can proceed to initiate a formal investigation.

## 3. MONITORING LANGUAGE SCHEMES

One of the Commissioner's primary functions is that of ensuring that the language schemes, as agreed on between the Minister and the head of a public body, are fully implemented. The Commissioner has recently highlighted the importance of the language schemes, as follows:

> Language schemes are the core mechanism in the legislation to increase the range and standard of services provided in Irish by public bodies. This Office has an important role in ensuring, as far as is practicable, that the statutory commitments given by public bodies in these schemes are fully implemented. Consequently, the compliance resources of my Office are largely dedicated to monitoring the implementation of the provisions contained in the language schemes (An Coimisinéir Teanga, Annual Report 2010, p. 15).

**Table 1:** Year in which first language scheme was confirmed

| Year | Schemes | Public Bodies Included |
|---|---|---|
| 2004 | 01 | 01 |
| 2005 | 22 | 35 |
| 2006 | 18 | 36 |
| 2007 | 29 | 55 |
| 2008 | 15 | 28 |
| 2009 | 15 | 26 |
| 2010 | 05 | 10 |
| Total | 105 | 191 |

The Minister confirms a language scheme, following a process of negotiation between department officials and the head of the particular public body. Once the scheme has been confirmed, the language scheme is transferred to the Language Commissioner. Table 1 indicates the volume of language schemes passed on to the Commissioner since the inception of the schemes to date.

A language scheme has a lifetime of three years, or a period lasting until such time as a second scheme is agreed on. Table 2 outlines the progress made in confirming the second round of language schemes.

**Table 2:** Second draft scheme confirmed

| Year | Draft Schemes | Public Bodies Included |
|---|---|---|
| 2007 | 20 | 33 |
| 2008 | 22 | 35 |
| 2009 | 48 | 84 |
| 2010 | 54 | 104 |
| Total | 144 | 256 |

Table 3 shows the number of reviews and audits completed by the Language Commissioner from 2005 until the end of 2010.

**Table 3:** Reviews/audits completed

| Year | Schemes | Public Bodies Included |
|---|---|---|
| 2006 | 09 | 16 |
| 2007 | 25 | 43 |
| 2008 | 42 | 74 |
| 2009 | 39 | 73 |
| 2010 | 33 | 50 |
| Total | 148 | 256 |

In his Annual Report of 2008, the Commissioner expressed concern about the delay in confirming language schemes with public bodies under the Act. This area is revisited in the 2010 Annual Report:

> At the end of the year, no second language scheme had yet been implemented for 51 public bodies whose first schemes had reached 'expiration', as described in subsection 15(1) of the Act. According to the legislation, public bodies must continue to provide services through Irish in accordance with the commitments given in their first scheme but, in the absence of a new scheme, a public body is not obliged to further develop these services.

> The total of 51 schemes which had reached 'expiration' equates to half of the schemes previously ratified. Of these schemes, 12 had expired more than two years ago.
>
> In addition, there were 26 other public bodies whose first draft schemes had been requested by the Minister for Community, Equality and Gaeltacht Affairs but remained to be agreed [on] and confirmed. In the case of 10 of those public bodies, more than 4 years had passed since they were requested to prepare the draft schemes and three and a half years had passed in two other cases.
>
> I am strongly of the opinion that this delay in the confirmation of schemes is not in accordance with what was envisoned under the provisions of the Act or under the statutory regulations made under the Act (An Coimisinéir Teanga, Annual Report 2010, p.7).

**(ii) Ombudsman service:** The office is mandated to carry out investigations on a formal statutory basis in accordance with the provisions of the Act. The Commissioner has the relevant authority and powers under sections 23, 24, 25 and 26 of the Act to carry out investigations, not only in cases where he suspects that public bodies have failed to comply with their statutory obligations under the Act, but also in cases where such bodies have contravened any other enactments which relate to the status or use of Irish. Investigations may be instigated on his own initiative, at the request of the Minister, or pursuant to a complaint made to him by any member of the public.

An investigation may be initiated if a provision of any of the following is being contravened, or is considered to have been contravened (and the matter cannot be resolved through informal negotiation):

- Provisions of the Official Languages Act 2003;
- Regulations in force under that Act;
- Any language scheme confirmed under that Act; or
- Any other enactment relating to the status or use of the Irish language.

An investigation is a formal process with defined published procedures, and is not carried out in public.

Where the Commissioner proposes to carry out an investigation under the Act, he or she shall notify the public body concerned, the person who made the complaint, the Minister, as well as any other person who is alleged to have been responsible for, or complicit in the matter complained of, and accord the concerned parties an opportunity to comment on the matter. The Commissioner

may refuse to investigate a complaint under the Act, or may discontinue the investigation under the Act, if he or she is of the opinion that:

- the complaint is trivial or vexatious;
- the person making the complaint has not taken reasonable steps to seek redress in respect of the subject matter of the complaint, or, if he or she has [done so], has not been refused redress;
- the complaint relates solely to a matter within the power of the Ombudsman to investigate pursuant to section 4 (2) (a) of the Ombudsman Act 1980;
- the matter complained of does not involve any contravention of the provisions of this Act or of any other enactment relating to the status or use of an official language (British and Irish Ombudsman Association, 2007).

The procedure for considering an investigation:

> … shall be such as the Commissioner considers appropriate in all the circumstances of the case and subject to the provisions of the Act. The investigation guidelines are similar to guidelines used by ombudsman offices, mindful of [the need to comply] with the rules of natural justice and ensuring that all parties have confidence that issues will be considered impartially and on their merits (British and Irish Ombudsman Association, 2007).

In an investigation carried out by him or her under the Act, the Commissioner may determine whether any person may be represented by counsel, a solicitor or another representative. The Commissioner shall not investigate any complaint if the complaint in question is under consideration in any court or civil legal proceedings.

Information obtained by the Commissioner shall not be disclosed except for the purposes of any statement, report or notification under the Act; and the Commissioner shall not be called upon to give evidence in any proceedings relating to a matter that comes to his or her knowledge in the course of such exercise.

In a case where a complaint is made to the Commissioner and where the Commissioner decides not to carry out an investigation, or decides to discontinue an investigation, the person who made the complaint and the public body concerned shall be informed in writing of the reasons for the decision.

In any case where the Commissioner conducts an investigation under the Act, he or she may issue an interim report, but must submit a report in writing detailing the findings of the investigation to the public body concerned, to the Minister and to the complainant, in a case where a complaint is made to the Commissioner. The report may include any recommendations that he or she considers appropriate with regard to the investigation. The Commissioner may request a public body to submit any comments it may wish to put forward regarding any findings or recommendations contained in a report. If, within a reasonable time after the report containing recommendations is submitted to a public body, any recommendations have not been satisfactorily implemented in the opinion of the Commissioner, the Commissioner may, after considering any responses made by that body, submit a report to both Houses of the Oireachtas. Any responses made by or on behalf of the public body shall be attached to the report.

A party to an investigation under the Act, or any other person affected by the findings and recommendations of the Commissioner following an investigation, may appeal to the High Court on a point of law. Such an appeal must be initiated not later than four weeks after notice of the relevant findings and recommendations has been furnished to the person bringing the appeal. The Court may order that some or all of the person's costs, except in the case of a head of a public body, should be paid by the public body concerned, even in the event of the complainant losing the case, if the Court considers that the point of law concerned was of exceptional public importance.

The Commissioner has carried out detailed investigations since 2007, carefully examining specific complaints from members of the public or investigating specific bodies that fail to implement initiatives agreed on in their language schemes. In 2007, ten such investigations were carried out; 17 were completed in 2008; 19 in 2009 and 11 in 2010. In order to provide a guarantee against overt political interference or manipulation of the conduct of the office and the course of investigations, or undue pressure concerning matters such as the level of staffing and resourcing, or spheres of competence, the OLC has a statutory guarantee of independence under the Act. This is a status which approaches that which is enjoyed by the Canadian Federal Commissioner of Official Languages, and is unlike that which obtains as regards the current provisions for the Office of the Language Commissioner in Wales (Williams, 2011).

These investigations carried out by the Commissioner concern language rights and obligations which are held by the most significant bodies in the Irish public service, and include – ironically enough – the investigation of issues relating to non-compliance with the language scheme of the Department of the Minister for Community, Equality and Gaeltacht Affairs. Consequently, the independence

of the office is of great importance in the carrying out of investigations and in seeking to press for remedial action in relation to the findings arising from the investigations, which are presented in summary form in the annual report of the Commissioner.

(iii) **Advisor on rights and obligations:** The Commissioner is mandated to provide advice to the public regarding their language rights and also to provide advice to public bodies regarding their language-related obligations under the Act. The 2010 Annual Report suggests that the office was contacted on 185 separate occasions by public bodies with specific questions, or those seeking advice about their language obligations under the Act. The Office also disseminates advice through the publication of information leaflets and guidebooks, both online and in a hard-copy format.

During 2010, the Office developed a bilingual educational resource pertaining to language rights. The resource consists of a series of lessons relating to language rights in general and Irish language rights in particular, in the context of human rights. It is envisaged that this resource will be made available to all secondary-level schools in the country, as study material for the Junior Certificate course in Civic, Social and Political Education.

## 4. REPORTING FUNCTIONS

In addition to the reporting duties attached to the conduction of investigations, the Commissioner is required by legislation to provide an annual report, in each of the official languages, of the activities of his office for that year to the Minister of Arts, Heritage and Gaeltacht Affairs, to be laid before the Houses of the Oireachtas. This report must be submitted not later than six months after the end of each year. The Minister must ensure that a copy of this report is laid before the Houses of the Oireachtas, not later than two months after the receipt of the report. After the report has been placed before the Houses of the Oireachtas, the Commissioner normally publishes the report, thereby making it available to the public as an annual report on the activities of his office, a practice he has followed each year since his appointment. These annual reports highlight the work that the office has undertaken in the previous year, with commentary on key issues arising from the work. The reports also include commentary by the Commissioner, focusing on issues of specific concern, e.g. the position of the Irish language in the educational system, positive discrimination for the recruitment of language speakers to the public service and the importance of language rights.

The Commissioner may also prepare and publish commentaries on the practical application and operation of the provisions of the Act, including commentaries based on the experience of holders of the office of Commissioner in relation to investigations and findings following investigations.

The Commissioner must also submit financial reports to the Controller and Auditor General, and these accounts must be provided to the Minister of Arts, Heritage and Gaeltacht Affairs to be laid before the Houses of Parliament.

## 5. OFFICE AND STAFF

The office is located in An Spidéal in the Galway Gaeltacht. Staff of the office are civil service appointments from within the service itself; or, if they are appointed from outside, staff join the civil service. The Office is allowed a staff complement of a minimum of eight persons, in addition to the Commissioner, according to the allocations made by the Department of Finance. Job titles and job specifications match the functions accorded to the Office in the Act, and are currently constituted as follows: Compliance Manager, Investigations Manager, and an Office Director serving as coordinator and reporting directly to the Commissioner.

The office is financed from public funds through the Department of Arts, Heritage and Gaeltacht Affairs. Table 4 shows the level of funding for the Office for the period from 2004 to 2009.

**Table 4:** Government funding for the office, 2004-2009

| Year | Amount of Funding |
|---|---|
| 2004 | €517,609 |
| 2005 | €648,815 |
| 2006 | €647,068 |
| 2007 | €694,495 |
| 2008 | €865,000 |
| 2009 | €796,000 |

As is the case with all similar structures, the percentage of the funding available for project work decreases each year as staff costs increase because of yearly increments pertaining to salaries and pensions. Of the €865,000 funding that was allocated in 2008, staff costs accounted for €497,000, while €600,000 of the €796,000 subvention for 2009 was required for staff costs.

Staff changes impact greatly on an office of this size; and flexibility and speed are required to close the skills gap that can occur in such cases. In 2010, the Office was operating with three staff vacancies, and was hampered by an embargo on employment in the public service.

## 6. STRENGTHS AND WEAKNESSES OF THE MODEL

### 6.1 Strengths

The Office is a statutory office established under the Official Languages Act 2003 with a specific and well-defined remit. This gives the Office the authority to function in the public service arena, and moves the workings of the Office away from any undue reliance on goodwill and voluntary support for the language, to the area of statutory compliance with state law. The detailed procedures involved in appointing a Commissioner and the care taken to ensure the independence of the post-holder are to be commended. The independence of the office-holder from influence or perceived influence from Government, Ministers, state departments, language organisations or other stakeholders, is thereby ensured. The Commissioner's independence is underpinned by a provision in the Act in terms of which he may only be removed from office in the gravest of defined circumstances, and then only by the President of Ireland.

The Act separates the functions and duties of language promotion from monitoring and compliance issues. This separation seems to be a positive development, giving the Office a clear remit and releasing it from the obligation to negotiate or bargain with the public bodies. However, it would be beneficial if the office had the competence, in terms of the Act, to provide commentary and to formally advise the government on important language issues as they arise.

The reporting duties of the Office make it possible for the citizens to be aware of the key issues that are under consideration in any period, and place the workings of the Office into the public domain. This is to be welcomed. All documents relating to the Office, all financial accounts and details of all travel costs and other expenditure incurred by the post-holder are also freely available on the Office website.

The Office's competency and authority to carry out investigations into possible language rights infringements is a great strength of the model. To date, the Commissioner has completed 57 detailed investigations, carefully examining specific complaints concerning language rights, institutional obligations and language status. While the findings arising from these investigations can be challenged in the High Court on a point of law within a specific time-frame,

this has not happened yet. The findings of the investigations offer valuable insights into the working of the Act and into the way in which the public service has approached the spirit and the letter of the law. They also highlight the importance of the independence of the Office of the Commissioner.

### 6.2 Weaknesses

One of the key weaknesses of the Irish model lies in the fact that the power to initiate language schemes rests within the political system. This provision is open to interpretation, and could result in a "stop-start" approach as changes occur in the political system. One Minister may view the language schemes as a priority, while another may well regard them as irrelevant and cumbersome.

This weakness may also impact on the development of capacity within the Ministry. It is necessary to build up skills and competencies amongst a core staff within the Department of HRGA if the language schemes are to proceed and develop as set out in the legislation. As a consequence of this, the message may filter through to the public bodies that there is uncertainty in the government's approach, which in turn could lead to a loss of focus and decrease the importance of the language schemes in the eyes of the public body. When the "driver" of change is the Ministry and the Department, rather than specific enactments of law, the model is at the mercy of the political and administrative system.

The office also depends to some degree on the authority derived from the law, rather than having the option of imposing hard-hitting sanctions on public bodies for non-compliance. In a case where non-compliance with the law becomes a major issue in the public system, one option would be to introduce hard-hitting sanctions against the public body for non-compliance. Section 27 of the Act allows for a compensation scheme to be put in place, but this has not yet been introduced.

The Commissioner's staffing and finances are somewhat dependent on the political system; and this is another perceived weakness in the model. In the event of severe difficulties arising between the Commissioner and the political establishment at any given time, it is not unreasonable to suggest that requests from the Commissioner for additional staff or funding might well fall on deaf ears within the political system.[2]

Overall, the Office has been established successfully and has secured the goodwill and support of the Irish language community. The Office fulfils its statutory duties with diligence, and has confronted some difficult issues and demonstrated its independence. The culture of "promise" is prevalent in language policy in Ireland;

but very often, problems are experienced with the non-realisation of those promises. Perhaps for the first time since the foundation of the state in 1922, these promises are being factored in, and people and organisations are being asked to deliver the language service that they have promised.

The fact that the Commissioner has been reappointed for a second six-year term with the support of all parties in Parliament suggests that the Office has gained positive recognition in the political and public administration arena for the work it carries out. Despite this support, the Office will not escape the current economic downturn and its impact on public service resources. The downturn will also impact on the ability of public bodies to comply with the legislation when financial and human resources become harder to secure.

Finally, the Office of the Commissioner is only one small, albeit crucial, part of the apparatus in the Irish language project. The prevailing culture of that project, along with its current predicament, impacts both positively and negatively on the Office. The long-term success of the Office may well depend on the success achieved by the other structures of that apparatus in fulfilling the role expected of them and functioning to their (required) capacity. Nevertheless, it can be concluded that the progress made in achieving the implementation of language rights has been encouraging, despite certain drawbacks such as a possible uneven application and understanding of what is involved. Two significant challenges are worthy of note. The first pertains to the relationship between rights and duties. Clearly, there has been a marked improvement in the specification of Irish language rights, and the Language Commissioner has played a crucial role, both in investigating and educating public bodies in this regard. However, for a right to be exercised there has to be a corresponding obligation to respect and comply with such rights. A persistent problem remains in the form of an almost systemic failure to uphold such rights in a clear and consistent manner, which suggests that the mechanisms adopted to date are partial and not necessarily integral to the workings of Irish society. Some credence is given to the government's Twenty-Year Strategy, which promises a more integrated and holistic approach if it is fully implemented. This brings us to the second challenge, namely the resourcing of Irish language policy and related programmes. The institutional bilingualism of the state, not to mention that of significant portions of the country, presupposes a robust, adequately-financed support programme to turn official rhetoric into real action at the point of local demand. This financial commitment cannot be taken for granted in straitened times; and in consequence, any attempt to treat the interests of the Irish language, including language rights and official language schemes, as a public good, is predicated on the assumption that such elements are integral to the well-being of society. This is not necessarily a safe assumption in

contemporary Ireland, despite a great deal of commitment, strategic planning and vigilant calling of government to account.

In its 2011 programme for government, the newly elected Irish government announced its intention to review the Official Languages Act. The formal review process was launched by the Minister in November 2011. The review of any piece of legislation by a government in a modern liberal democracy is to be expected. However, this announcement was a cause of concern in the Irish language community, in view of the previous reluctance of the state system to implement the provisions of the Act in full. This concern was further heightened by the government's announcement, 14 days later, that it had decided to "merge the functions of Language Commissioner with [those of the] Ombudsman Office", and that this would be carried out "in the context of the ongoing review of the Official Languages Act 2003" (17/11/2011). No details have been published to indicate the economic or administrative reasoning that led to this decision – a decision that has given rise to widespread unease and opposition in the language community.

The review of the Official Languages Act is ongoing; and on completion thereof, the Minister will submit recommendations in this regard to the government for consideration.

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## ENDNOTES

1 One such advocate was the Canadian OCOL Commissioner, Adam, who stressed throughout her mandate that linguistic duality was a part of Canada's core values. For details see Adam (2007) and OCOL (2010).

2 This is a common predicament and was experienced in Canada in the mid-90s, when the Government of Canada carried out a cost-cutting exercise to reduce the deficit, which included attempts to cut and re-route the finances needed for the OCOL and the official language communities, and saw a lack of progress in implementing Part V11 of the Act. "The Commissioner concluded that these transformations had contributed to a 'subtle but cumulative erosion of language rights'" (OCOL Annual Report 2009-2010, p. 11).

# LA COUR SUPRÊME DU CANADA ET LA RÉFLEXION SUR LA NATURE, LES FONDEMENTS ET LES CARACTÉRISTIQUES DES *DROITS* ET DE LA *LIBERTÉ* LINGUISTIQUES

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**Résumé**

Dans sa jurisprudence, la Cour suprême du Canada distingue les *droits linguistiques* formellement reconnus en tant que tels et la *liberté linguistique* qui découle implicitement de certains droits fondamentaux. La *liberté linguistique* n'existe que dans le domaine de l'usage *privé* des langues, c'est-à-dire les relations des particuliers entre eux. C'est une liberté négative, dans le sens où elle permet seulement aux individus de s'exprimer dans la langue de leur choix, sans leur donner le droit d'être compris dans la langue choisie ou de recevoir une réponse dans cette langue. Cette liberté linguistique bénéficie à tous (et à toutes les langues). Par contre, les *droits linguistiques proprement dits*, reconnus en tant que tels, portent sur les relations entre les individus et les autorités publiques (l'usage *officiel* des langues). À ce titre, il s'agit de droits positifs qui exigent que l'État mette à la disposition des individus des prestations et des services destinés à leur garantir la jouissance effective des droits en cause. De tels droits doivent être expressément reconnus, car ils ne sauraient être déduits des droits fondamentaux et du droit à l'égalité. Lorsqu'ils sont reconnus, les droits linguistiques dans l'usage officiel ne le sont habituellement que pour les minorités nationales, par opposition aux minorités issues de l'immigration.

Une catégorie encore insuffisamment explorée par la Cour suprême du Canada est celle des « accommodements linguistiques » en matière d'usage officiel. Dans la mesure où la méconnaissance de la langue officielle empêche une personne de jouir effectivement d'une liberté ou d'un droit considéré comme fondamental, l'État a l'obligation de consentir un « accommodement linguistique », consistant en la prestation d'un service de traduction ou d'interprétation, destiné à permettre à l'individu de surmonter son handicap linguistique.

Au fil de sa jurisprudence, la Cour suprême a également souligné certaines caractéristiques des *droits linguistiques* dans l'usage officiel, qui s'opposent aux

caractéristiques de la *liberté linguistique* dans l'usage privé : il s'agit de droits présentant une dimension collective accentuée ; ayant un contenu susceptible de varier en fonction du contexte ; exigeant une intervention gouvernementale active plutôt qu'une attitude d'abstention.

**Abstract**

In the case law of the Supreme Court of Canada, two categories of rights and freedoms are distinguished in relation to the use of languages. On the one hand, a *linguistic freedom* derives implicitly from fundamental freedoms, such as freedom of expression, and from the right to equality (thus benefiting the speakers of all languages), and applies only to the *private* use of languages (in the relations between private individuals). The exercise of such a freedom does not require the state to award individuals any benefit or to provide them with any material assistance, but only requires that the state should abstain from restricting their free conduct. On the other hand, *special linguistic rights* relate to the *official* use of languages (in relations between individuals and the state); and such rights will exist only if they are expressly recognised (they cannot be derived from universal fundamental freedoms, or from the right to equality). Such rights are usually recognised only for national, as opposed to immigrant, minorities. The exercise of linguistic rights for official purposes requires that the state set up bilingual or multilingual services.

A third concept, to date, has only been tentatively examined by the Supreme Court of Canada. It is possible to argue that a *right to linguistic accommodation* exists with regard to the *official* use of languages, whenever a right that can be considered as important or fundamental is infringed by the fact that the state functions only in its official language. This right to accommodation has hybrid characteristics from the point of view of the distinction between linguistic freedom and special linguistic rights. It is not simply a freedom, since it places a positive obligation on the state. It benefits everyone, irrespective of the language used. It does not need to be expressly acknowledged, since it implicitly derives from certain fundamental rights and freedoms. However, it exists only insofar as the accommodation is necessary to avoid the violation of a right or freedom considered as sufficiently important, such as the right to health care, the right to a meaningful education or the right to a fair trial.

Finally, I will also examine the way in which the Supreme Court characterises special linguistic rights for official purposes, as opposed to the linguistic freedom that is applicable in private relations. Such special rights have a pronounced collective aspect; they may vary in content according to the context; and they require positive action and active intervention on the part of the state, as opposed to mere abstention.

Dans les trente dernières années, la Cour suprême du Canada a été amenée à se livrer à une réflexion approfondie sur l'objet, la nature, les caractéristiques et les fondements des *droits* et de la *liberté* linguistiques. Cela tient au fait que cette période a été marquée par de nombreux conflits linguistiques, reliés à la situation sociolinguistique du pays.

## 1. LA SITUATION SOCIOLINGUISTIQUE DU CANADA ET LES DIFFERENTS CONFLITS LINGUISTIQUES PORTES DEVANT LA COUR SUPREME

La situation canadienne se caractérise en premier lieu par l'existence d'une minorité nationale francophone, distincte de la majorité anglophone du pays. Les francophones sont présents partout dans les dix provinces et les trois territoires qui composent le Canada, mais ils sont aujourd'hui concentrés à presque 90% dans la province du Québec, où ils forment la majorité de la population, les anglophones y occupant la position minoritaire. En dehors du Québec, partout ailleurs au Canada, les francophones sont minoritaires et les anglophones majoritaires[1].

En second lieu, le Canada est depuis très longtemps un pays de forte immigration et on y trouve donc également de nombreuses communautés culturelles dont la langue d'origine est différente à la fois du français et de l'anglais. Toronto est la ville la plus multiculturelle du continent et l'on prévoit qu'en 2050 plus de la moitié de sa population sera née ou aura des parents nés en dehors du Canada. À Montréal, les écoles publiques accueillent des enfants qui parlent à la maison plus de 90 langues différentes. La situation est la même dans la plupart des grandes villes canadiennes. Cette situation de multiculturalisme soulève la question de l'intégration linguistique des immigrants. Leur intégration ne soulève pas de problèmes particuliers dans les parties anglophones du Canada, où les immigrants s'intègrent naturellement et spontanément à la majorité anglophone. Mais elle soulève certains problèmes au Québec, où beaucoup d'immigrants préféreraient apprendre l'anglais et vivre en anglais, mais où la politique du gouvernement du Québec consiste à les encourager, voire à les forcer, à apprendre prioritairement le français et à fonctionner en français pour certaines de leurs relations sociales.

La situation de coexistence d'une majorité nationale anglophone et d'une minorité nationale francophone (la situation étant inversée au Québec) existait déjà au moment de la création de la fédération canadienne en 1867. Elle explique certaines caractéristiques qui ont été données à la Constitution canadienne lorsque celle-ci a été adoptée. En effet, si le Canada est aujourd'hui une fédération, c'est que les francophones du Québec n'ont accepté de donner leur accord à la création du Canada

en 1867 qu'à la condition que le régime soit fédéral plutôt qu'unitaire, comme l'auraient préféré certains des représentants de la majorité anglophone. En effet, le choix d'un système fédéral permettait aux francophones de se retrouver en situation majoritaire au moins dans l'une des entités fédérées - le Québec - et donc de pouvoir y exercer un certain contrôle sur leur destin. En outre, la Constitution de 1867 contient des dispositions garantissant une certaine forme de bilinguisme officiel, l'usage du français et de l'anglais étant prévu de façon paritaire dans les domaines parlementaire, législatif et judiciaire (Woehrling 2004; Morin et Woehrling 1994). Il faut cependant souligner que ce bilinguisme était – et est demeuré - asymétrique. En 1867, le bilinguisme officiel s'appliquait, d'une part, au niveau des institutions fédérales, ce qui avait pour effet de protéger les droits des francophones partout au Canada, et, d'autre part, au niveau de la seule province du Québec, ce qui avait pour effet de protéger la minorité anglophone du Québec, mais pas les minorités francophones des autres provinces. Par la suite, des dispositions similaires sont devenues applicables à deux autres provinces, le Manitoba en 1870 et le Nouveau-Brunswick en 1982. Actuellement, les dispositions sur le bilinguisme officiel ne s'appliquent donc qu'à trois provinces sur dix, ainsi qu'aux institutions fédérales. Il faut également souligner que la Constitution canadienne de 1867 ne garantissait ni le bilinguisme des services administratifs, ni le droit à l'enseignement dans la langue de la minorité (francophone ou anglophone) dans les écoles publiques. Les provinces, auxquelles la Constitution reconnaît une compétence exclusive pour légiférer en matière d'éducation, étaient donc libres d'adopter la politique de leur choix dans ce domaine. Cette situation a changé en 1982, quand la Constitution a été modifiée pour y ajouter une nouvelle *Charte canadienne des droits et libertés*, dans laquelle on trouve des dispositions qui garantissent le droit à l'instruction primaire et secondaire dans la langue de la minorité pour les francophones en dehors du Québec et pour les anglophones du Québec. Le Québec s'est opposé à la reconnaissance de ces nouveaux droits linguistiques en matière d'instruction publique, dans la mesure où cela entrait en opposition avec sa propre politique linguistique, qui sera expliquée plus loin (Woehrling 1992).

Les conflits linguistiques qui ont été portés devant les tribunaux canadiens et, ultimement, devant la Cour suprême, dans les trente dernières années concernent deux situations qui présentent des caractéristiques bien distinctes.

Il y a en premier lieu la situation des minorités francophones établies dans les provinces et territoires où la majorité est anglophone. Les difficultés auxquelles ces minorités font face tiennent essentiellement à la mauvaise volonté dont font parfois preuve les autorités provinciales ou fédérales, mais surtout provinciales, dans le respect des droits linguistiques expressément garantis par la Constitution. Autrement dit, les minorités francophones en dehors du Québec ont surtout des problèmes portant sur l'usage du français en matière d'usage

officiel (dans leurs relations avec les entités gouvernementales), ou encore certaines difficultés à recevoir l'enseignement en français dans les écoles publiques (néanmoins, dans ce dernier domaine, l'application, depuis 1982, de l'article 23 de la *Charte canadienne des droits et libertés* a considérablement amélioré la situation). Par contre, elles ne rencontrent aucune entrave *juridique* à utiliser leur langue dans le domaine des relations sociales privées, par exemple en matière commerciale, bien qu'en pratique cette liberté soit souvent illusoire, compte tenu du fait que la langue française est généralement ignorée dans les rapports privés en dehors du Québec.

Au Québec, la situation est sensiblement différente. Depuis une trentaine d'années, le gouvernement du Québec a senti le besoin de légiférer pour défendre et promouvoir le statut du français en tant que langue majoritaire au Québec, mais fortement minoritaire au Canada et en Amérique du Nord. À cette fin, il a mis en oeuvre une politique linguistique principalement contenue dans une loi adoptée en 1977, appelée la *Charte de la langue française* (mais mieux connue sous le nom de « Loi 101 »). La Loi 101 contient des mesures qui peuvent se résumer, en simplifiant, de la façon suivante.

En premier lieu, l'usage de l'anglais dans le fonctionnement des institutions publiques et para-publiques provinciales a été réduit par rapport à la situation existant avant 1977, dans la mesure où cela était possible compte tenu des obligations constitutionnelles qui s'imposent au Québec dans ce domaine. Or, pour ce qui est du Québec, la Constitution exige seulement le bilinguisme parlementaire, législatif et judiciaire, mais pas le bilinguisme des services administratifs (Woehrling 1998; Woehrling 2005). Ainsi, par exemple, en l'absence de protection constitutionnelle du bilinguisme au niveau municipal, la Loi 101 prévoit que les municipalités québécoises n'ont la possibilité - mais pas l'obligation - de fonctionner de façon bilingue (en anglais et en français) que lorsque la population est *majoritairement* anglophone. Dans tous les autres cas, elles ne fonctionnent qu'en français.

En second lieu, le Québec oblige tous les immigrants, même ceux qui viennent de pays anglophones, à envoyer leurs enfants dans des écoles publiques ou privées subventionnées où la langue d'instruction est exclusivement le français. La même obligation s'impose aux parents francophones. Les seuls parents qui ont le droit d'envoyer leurs enfants dans des écoles publiques ou privées subventionnées anglophones sont ceux qui ont eux-mêmes reçu leur instruction primaire en anglais au Québec ou ailleurs au Canada (autrement dit, les anglophones québécois et canadiens « de souche »)[2]. Par ailleurs, tous les parents ont le droit d'envoyer leurs enfants dans une école anglophone si elle est privée et non subventionnée.

Enfin, le Québec a également légiféré pour imposer l'usage du français dans certains domaines de la vie sociale relevant des rapports privés, comme les relations employeurs-employés, les contrats, le fonctionnement interne des entreprises de cinquante employés ou plus, ou encore l'affichage public et commercial.

Cette politique linguistique québécoise provoque évidemment de nombreux mécontentements, ce qui explique qu'elle a souvent été attaquée devant les tribunaux dans le passé et qu'elle continue de l'être actuellement. Les conflits linguistiques portés devant les tribunaux au Québec présentent deux différences avec ceux qui existent dans le reste du Canada. D'une part, la politique linguistique québécoise est contestée non seulement par les membres de la minorité anglophone, mais aussi par de nombreux immigrants et par une partie de la majorité francophone elle-même, surtout pour ce qui est des règles d'accès aux écoles publiques anglophones. La plupart des immigrants, et un certain nombre de parents francophones, voudraient envoyer leurs enfants dans ces écoles pour qu'ils apprennent suffisamment l'anglais, pour des raisons évidentes de réussite sociale et économique. D'autre part, ceux qui contestent les dispositions de la Loi 101 qui s'appliquent dans le domaine des rapports privés, comme l'affichage commercial, invoquent, non pas les droits linguistiques contenus dans la Constitution, lesquels ne s'appliquent qu'à l'usage officiel des langues et à l'éducation publique, mais les droits de l'homme (les droits fondamentaux), qui sont reconnus dans la *Charte canadienne des droits et libertés* et dans la *Charte des droits et libertés de la personne* du Québec (la Charte provinciale québécoise), ou encore dans les conventions internationales sur les droits de l'homme auxquelles le Canada et le Québec sont parties. C'est ce qui explique que les tribunaux canadiens, et bien sûr la Cour suprême, ont été amenés à réfléchir sur le rôle respectif des *droits linguistiques proprement dits*, d'une part, et des *droits de l'homme*, d'autre part, dans la défense de la *liberté* et du *droit* des personnes d'utiliser la langue de leur choix dans certaines situations (et cela tant pour ce qui est des membres de la majorité que pour ce qui est des minorités).

## 2. LA DISTINCTION ETABLIE PAR LA COUR SUPREME ENTRE LES *DROITS LINGUISTIQUES* DANS L'USAGE OFFICIEL ET LA *LIBERTE LINGUISTIQUE* DANS L'USAGE PRIVE

La décision dans laquelle la Cour suprême du Canada a pour la première fois été amenée à clarifier le rôle respectif des droits linguistiques en matière d'usage public, d'une part, et de la liberté linguistique en matière d'usage privé, d'autre part, est l'affaire *Ford* de 1988. Dans cette affaire, des commerçants montréalais (certains anglophones, d'autres francophones) contestaient les

dispositions de la Loi 101 qui, à l'époque, obligeaient les commerçants à utiliser exclusivement le français dans leurs affiches commerciales et dans leurs raisons sociales. Le gouvernement du Québec leur opposait l'argument selon lequel la Constitution canadienne ne garantit explicitement aucun droit d'utiliser la langue de son choix en matière de relations commerciales, et qu'en outre le fait qu'elle contient certains droits linguistiques spécifiques en matière d'usage officiel empêchait qu'on en fasse découler, par interprétation, d'autres droits linguistiques implicites dans le domaine des activités commerciales privées. Il invoquait à cet égard le principe d'interprétation bien connu selon lequel on ne peut augmenter par interprétation des droits ou des obligations que le rédacteur d'une loi ou d'une constitution a pris la peine de détailler de façon explicite et précise, et dont il faut pour cela présumer qu'il a voulu leur donner un caractère exhaustif (ce principe est exprimé dans le monde juridique anglo-saxon par l'entremise de l'adage latin *expressio unius est exclusio alterius*).

La Cour suprême a rejeté cette argumentation en faisant précisément appel à la distinction entre deux catégories différentes de droits et de libertés. D'une part, les *droits linguistiques proprement dits*, qui portent sur l'usage des langues en matière officielle ou en matière d'instruction publique, et qui n'existent que dans la mesure où ils sont expressément reconnus dans un texte législatif ou constitutionnel. D'autre part, *la liberté linguistique* dans le domaine des rapports privés, qui n'a nul besoin d'être reconnue explicitement, puisqu'elle découle implicitement d'un certain nombre de droits fondamentaux, en l'occurrence la liberté d'expression.

« [L]es garanties spéciales de droits linguistiques ne font pas obstacle, par implication, à une interprétation de la liberté d'expression qui englobe la liberté de s'exprimer dans la langue de son choix. La liberté générale de s'exprimer dans la langue de son choix et les garanties spéciales de droits linguistiques dans certains secteurs d'activité ou de compétence gouvernementale - la législature et l'administration, les tribunaux et l'enseignement - sont des choses tout à fait différentes. […] Les intimées [les commerçants qui contestent la loi] désirent se dégager de l'exigence, imposée par l'État, de faire leur publicité et leur affichage commerciaux uniquement en français et réclament la liberté, dans le domaine entièrement privé ou non gouvernemental de l'activité commerciale, de faire leur publicité et leur affichage dans la langue de leur choix ainsi qu'en français. À l'évidence, les intimées ne cherchent pas à utiliser la langue de leur choix dans des relations directes, quelles qu'elles soient, avec un organisme gouvernemental et ne cherchent pas non plus à obliger le gouvernement à leur fournir des services ou d'autres avantages dans la langue de leur choix. En cela, les intimées revendiquent une liberté, la liberté de s'exprimer dans la langue de leur choix dans un secteur d'activité

non gouvernemental par opposition à un droit linguistique de la nature de ceux garantis par la Constitution. […] La structure juridique, la fonction et les obligations des institutions gouvernementales en ce qui concerne l'anglais et le français ne sont aucunement touchées par la reconnaissance que la liberté d'expression comprend la liberté de s'exprimer dans la langue de son choix en dehors des domaines pour lesquels les garanties linguistiques spéciales ont été prévues » (*Ford* 1988 : 750-752).

La Cour distingue donc les « droits linguistiques » reconnus en tant que tels et la « liberté linguistique » qui découle implicitement de certains droits fondamentaux, en soulignant très clairement les attributs et les caractéristiques de chacune de ces deux catégories.

La *liberté linguistique* n'existe que dans le domaine des relations privées (ce qu'on appelle parfois l'usage privé des langues), c'est-à-dire les relations des particuliers entre eux, par opposition aux relations des particuliers avec les autorités publiques. C'est une liberté négative, dans le sens où elle permet seulement aux individus de s'exprimer dans la langue de leur choix, sans leur donner le droit d'être compris dans la langue choisie ou de recevoir une réponse dans cette langue par les tiers. Elle n'oblige pas l'État à fournir aux individus quelque aide ou prestation destinée à leur faciliter l'expression ou à leur garantir la compréhension. Dans un État de droit, cette liberté linguistique existe sans qu'il soit nécessaire de la reconnaître expressément, parce qu'elle découle implicitement de certains droits fondamentaux dont elle constitue une condition d'exercice, principalement la liberté d'expression, mais également, par exemple, le droit au respect de la vie privée et de la vie familiale. Elle découle aussi implicitement du droit à l'égalité, dans la mesure où les limitations de cette liberté linguistique constitueraient nécessairement une forme de discrimination - directe ou indirecte - fondée sur la langue. Enfin, cette liberté linguistique bénéficie à tous (et à toutes les langues), puisque c'est également le cas des droits fondamentaux et du droit à l'égalité.

Par contre, les *droits linguistiques proprement dits*, reconnus en tant que tels, portent sur les relations entre les individus et les autorités publiques (l'usage officiel des langues). À ce titre, il s'agit de droits positifs (ou droits « créances ») qui exigent que l'État mette à la disposition des individus des prestations et des services destinés à leur garantir la jouissance effective des droits en cause : des services d'interprétation ou de traduction ; des fonctionnaires, des juges, des lois, des règlements bilingues, etc. Ils confèrent donc non seulement le droit de s'exprimer dans une langue déterminée, mais également le droit d'être compris dans cette langue et de recevoir une réponse dans celle-ci. De tels droits ne sauraient être déduits des droits fondamentaux et du droit à l'égalité,

sinon ils existeraient pour toutes les langues et tous les groupes linguistiques à l'intérieur d'un État, ce qui est inimaginable. Les droits linguistiques dans l'usage officiel n'existent donc que dans la mesure où ils sont expressément reconnus dans la loi ou dans la Constitution. Ils ne sont habituellement reconnus que pour un très petit nombre de langues et de groupes linguistiques. En fait, ils ne sont pratiquement toujours reconnus que pour les minorités nationales (ou minorités de souche), par opposition aux minorités issues de l'immigration. On peut ajouter que, lorsqu'ils sont reconnus à une ou plusieurs minorités nationales, c'est souvent moins par générosité que pour éviter l'insatisfaction de ces minorités et les mouvements sécessionnistes qui en résulteraient. Et s'ils ne sont jamais reconnus aux minorités issues de l'immigration, c'est que l'on considère que cela empêcherait, ou du moins retarderait, l'intégration linguistique et sociale de celles-ci (par contre, comme nous le verrons ci-dessous, il n'est pas rare que certains « accommodements » linguistiques, en matière d'usage officiel, soient reconnus aux minorités issues de l'immigration).

## 3. UNE CATEGORIE ENCORE INSUFFISAMMENT EXPLOREE PAR LA COUR SUPREME : L'« ACCOMMODEMENT RAISONNABLE » EN MATIERE LINGUISTIQUE

Malgré l'intérêt et l'utilité de la distinction opérée par la Cour suprême du Canada entre les droits linguistiques dans l'usage officiel et la liberté linguistique dans l'usage privé, il faut constater que cette distinction ne s'applique pas parfaitement à un droit de nature linguistique pourtant universellement reconnu, le droit à l'interprète en matière judiciaire pour les personnes qui ne comprennent pas la langue des procédures ou qui sont sourdes. Ce droit présente en effet des caractéristiques hybrides qui appartiennent aux deux catégories mentionnées.

Comme la liberté linguistique, ce droit n'a pas besoin d'être expressément reconnu pour exister (bien qu'il soit très souvent reconnu de façon expresse dans les constitutions et dans les conventions internationales). En effet, s'il n'est pas reconnu expressément, il pourra être déduit du droit à un procès équitable (c'est ce que la Cour suprême du Canada a souligné dans plusieurs décisions). Comme la liberté linguistique, ce droit bénéficie à tous, peu importe que la langue parlée par le justiciable soit reconnue comme langue officielle ou non.

Comme les droits linguistiques proprement dits, le droit à l'interprète porte sur l'usage officiel des langues, en matière de justice. Comme pour les droits linguistiques proprement dits, il s'agit d'un droit positif, obligeant l'État à fournir une prestation à l'individu (les services d'un interprète) et l'on considère généralement que ce service est à la charge financière des autorités publiques.

Par ailleurs, lorsque des droits linguistiques au sens propre sont reconnus en matière judiciaire pour certaines langues et certains groupes linguistiques, les conséquences en sont très différentes de celles du simple droit à l'interprète. C'est ce que la Cour suprême du Canada a souligné dans l'affaire *Beaulac* de 1999. En effet, différentes dispositions constitutionnelles et législatives canadiennes reconnaissent le droit des justiciables de choisir entre l'anglais et le français pour être jugés. Dans l'affaire *Beaulac*, l'article 530 du *Code criminel* canadien était en cause, lequel permet à un accusé de subir son procès devant un juge, ou un juge et un jury, qui parlent la langue officielle qui est celle de l'accusé, ou qui parlent les deux langues officielles. L'article prévoit en outre que l'accusé a droit à ce que le poursuivant parle la même langue officielle que lui. La Cour a expliqué de la façon suivante les différences qui existent entre, d'une part, les droits linguistiques découlant de l'article 530 pour l'usage du français et de l'anglais, et, d'autre part, le droit à l'assistance d'un interprète qui bénéficie à tous, quelle que soit leur langue. En premier lieu, le droit à l'interprète n'existe que dans les cas où le justiciable peut démontrer qu'il ne comprend pas la langue des procédures; il s'agit donc d'un droit à la *communication* ou à la *compréhension*. Par contre, en vertu de l'article 530 du *Code criminel*, le justiciable a le droit discrétionnaire de choisir entre l'anglais et le français, indépendamment de ses capacités linguistiques, avec cependant l'exigence minimale qu'il doit être en mesure de communiquer avec son avocat dans la langue choisie. Il s'agit donc d'un *droit à la préférence linguistique*. En second lieu, le droit à l'interprète, comme son nom l'indique, ne donne que le droit à des services d'interprétation ou de traduction, alors que les droits linguistiques reconnus en matière d'usage du français et de l'anglais visent à assurer une égalité réelle de statut entre la majorité et la minorité et donnent le droit à un procès entièrement conduit dans la langue choisie par l'accusé, avec un juge, un jury et un poursuivant qui parlent sa langue. Enfin, du point de vue de sa justification, le droit à l'interprète est nécessaire pour assurer l'équité du procès, alors que le droit à la préférence linguistique (indépendamment des connaissances linguistiques de l'accusé) est justifié par le désir d'établir une égalité réelle entre la majorité et la minorité nationales et de permettre à chacun de ces deux groupes de vivre dans sa langue.

Sur ce dernier point, voici comment s'exprime la Cour suprême dans l'arrêt *Beaulac*:

> « Le droit à un procès équitable est universel et il ne peut pas être plus important dans le cas de membres des collectivités des deux langues officielles au Canada que dans celui de personnes qui parlent d'autres langues. Les droits linguistiques ont une origine et un rôle complètement distincts. Ils visent à protéger les minorités de langue officielle du pays et à assurer l'égalité de statut du français et de l'anglais. » (*Beaulac* 1999 : paragraphe 41).

Si l'on cherche maintenant à établir le principe qui est au fondement du droit à l'interprète en matière judiciaire, il semble être le suivant. Dans la mesure où la méconnaissance de la langue officielle empêche une personne de jouir effectivement d'une liberté ou d'un droit considéré comme fondamental, en l'occurrence le droit à un procès équitable, l'État a l'obligation de consentir un « accommodement linguistique », consistant en la prestation d'un service de traduction ou d'interprétation, destiné à permettre à l'individu de surmonter son handicap linguistique. En effet, bien que la politique de l'État consistant à n'avoir qu'une seule, ou un petit nombre, de langues officielles soit justifiée (et même inévitable, l'État ne pouvant fonctionner dans toutes les langues parlées sur son territoire), elle peut entraîner la négation d'une liberté ou d'un droit fondamental, l'accommodement devenant alors la mesure correctrice appropriée. Comme l'indique l'adjectif « raisonnable », le droit à l'accommodement n'existe cependant que dans la mesure où le coût ou les contraintes qu'il entraîne pour les autorités publiques n'est pas excessif, compte tenu des circonstances.

Ce même principe est évidemment susceptible de s'appliquer dans d'autres domaines de l'usage officiel des langues que celui du fonctionnement du système judiciaire, par exemple en ce qui concerne le système électoral (par la mise à disposition de bulletins de vote dans diverses langues), en matière d'accès effectif aux soins dans les hôpitaux publics ou encore d'accès effectif à l'éducation publique. Pour ce qui est de ce dernier domaine, la Cour suprême des États-Unis, dans l'affaire *Lau* c. *Nichols*, a reconnu que le droit à une éducation « effective » (ou efficace), sans discrimination fondée sur l'origine nationale, supposait que l'on mette à la disposition des enfants qui ne comprennent pas suffisamment la langue dans laquelle l'éducation publique est donnée (l'anglais en l'occurrence) des services particuliers destinés à les aider à surmonter ce handicap, sous la forme de cours d'anglais préparatoires ou d'un enseignement partiellement assuré, pendant quelque temps, dans la langue d'origine des enfants:

> « there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education. Basic English skills are at the very core of what these public schools teach. Imposition of a requirement that, before a child can effectively participate in the educational program, he must already have acquired these basic skills is to make a mockery of public education. We know that those who do not understand English are certain to find their classroom experiences wholly incomprehensible and in no way meaningful » (*Lau* 1974: 566)[3].

On constate donc l'existence de ce qu'on pourrait appeler un « droit à l'accommodement linguistique » en matière d'usage officiel, qui n'est pas une

simple liberté, puisqu'il met des obligations positives à la charge de l'État ; qui bénéficie à tous, quelle que soit la langue utilisée, qu'elle soit reconnue ou non comme officielle ; qui n'a pas besoin d'être expressément prévu, puisqu'il fait implicitement partie de certains droits fondamentaux ; mais qui n'existe que dans la mesure où l'accommodement est nécessaire pour éviter la violation d'un autre droit considéré comme fondamental, comme l'accès aux soins de santé, le droit à une instruction effective ou le droit à un procès équitable[4]. Ce n'est pas un droit linguistique au sens propre, car la langue n'est pas protégée pour elle-même (pour sa valeur expressive et identitaire), mais plutôt comme un simple vecteur de communication nécessaire pour permettre à l'individu la pleine jouissance d'un droit fondamental (Patten 2009; Kymlicka & Patten 2003). Le droit à l'accommodement cesse d'exister dès que la communication est possible autrement. Ainsi, pour reprendre l'exemple de l'affaire *Lau* c. *Nichols*, une fois les enfants en mesure de suivre la scolarité en anglais de façon normale, la nécessité de l'accommodement disparaît.

Au Canada, la Cour suprême n'a pas encore eu l'occasion d'approfondir le concept d'accommodement raisonnable en matière linguistique, alors qu'elle a souvent été amenée à traiter de l'accommodement en matière religieuse (Woehrling 2010). Comme cela a été mentionné précédemment, elle a reconnu l'existence d'un droit à l'interprète en matière pénale comme élément implicite du droit à un procès équitable, ce qui constitue bien une application particulière de l'idée générale d'accommodement linguistique. D'autre part, en 1997, dans un arrêt *Eldridge*, dans lequel elle a jugé qu'un hôpital avait l'obligation de fournir des services d'interprétation à des patients malentendants, elle a accepté, au moins indirectement, l'idée qu'il pourrait en être de même dans le cas de patients ne comprenant et ne parlant pas la langue utilisée par le personnel soignant et, pour cette raison, privés de l'accès à des soins de santé efficaces (*Eldridge* 1997: paragraphes 88-90).

Enfin, terminons en soulignant que, lorsqu'ils existent, les accommodements linguistiques, destinés à faciliter l'accès à certains services publics essentiels des personnes qui ne comprennent pas la langue officielle, ne sont pas nécessairement considérés par les autorités publiques comme résultant de l'exercice d'un droit mais sont souvent accordés sur la base de considérations intéressées et pragmatiques, comme la recherche d'une communication plus efficace avec les administrés, d'une meilleure et plus rapide intégration des immigrants, et ainsi de suite.

## 4. LES CARACTERISTIQUES DES DROITS LINGUISTIQUES PROPREMENT DITS (DANS L'USAGE OFFICIEL DES LANGUES) TELLES QUE DEGAGEES PAR LA COUR SUPREME DU CANADA

Au fil de sa jurisprudence, la Cour suprême a souligné certaines caractéristiques des *droits linguistiques* dans l'usage officiel, qui s'opposent aux caractéristiques de la *liberté linguistique* dans l'usage privé: il s'agit de droits présentant une dimension collective accentuée (bien qu'ayant également une dimension individuelle); il s'agit de droit qui ont un contenu susceptible de varier en fonction du contexte; il s'agit de droits qui exigent une intervention gouvernementale active plutôt qu'une attitude d'abstention (Woehrling et Tremblay 2005).

### 4.1 Des droits présentant une dimension nettement collective

La dimension collective la plus importante des droits linguistiques tient à leur objet (leur finalité) qui est, non pas la défense de la liberté, de l'égalité et de la dignité individuelles, comme c'est le cas pour les droits fondamentaux, mais la défense de l'égalité, de la liberté et de la dignité des *collectivités* linguistiques, principalement celles qui sont minoritaires. C'est ce que la Cour suprême du Canada a reconnu notamment dans l'affaire *Mahe c. Alberta* de 1990, dans les termes suivants:

« L'objet général de l'art. 23 [qui garantit le droit à l'instruction dans la langue de la minorité anglophone ou francophone] est clair: il vise à maintenir les deux langues officielles du Canada ainsi que les cultures qu'elles représentent et à favoriser l'épanouissement de chacune de ces langues, dans la mesure du possible, dans les provinces où elle n'est pas parlée par la majorité. » (*Mahe* 1990: 372).

Elle a précisé ce point de vue dans l'affaire *Beaulac* en 1999:

« Les droits linguistiques doivent dans tous les cas être interprétés en fonction de leur objet, *de façon compatible avec le maintien et l'épanouissement des collectivités de langue officielle au Canada*. » (*Beaulac* 1999 : paragraphe 41).

On peut ajouter que les droits linguistiques présentent encore d'autres aspects collectifs (Woehrling 2003-2004).

Dans certains cas, seuls les membres d'une certaine collectivité en sont titulaires plutôt que l'ensemble des individus, comme pour les droits de l'homme. C'est le cas pour les droits à l'instruction dans la langue de la minorité prévus par l'article 23 de la *Charte canadienne*. Pour en bénéficier, il est nécessaire de remplir l'un des critères prévus, qui sont destinés à vérifier

l'existence d'un lien d'appartenance des individus à la minorité linguistique anglophone ou francophone. Par contre, les droits reliés au statut de l'anglais et du français comme langues officielles bénéficient à tous, pour des raisons à la fois pratiques et de principe. Il serait trop compliqué de vérifier à chaque fois l'identité linguistique d'une personne pour ce qui est, par exemple, du droit d'employer l'anglais ou le français devant les tribunaux. Quant à l'identification et à l'enregistrement des personnes comme membres de l'un ou de l'autre des groupes linguistiques, une telle modalité serait contraire aux principes de liberté individuelle et de mobilité géographique et sociale qui prévalent dans la culture juridique et constitutionnelle canadienne.

Une troisième dimension collective des droits linguistiques tient au fait qu'il s'agit de droits qui ne peuvent être habituellement mis en œuvre qu'à partir d'un certain seuil démographique. Ainsi, l'article 23 de la *Charte canadienne* garantit les droits à l'instruction dans la langue de la minorité là où *le nombre des ayants-droit le justifie* et l'article 20(1)a) donne le droit de communiquer en anglais ou en français avec les bureaux des institutions fédérales autres que centrales et d'en recevoir les services dans ces deux langues là où l'emploi de celles-ci fait l'objet d'une *demande importante*. Dans le cas des autres protections linguistiques prévues par la Constitution canadienne (emploi des langues devant les tribunaux, dans les lois et débats parlementaires, etc.) la même condition n'est pas exigée sur un plan *juridique*, mais elle n'en existe pas moins sur un plan *pratique* et *empirique*. En effet, si l'importance démographique des minorités francophones hors Québec ou de la minorité anglophone du Québec diminuait en deçà d'un certain seuil, le maintien de ces garanties, avec les coûts et les complications qu'entraîne le bilinguisme officiel, finirait par ne être plus considéré comme justifié. Autrement dit, contrairement à la liberté linguistique en matière d'usage privé qui peut être garantie sur un plan individuel, dans la mesure où elle n'exige que la non-interférence par l'État, les droits linguistiques en matière d'usage officiel ne peuvent être garantis que de façon collective, les prestations positives qu'ils exigent de la part de l'État n'étant en pratique justifiables qu'à l'égard de communautés linguistiques suffisamment nombreuses pour être viables. En outre, bien que des communautés issues de l'immigration puissent évidemment remplir cette dernière condition, pour les raisons mentionnées précédemment, les droits linguistiques en matière d'usage officiel ne sont habituellement reconnus qu'aux minorités historiques.

La dimension collective des droits linguistiques n'empêche cependant pas qu'ils soient attribués aux *individus* pour ce qui est de leur mise en œuvre sur le plan juridique et judiciaire, avec l'avantage que chacun des bénéficiaires pourra en réclamer la jouissance indépendamment de la volonté des autres bénéficiaires ou de celle du groupe. C'est ce que la Cour suprême du Canada

a noté dans certaines décisions, en indiquant que le droit à l'instruction dans la langue de la minorité est conféré individuellement à chaque parent et que son exercice n'est pas lié à la volonté du groupe minoritaire. Il y a cependant une exception à cet exercice individuel des droits linguistiques. Dans l'arrêt *Mahe*, la Cour suprême a reconnu que le droit à l'instruction dans la langue de la minorité comprend, lorsque le nombre des ayant-droits le justifie, le droit à la gestion des établissements scolaires par la minorité elle-même. Un tel droit à l'autonomie administrative ne peut évidemment pas être exercé de façon individuelle, mais nécessite l'exercice d'un processus décisionnel collectif au sein du groupe minoritaire.

### 4.2 Des droits dont le contenu est susceptible de varier en fonction du contexte

Une première constatation est que les *droits linguistiques* en matière d'usage officiel ont un caractère *particulariste* très marqué, par opposition aux droits de l'homme, et à la *liberté linguistique* qui en découle en matière d'usage privé, qui ont une nature *universaliste*. Alors que les droits de l'homme sont par définition les mêmes partout, puisqu'ils s'attachent à la condition humaine, les droits linguistiques dans l'usage officiel sont nécessairement propres à une situation sociolinguistique particulière. C'est d'ailleurs pourquoi on n'a jamais réussi à en donner une définition générale dans une convention internationale. Il suffit de penser par exemple à la *Charte européenne des langues régionales ou minoritaires* pour constater que le droit international n'a pas réussi à produire un régime unitaire des droits linguistiques dans l'usage officiel, mais qu'il doit forcément laisser aux États une grande latitude dans le choix des régimes qu'ils sont prêts à appliquer. Quand un État reconnaît de tels droits linguistiques, il les ajuste nécessairement à la situation concrète des groupes bénéficiaires, ces situations étant évidemment très variées. Le régime des droits linguistiques dépendra donc nécessairement d'un ensemble de circonstances variant d'une situation à l'autre. Quelle est l'importance démographique respective de la minorité et de la majorité? La majorité est-elle une majorité « normale » ou une majorité vulnérable, étant minoritaire sur un autre plan géographique ou politique? La minorité est-elle une minorité vulnérable ou une minorité dominante (celle-ci étant moins vulnérable et ayant moins besoin de protection que celle-là)? Quelle est la vulnérabilité ou la force respective de la langue minoritaire et de la langue majoritaire tenant compte du nombre de leurs locuteurs, de leur distribution géographique, de leur prestige social, de leur utilité économique, etc.?

Au Canada, la Cour suprême est allée plus loin dans la reconnaissance du *particularisme* et même du *relativisme* des droits linguistiques, puisqu'elle considère que l'application des *mêmes dispositions* constitutionnelles relatives

à l'usage du français ou de l'anglais est susceptible de varier en fonction du contexte sociolinguistique et historique particulier de *chaque province ou territoire concerné*. Ainsi, dans une décision de 1993 portant sur le droit à l'instruction dans la langue de la minorité, elle s'exprime ainsi :

> « […] l'accent mis sur le contexte historique de la langue et de la culture indique qu'il peut bien être nécessaire d'adopter des méthodes d'interprétation différentes dans [diverses provinces] qui tiennent compte de la dynamique linguistique particulière à chaque province» (*Renvoi relatif à la Loi sur les écoles publiques* 1993: 851).

Ce particularisme, voire ce relativisme, des droits linguistiques en matière d'usage officiel montre bien que ces droits n'ont pas la même nature que les droits fondamentaux (les droits de l'homme), à l'égard desquels une telle variation dans leur contenu d'une province à l'autre semble peu imaginable.

### 4.3 Des droits positifs, exigeant une intervention gouvernementale active

La Cour suprême a reconnu que le respect des droits linguistiques exige non pas une attitude d'abstention de l'État comme c'est le cas pour la plupart des libertés fondamentales, mais au contraire une intervention active de sa part pour créer les conditions matérielles de leur jouissance par les individus qui en sont les bénéficiaires.

Dans l'affaire *Beaulac*, elle s'exprime ainsi sur cet aspect :

> «Les droits linguistiques ne sont pas des droits négatifs, ni des droits passifs; ils ne peuvent être exercés que si les moyens en sont fournis. Cela concorde avec l'idée […] que la liberté de choisir est dénuée de sens en l'absence d'un devoir de l'État de prendre des mesures positives pour mettre en application des garanties linguistiques» (*Beaulac* 1999 : paragraphe 20).

Dans d'autres décisions, pour donner une effectivité pratique à ce caractère « positif » des droits linguistiques, la Cour suprême a accepté que leur mise en œuvre puisse justifier des redressements de nature exceptionnelle, notamment des ordonnances « mandatoires » par lesquelles les tribunaux enjoignent aux autorités publiques d'adopter les mesures positives nécessaires pour permettre l'exercice effectif des droits linguistiques. De même, les tribunaux sont autorisés à obliger les autorités administratives à se représenter devant eux à intervalles réguliers pour rendre compte des progrès accomplis dans l'exécution de telles ordonnances, et ceci même si on peut à certains égards considérer que de telles ordonnances judiciaires constituent un empiètement sur le domaine réservé du pouvoir exécutif et, donc, sont peu compatibles avec le principe de la séparation des pouvoirs (*Doucet-Boudreau* 2003).

## 5. CONCLUSION

En conclusion, il faut revenir sur la question de l'objet (ou finalité, ou raison d'être) des droits linguistiques dans l'usage officiel. La question est importante dans le contexte canadien car, pour la Cour suprême du Canada, la principale règle d'interprétation en matière de droits et de libertés garantis dans la Constitution est celle de l'interprétation « par l'objet ». Autrement dit, pour définir la portée, le contenu et les limites d'un droit ou d'une liberté, lesquels sont souvent exprimés de façon vague et générale, il faut établir quel rôle, quelle finalité le Constituant a voulu lui donner.

Pour ce qui est de la liberté linguistique dans l'usage privé et du droit à l'accommodement linguistique dans l'usage officiel, qui sont déduits de certains droits fondamentaux, leur objet est le même que celui des droits fondamentaux dont ils sont issus, à savoir la liberté, l'égalité et la dignité individuelles.

Mais qu'en est-il des droits linguistiques en matière d'usage officiel ? Si leur fondement était exactement le même que celui de la liberté linguistique et des droits fondamentaux (si les droits linguistiques étaient des droits fondamentaux, des droits de l'homme), ils devraient logiquement bénéficier à tous et pas uniquement aux membres des groupes linguistiques dont les langues sont reconnues comme officielles dans un État déterminé. Autrement dit, les États devraient reconnaître comme officielles toutes les langues parlées sur leur territoire, ou du moins ils devraient faire fonctionner leurs institutions dans toutes ces langues. C'est manifestement impossible et cela ne correspond manifestement pas à la réalité observable. Parmi toutes les langues parlées sur leur territoire, les États ne reconnaissent toujours comme officielles, soit qu'une seule langue, celle de la majorité, soit qu'un petit nombre de langues, celle de la majorité et celles d'une ou de plusieurs minorités nationales (par opposition aux minorités issues de l'immigration).

Une première différence entre droits linguistiques et droits fondamentaux, quant à leur objet, a déjà été mentionnée plus haut : les droits linguistiques ont comme objet la liberté, l'égalité et la dignité *collective* des communautés linguistiques qui en sont les bénéficiaires, même si, en bénéficiant à la collectivité, ils bénéficient également aux membres de cette collectivité.

La deuxième différence, plus significative pour la nature des droits linguistiques, est qu'ils ont prioritairement une nature, un objet et une finalité politiques. Comme la Cour suprême l'a souligné dans un arrêt (*Société des Acadiens*, 1986), ils sont le plus souvent le résultat d'un compromis politique entre la majorité et la ou les minorités. Ils sont donc le résultat d'un processus politique contingent, alors que les droits de l'homme sont issus de principes. Ensuite, autant que par

l'idée de justice et d'égalité, leur reconnaissance est motivée par des raisons politiques. Lorsque la majorité dans un État reconnaît des droits linguistiques à une ou plusieurs minorités, c'est le plus souvent parce qu'elle a le sentiment que le refus d'une telle reconnaissance entraînerait des tensions dangereuses pour l'unité nationale (Arzoz 2010). Dans l'arrêt *Beaulac*, la Cour suprême a souligné qu'en présentant le projet de loi venant modifier le *Code criminel* pour garantir le droit à un procès dans la langue officielle choisie par l'accusé, le ministre de la Justice avait déclaré que ces dispositions étaient adoptées « dans l'intérêt de la justice *et de l'unité canadienne* » (*Beaulac* 1999 : paragraphe 23; italiques ajoutés).

Ces aspects politiques de la reconnaissance des droits linguistiques dans l'usage officiel sont particulièrement marqués au Canada. Les droits linguistiques reconnus en 1867 l'ont été afin de permettre la réunion, au sein de la fédération canadienne, des provinces à majorité anglophone (où les francophones étaient minoritaires) et du Québec majoritairement francophone (où les anglophones étaient minoritaires). Il s'agissait donc de garanties mutuelles destinées à rassurer les deux groupes. Elles font partie de ce que la Cour suprême, dans plusieurs décisions, a appelé « le compromis de la Confédération ». Sans ce compromis, la création du Canada n'aurait pas été possible. Les droits linguistiques ajoutés à la Constitution en 1982 faisaient partie, dans l'esprit du parrain de cette réforme, P.E. Trudeau (le Premier ministre canadien de l'époque), d'un programme de « nation building », de construction (ou reconstruction) nationale, destiné à consolider l'unité nationale en apaisant les tensions linguistiques qui la menaçaient en nourrissant le projet séparatiste au Québec.

Finalement, cette différence entre les droits linguistiques dans l'usage officiel et la liberté linguistique dans l'usage privé en entraine une autre, pour ce qui est de l'arène (du forum) dans lequel ils doivent être réclamés. La liberté linguistique relève surtout du forum judiciaire, comme les autres libertés et droits fondamentaux. Les droits linguistiques dans l'usage officiel relèvent autant, et peut-être plus, du forum politique que du forum judiciaire.

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## ENDNOTES

1 Au Québec, le français est la langue maternelle de 80.2 % de la population et l'anglais celle de 7,9 %, quelque 11,9 % ayant une autre langue maternelle. Dans l'ensemble duCanada, le français est la langue maternelle de 22,1 % de la population et l'anglais de 58 %, 19,9 % ayant comme langue maternelle une autre langue. Près de 90% des francophones du Canada résident aujourd'hui au Québec. D'un recensement à l'autre, la part des francophones diminue dans les autres provinces. À part le Nouveau-Brunswick, où ils constituent 31% de la population, la présence des francophones est devenue marginale dans chacune des autres provinces: à Terre-Neuve, en Saskatchewan, en Alberta et en Colombie-Britannique, leur part est de 1% ou moins; à l'Ile-du-Prince-Édouard, en Nouvelle-Écosse et au Manitoba, elle n'atteint pas 3%; en Ontario elle est descendue à moins de 4%.

2 Avant l'adoption, en 1982, de la *Charte canadienne des droits et libertés*, la politique linguistique québécoise prévoyait que seuls les parents ayant eux-mêmes reçu leur instruction primaire en anglais *au Québec* pouvaient envoyer leurs enfants dans les écoles anglophones québécoises. L'article 23 de la *Charte canadienne* a eu pour effet d'élargir ce droit au bénéfice des parents ayant reçu leur instruction primaire en anglais *dans l'ensemble du Canada*. C'est la raison pour laquelle le gouvernement du Québec s'y était à l'époque opposé, mais sans succès.

3 Cette décision est fondée sur les dispositions du Titre VI du *Civil Rights Act* de 1964 (42 U.S.C. § 2000a) qui interdisent la discrimination fondée sur la race, le sexe ou l'origine nationale dans les activités des entités bénéficiaires de subventions fédérales.

4 Par contre, à mon avis, la simple existence d'une distinction de traitement entre ceux qui utilisent la langue officielle et ceux qui utilisent une langue autre ne devrait pas suffire à fonder l'obligation d'accommodement, dans la mesure où cela contredirait le principe unanimement admis selon lequel l'État peut légitimement se doter d'une seule langue officielle et qu'il n'est donc pas obligé de fonctionner ou de s'adresser aux particuliers dans des langues autres que la langue officielle. C'est uniquement lorsqu'il y a discrimination dans la jouissance ou le bénéfice d'un *autre* droit, considéré comme fondamental, qu'une telle obligation devrait exister. Ainsi, dans l'affaire *Lau*, la Cour suprême des États-Unis avait constaté l'existence d'une atteinte discriminatoire au droit à une éducation effective.

*Law, Language and the Multilingual State* includes 16 papers that were presented at the Twelfth International Conference of the International Academy for Linguistic Law, co-presented with the Department of Language Management and Language Practice (University of the Free State), that took place November 2010 at Thaba 'Nchu, South Africa. The conference also highlighted a colloquium, Language legislation and litigation, that focused specifically on the South African context.

This book is a collection of writings by experts in the multilingual field and emphasises challenges that societies face. Issues such as the drafting and implementation of legislation, the degree and forms of state intervention and the functioning of support structures are addressed. Related issues such as globalisation and diversity, language rights, ideology and legislation, as well as minority and indigenous languages are also discussed.

A truly multilingual state requires linguistic equality and language rights. This book contributes to the promotion and protection of linguistic diversity.

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