

**The Impact of Official Bilingualism on the Allophones' Linguistic Rights in Canada:**

**A Human Rights-Based Approach to the Right to Education in Mother Tongue**

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### *Abstract*

This thesis considers the right to education in mother tongue for Allophones in Canada from an international human rights law perspective. It seeks to determine whether the provincial governments' approach to language education rights for Allophones would amount to discrimination under international law. In order to address this question, language rights, the right to education in mother tongue and discrimination on the grounds of language are explored in international law. Then, the system of official bilingualism in Canada as the model to protect linguistic minority language rights and also language education rights in this country are discussed. With consideration to the significant role of mother tongue education in the survival of linguistic minorities and maintaining cultural diversity, Canada's approach to language education rights for Allophones is analyzed within the international law's discrimination framework. This thesis concludes that the principles of equality and non-discrimination require the states to establish publicly-funded schools that provide instruction in mother tongue for linguistic minorities where there are adequate numbers. In the conclusion, recommendations based on practical realities that can be adopted by the states are made to address this issue.

## ***Résumé***

Cette thèse considère le droit à l'éducation dans la langue maternelle pour les allophones au Canada du point de vue du droit international des droits humains. Il vise à déterminer si l'approche des gouvernements provinciaux de droits à l'éducation de langue pour les allophones pourrait constituer une discrimination en vertu du droit international. Afin de répondre à cette question, les droits linguistiques, le droit à l'éducation dans la langue maternelle et la discrimination fondée sur la langue sont explorées dans le droit international. Ensuite, le système de bilinguisme officiel au Canada comme modèle pour protéger les droits linguistiques des minorités linguistiques, et en plus, les droits linguistiques éducatives dans ce pays sont discutés. En tenant compte de l'importance du rôle de l'éducation dans la langue maternelle dans la survie des minorités linguistiques et le maintien de la diversité culturelle, l'approche du Canada aux droits linguistiques éducatives pour les allophones est analysé dans le cadre de la discrimination de la loi internationale. Cette thèse conclut que les principes d'égalité et de non-discrimination exigent les États à établir des écoles publiques qui offrent un enseignement dans la langue maternelle pour les minorités linguistiques où il y a un nombre suffisant. Dans la conclusion, des recommandations en fonction des réalités pratiques qui peuvent être adoptées par les États sont faites pour aborder cette question.

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## *Introduction*

Having lived in a country with a great cultural diversity, every now and then I heard about the linguistic minority's demands from the government to allow mother tongue education. Being from the majority community, speaking the official language of the country, I never quite understood the significance of their demand. As I later realized, the majority usually takes for granted what could be considered as a privilege: the privilege to study, communicate and demand services in their own language. I knew that linguistic minorities exist, but the ones that I knew, living in the capital city of the country, were perfectly capable of communicating, working and studying in the same language as mine: the official language. So it never occurred to me that why they would want education in their mother tongue, they used it to communicate among themselves, why would they need education as well? To me it sounded like a luxury, an idea that encouraged separatism, something that could neither do any good nor was necessary for the national unity of my country. I could not have been more wrong.

The majority will never know the struggles of being the minority. Not until they become one. Moving to Canada to study for my master's degree, I was suddenly among the minority, and the first thing that distinguished me from the others was my language. English is not my mother tongue, and nor is French, and suddenly I saw what I had chosen not to see in all the years before: language matters. It is the tool for communicating, the first barrier to overcome as a new-comer to any country. I met people from all around the world, and learned their stories, and soon I realized how perfectly powerful assimilation is. I had the experience of living in another country as a child, and while I had no memories of being the minority, I remembered perfectly well how us children went to English school during the week, and took classes in the weekend to learn our mother tongue, and how our teachers had to stay with us during the breaks to make sure that we were not

speaking English to each other. I may not have known the feeling of being the minority, but I knew perfectly well what assimilation was, and I was sure that if my family had stayed, I would have assimilated within the English community back then, probably not able to speak my mother tongue properly now. So I asked myself: if I ever stay here or anywhere other than my home country, do I want my children to be able to speak my language? The answer was quite simple, of course I did. It is my language, my culture, my traditional values. I want to pass it along to my children. This is my heritage, I do not want it to be lost. So I asked myself again: how do I make sure that my children are able to speak my language properly? The answer again was quite simple, something I had always known but had let it slip through my mind: education.

Education rights are part of a bigger family of human rights, namely cultural rights, and more narrowly, language rights. Language rights refer to the individual's right to speak their own language in the private and public spheres.<sup>1</sup> Although the linguistic majority and minority enjoy this right equally, language rights are usually associated with the linguistic minorities, as their rights are more likely to be denied by the states due to their preference to promote the majority language. Language rights are also more critical for linguistic minorities, since language is the means of communication and therefore, a tool for transferring culture and traditions.<sup>2</sup> That is why language rights are recognized in the states' national law as well as international law. At the international level, language rights are mostly protected under the principles of equality and non-discrimination and minority rights, and language is named as one of the four main grounds on which discrimination is prohibited; along with race, sex and religion.<sup>3</sup> To put it more simply, according to international law, everyone is born free and equal and differences in color, race,

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<sup>1</sup> André Braën, "Language Rights" in Michel Bastarache, ed, *Language Rights in Canada*, translated by Translation Devinat et Associés (Montreal: Editions Y. Blais, 1987) 1 at 14.

<sup>2</sup> *Ibid* at 15.

<sup>3</sup> *Charter of the United Nations*, 26 June 1945, Can TS 1945 No 7 art 1(3) [*Charter*].



religion, gender or language must not affect one's entitlement to fundamental human rights. Thus, the differential treatment of linguistic minorities on the grounds of their language is not acceptable in international law.

Turning to education, the truth is, it plays a significant role in shaping the child's identity and future. Education is the basis of career opportunities, and what builds the individual's social, economic and political life. So it is not surprising that education rights are considered to be among the most important language rights, and as history has shown, one of the most controversial, for linguistic minorities in particular. Given that the right to education and the principle of non-discrimination are recognized at the international level, it is important that everyone has access to education with respect to human dignity.<sup>4</sup> As a matter of fact, education in mother tongue is considered to be the most effective way of teaching, especially at the primary levels.<sup>5</sup> In regard with linguistic minorities, education in mother tongue is a means to maintaining their cultural values and traditions, an element that determines their survival.<sup>6</sup> This implies that the absence of mother tongue medium education could lead to linguistic and cultural assimilation and eventually, the death of the minority language.

This thesis is primarily about the right to education in mother tongue. With consideration to the crucial role of language rights in the survival of linguistic minorities, this thesis intends to discuss the position of the right to education in mother tongue in international human rights law, with regard to the principle of non-discrimination in particular. Since states' language policies

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<sup>4</sup> *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3 art 13 (entered into force 3 January 1976) [ICESCR].

<sup>5</sup> UNESCO, *The Use of Vernacular Languages in Education*, (France: UN Educational, Scientific and Cultural Organizations, 1953) at 6.

<sup>6</sup> Tove Skutnabb-Kangas, *Linguistic Genocide in Education -- or Worldwide Diversity and Human Rights?* (London: L. Erlbaum Associates, 2000) at 296.

inevitably lead to the differential treatment of the people who do not speak the official language, the purpose of this thesis is to analyze whether or not the states' failure to provide mother tongue education in particular for linguistic minorities could amount to discrimination under international law. The jurisdiction chosen to carry out this analysis is Canada, as this country has distinctive characteristics that distinguishes it from other countries with great cultural diversity. Apart from aboriginal peoples and significant number of immigrants, Canada's history in dealing with two races, English and French, who each have made contributions to the development of the country, is what makes it an interesting subject to study in the field of language rights.

When talking about language rights in Canada, the first thing that needs to be discussed is the system of official bilingualism. As said before, Canada has a history of dealing with two races, which means a history of making laws to put an end to the language conflicts between Anglophones and Francophones. While language is not the only element that distinguished these two communities, it has played quite a crucial role, and language issues have been a key element of the Canadian political system.<sup>7</sup> So the system of official bilingualism was designed to ensure the equal status of the English and French language by declaring these two languages as the official languages of Canada. However, it did not make Canada fully bilingual as it only applies to the legislative and judicial domains of the Federal Government and Québec.<sup>8</sup> For other purposes, language regulation is ancillary to the federal and provincial powers. The system of official bilingualism also had an impact on the education system in Canada by making it a provincial responsibility to make laws in this regard. However, this right is not unlimited, and it is subject to

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<sup>7</sup> Micheal MacMillan, "Federal Language Policies in Canada and the Québec Challenge" in Pierre Larrivée, ed, *Linguistic conflicts and language laws: understanding the Québec question* (New York: Palgrave Macmillan, 2003) 87 at 87.

<sup>8</sup> *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 133, reprinted in RSC 1985, Appendix II, No 5 [BNA Act].

constitutional conditions that seek to protect the official minority's language rights in education to some extent.<sup>9</sup>

So under the Canadian Constitution, the official minority's language education rights are guaranteed, provided that the conditions are fulfilled. But as said before, Canada's cultural diversity is not only because of the English and French population, but also because of the original inhabitants of the country, namely the First Nations, and also the considerable number of incoming immigrants from all around the world. With consideration to the crucial role of mother tongue medium education in the survival linguistic minorities, are the language education rights of the speakers of third languages being protected as well? It is important to note that this issue concerns publicly-funded schools that provide instruction in the mother tongue of a linguistic group, i.e. a school where all the subjects are taught in that language, and so are the extra-curriculum activities. In other words, private schools that are funded by the linguistic community itself, and also public schools offering language classes a few times a week, are not concerned.

In order to narrow down the subjects of this analysis, Allophones –the speakers of languages other than English, French and aboriginal languages- were chosen as the primary group to be discussed. Nevertheless, it is important to note that the issue of aboriginal people's language rights which has been controversial throughout the Canadian history is acknowledged. The declaration of English and French as the official languages of the “founders” of Canada was not accepted very well by the First Nations, as they were the original inhabitants of the country before Canada was “found” by any European country. Although the issue of the First Nation's linguistic rights forms a very important part of the Canadian history in language conflicts, and there are many legal issues that can be discussed in this field, it is excluded from the scope of this thesis. While some references

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<sup>9</sup> *Ibid*, s 93.

to the aboriginal people's language rights are made, the main focus of this thesis are Allophones and their linguistic rights, language education rights in particular. The reason for this choice was the growing rate of immigration and also asylum across the world, and the concern for the protection of their fundamental human rights. In this case, the right to education in mother tongue, as a division from linguistic rights, was chosen to be analyzed from an international human rights law perspective.

Thus, the issue that will be explored in this thesis is the Allophones' language education rights in Canada, and whether the provincial governments' failure to provide mother tongue medium education for Allophones amounts to discrimination under international human rights law. In order to address this issue, this thesis is divided into six chapters. The first chapter deals with language rights in general, and provides definitions and examples of these rights. Then, the relevant laws and regulations in international law and also Canadian Constitution are discussed. In the second chapter, the right to education in mother tongue is addressed. In this chapter, the benefits of mother tongue education and also the difficulties that are associated with it are mentioned. The third chapter is devoted to discrimination in international law. For this purpose, the elements of discrimination based on language are examined from the international law perspective, and the circumstances in which discrimination in providing mother tongue education is constituted are determined. In order to apply these findings to the Canadian context, the system of official bilingualism in Canada is examined in chapter four. First, the history of official bilingualism is introduced and then, the status of third languages in Canada is briefly analyzed. The fifth chapter reviews language education rights in Canada, namely the constitutional provisions for the protection of the official minority's language education rights that are applicable to all the provinces, and also Québec's provisions in this field. In the last chapter, the primary question of

this thesis will be addressed and Canada's approach in protecting the Allophones' language education rights will be analyzed within the discrimination framework provided by international law.

The method that is used in this thesis is doctrinal method. In order to explore this issue, international documents as well as academic articles and books on linguistic rights, the right to education in mother tongue and discrimination are reviewed. Also, Canada's constitutional provisions and the relevant decided cases concerning official bilingualism and language education rights in particular are discussed. While I do not believe that the purpose of this research is to give a definite "yes" or "no" answer to the question that it is proposing, I hope that it can establish a basis on which the right to education in mother tongue for linguistic minorities can be legally justified in the light of fundamental human rights, and address one of the many aspects of the linguistic minority's issues all around the world.

## ***Chapter 1: Linguistic Rights***

It is only fair to begin the first chapter on linguistic rights with a brief introduction on why language is important in our lives. Language is not only a tool for communication, but also an agent for understanding, interpreting and changing the world. Language forms our individual and group identity, and helps us learn our cultural ethics.<sup>10</sup> So it is not surprising to see that people have struggled for the recognition of their language rights by the states. The issue of language rights was highlighted after World War I, when linguistic communities found themselves being referred to as “minorities” in the new state structures.<sup>11</sup> In the light of national security and stability, language rights were born to “create stable national systems out of multilingual populations”.<sup>12</sup> The regulation of language rights however, has not been an easy task, and has been affected by demographic, economic and political factors in each state.<sup>13</sup> In this chapter, the scope and nature of language rights will be discussed first, and then the laws and regulation concerning these rights in international law and also Canadian constitution will be reviewed.

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<sup>10</sup> Skutnabb-Kangas, *Linguistic Genocide in Education*, *supra* at 105.

<sup>11</sup> Joseph Eliot Magnet, *Official Languages of Canada: Perspectives from Law, Policy and the Future* (Cowansville, Québec: Editions Y. Blais) at 3.

<sup>12</sup> *Ibid* at 4.

<sup>13</sup> Pierre Larrivée, “Introduction” in Pierre Larrivée, ed, *Linguistic Conflicts and Language Laws: Understanding the Québec Question* (New York: Palgrave Macmillan, 2003) ix at ix.

## *1.1. The Scope and Nature of Linguistic Rights*

### **1.1.1. Definition**

According to one definition, linguistic or language rights are referred to as human rights norms and standards that concern one's use of their mother tongue or native language to communicate in the private and public domains. Language rights actually concern the right to speak a language because "it is the language of one's heritage", and do not refer to the right to speak a language *per se*.<sup>14</sup> As it can be seen, this definition does not specify the individual's background i.e. whether they are from the majority or minority community in the area that they reside. However, it is important to note that at the international level, linguistic rights are usually associated with linguistic minorities, as their rights are more likely to be ignored by states. This is because the majority's language is usually the one chosen as the official language of the state and therefore, protected and promoted by the government.<sup>15</sup> That is why the *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities* defines linguistic rights as the "right granted to persons belonging to linguistic minorities to use their own language."<sup>16</sup>

To be more precise, language rights can be defined through two approaches. These approaches are primarily based on Heinz Kloss's division between "tolerance-oriented" and "promotion-oriented" minority rights. The first group of rights are established when the state takes measures in order to assure the enrichment of the minority language and culture in the private domain.<sup>17</sup> Promotion-

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<sup>14</sup> Micheal MacMillan, *The Practice of Language Rights in Canada* (Toronto: University of Toronto Press, 1998) at 11.

<sup>15</sup> Lauri Malksoo, "Language Rights in International Law: Why the Phoenix Is Still in the Ashes" (1998-2000) 12 Fla J Intl L 431 at 462 (HeinOnline).

<sup>16</sup> Francesco Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, UN Doc E/CN.4/Sub.2/384/Add.4 (1979) note 103 at 67.

<sup>17</sup> Heinz Kloss, *The American Bilingual Tradition*, reprint ed. (Washington: Center for Applied Linguistics, 1998) at 20.

oriented rights however, refer to the rights that the minority group enjoys when the state uses and cultivates their language and traditions.<sup>18</sup>

With regard to Kloss's division between minority rights, two approaches to language rights can be adopted. The first approach is "negative" in nature, and only prohibits discrimination on the basis of language for the individual. This regime of "linguistic tolerance"<sup>19</sup> does not offer any positive guarantees to the individual or the minority group to exercise their language rights.<sup>20</sup> This approach appears in the international instruments which contain the general principle of non-discrimination on the basis of language as an individual linguistic right.<sup>21</sup> Generally, the concept of tolerance-oriented linguistic rights considers a member of a minority language group to have the same needs as the majority group of the society, and does not see any reason why the minority group should be given a privilege in using their language.<sup>22</sup> This concept only requires states to avoid restricting the use of minority languages in the private sphere, from home to private associations.<sup>23</sup>

The second approach is based on the idea that language rights can either exist as individual rights or collective rights. This approach which is "positive" in nature, suggests that in order for language rights to be fully protected, a regime of "linguistic promotion"<sup>24</sup> should be set up. In other words, in addition to protection against discrimination, states are obliged to provide a situation in which linguistic minorities can implement their rights as a privilege,<sup>25</sup> namely in the public sphere such

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<sup>18</sup> *Ibid* at 21.

<sup>19</sup> Robert Dunbar, "Minority Language Rights in International Law" (2001) 50 Intl & Comp LQ 90 at 91 (HeinOnline).

<sup>20</sup> Joseph P. Gromacki, "The Protection of Language Rights in International Human Rights Law: A Proposed Draft Declaration of Linguistic Rights" (1991-1992) 32 Va J Intl L 515 at 516 (HeinOnline).

<sup>21</sup> *Charter of the United Nations*, art 1(3); *Universal Declaration on Human Rights*, art 2; *International Covenant on Civil and Political Rights*, art 2(1) & 26; *International Covenant on Economic, Social and Cultural Rights*, art 2(2).

<sup>22</sup> Kloss, *supra* at 22.

<sup>23</sup> MacMillan, *The Practice of Language Rights*, *supra* at 13.

<sup>24</sup> Dunbar, *supra* at 92.

<sup>25</sup> Gromacki, *supra* at 516.



as administrative services and education.<sup>26</sup> A certain interpretation of article 27 of the *International Covenant on Civil and Political Rights [ICCPR]* favors this approach:

”[i]n those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or *to use their own language*.”<sup>27</sup>

A number of scholars are in favor of this approach, and suggest that states have a duty to ensure the maintenance of the minority’s characteristics by supporting their use of their own language. Such obligation requires states to come up with plans to make minority languages available in governmental services and also provide financial assistance to support and promote their linguistic rights through media and education.<sup>28</sup> The implementation of such regime will lead to the improvement of both individual and collective linguistic rights.<sup>29</sup> As some scholars have pointed out, political and social peace will not be established unless these two category of rights are secured.<sup>30</sup> This approach is also favored by the UN Human Rights Committee, which reinterpreted article 27 in *General Comment number 23* adopted in 1994. According to this Comment, the Committee sees article 27 as imposing positive obligations on states.<sup>31</sup> Nevertheless, not many states are in favor of this approach as such plans are time-consuming and costly, setting aside the political aspect which is the mere promotion of minority linguistic rights and how that fits into the states’ policies.

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<sup>26</sup> Dunbar, *supra* at 92.

<sup>27</sup> *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 art 27 (entered into force 23 March 1976, accession by Canada 19 May 1976) [ICCPR] [*emphasis added*].

<sup>28</sup> Fernand de Varennes, *Language, Minorities and Human Rights* (Cambridge, MA: Kluwer Law International, 1996) at 150.

<sup>29</sup> Dunbar, *supra* at 23.

<sup>30</sup> De Varennes, *Language, Minorities and Human Rights*, *supra* at 153.

<sup>31</sup> Human Rights Committee, *General Comment 23, Article 27*, 1994, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc HRI/GEN/1/Rev.1 at 38 (1994) notes 6.1, 6.2 & 7.

### 1.1.2. Examples

The *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities* has identified four contexts in which language rights can be exercised: 1) non-official matters; 2) official matters; 3) communications media; and 4) school systems.<sup>32</sup> Firstly, people choose the language in which they are willing to use in their social life and private relations to communicate with other members of the society. They are also free to use their own language in matters such as commerce and religious services.<sup>33</sup> The non-official usage of language cannot be regulated by states<sup>34</sup>, as opposed to the official usage which refers to the use of language in legislative and executive branches of the government, in dealing with administrative authorities and in the courts.<sup>35</sup> Communications media include materials such as newspapers and books and also television and radio channels.<sup>36</sup> Minority language and education will be discussed in detail in the following chapters; nevertheless, it is important to note that the use of language in the educational system is one of the key elements to the maintenance of the minority group's culture and traditions<sup>37</sup>, and therefore, the right to education in mother tongue is considered to be a crucial aspect of the minority's linguistic rights.

Some rights that derive from language are protected in international law. One of the most important ones that has also been entered in many states' constitution, is the individual's right to a fair trial as stated in article 10 of the *Universal Declaration of Human Rights [UDHR]*. According to this article:

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<sup>32</sup> Capotorti, *supra*.

<sup>33</sup> *Ibid*, note 110 at 72.

<sup>34</sup> Skutnabb-Kangas, *Linguistic Genocide*, *supra* at 496.

<sup>35</sup> Capotorti, *supra*, note 113 at 73.

<sup>36</sup> *Ibid*, notes 154 & 160 at 91 & 93.

<sup>37</sup> *Ibid*, note 167 at 96.

“[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal...”<sup>38</sup>

Naturally, a trial can only be considered fair if the accused person can understand the charges and is capable of expressing and defending themselves in their own language. Therefore, at the very least, the right to fair trial guarantees the accused person’s right to an interpreter if they do not understand the official language of the court.<sup>39</sup> This right is exclusively and positively secured in article 14(3) of the *ICCPR*:

“[i]n the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

...

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court...”<sup>40</sup>

Freedom of thought and expression are also among human rights that can be associated with language rights, as secured in articles 18 and 19 of the *UDHR*.<sup>41</sup> Clearly, freedom of thought and expression will not be fully accomplished unless the individual is free to choose the language in which they want to exercise their right, including their mother tongue.<sup>42</sup>

As mentioned before, the right to education is also one of the human rights that has a close link to language. However, it is important to note that the right to education is narrowly interpreted in

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<sup>38</sup> *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71 art 10 [*UDHR*].

<sup>39</sup> Gromacki, *supra* at 534.

<sup>40</sup> *ICCPR*, *supra*, art 14(3).

<sup>41</sup> *UDHR*, *supra*, arts 18 & 19.

<sup>42</sup> Gromacki, *supra* at 534.

international human rights law. While article 26(1) of the *UDHR* obliges states to provide education for all, no commitment in regard with the students' language rights has been imposed.<sup>43</sup>

Article 26(3) has the potential to be interpreted in accordance with linguistic rights:

“Parents have a prior right to choose the kind of education that shall be given to their children.”<sup>44</sup>

Parents' right to choose the kind of education that is given to their children can include their right to choose in which language they want their child to be educated, at least when such choice is available.<sup>45</sup>

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<sup>43</sup> *UDHR, supra*, art 26(1).

<sup>44</sup> *Ibid*, art 26(3).

<sup>45</sup> Gromacki, *supra* at 534.

### 1.1.3. Importance

The concept of language rights is a critical one, however, a right will not be considered that fundamental to become a human right unless there is a consensus about it at the international level. Such consensus will only be achieved if there are clear reasons why a right needs to be of international concern. In case of language rights, the reason why they should be recognized and protected as part of human rights law is not as clear as it is for other human rights; for example the right to be free from torture which is the result of protection of humanity.<sup>46</sup> That is why it is important to discuss the goals to be attained by the promotion of linguistic rights in international law. There are different approaches to why language rights should be protected in international law; each while justifiable, have been criticized by states and scholars. Obviously there is still a long way to go before reaching a definite answer to the issue of linguistic rights, but discussing each approach may help to find a way in the middle.

The first approach is actually drawn from the *1992 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*:

"[Considering that] the promotion and protection of the rights of persons belonging to national or ethnic, religious and linguistic minorities contribute to the political and social stability of States in which they live...".<sup>47</sup>

According to this approach, language rights are a tool for maintaining global peace and security.

The idea is that if a state prohibits minorities from using their mother tongue, they will be provoked

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<sup>46</sup> Malksoo, *supra* at 435.

<sup>47</sup> *UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, GA Res 47/135, UNGAOR, 47<sup>th</sup> sess, UN Doc A/RES/47/135 (1993).

to rebellion and such conflict threatens the world's peace and security.<sup>48</sup> Generally this approach applies to all minority rights, language rights among them.

But this approach can be challenged by a completely opposite idea: is it true that granting linguistic rights to minorities reduces the conflict potential rather than creating it? The critics of this approach argue that promoting minority identity and rights, including language rights, may threaten the state's sovereignty as the minority group may seek separation. On the other hand, one of the other goals of international law is protecting the territorial integrity and unity of the states.<sup>49</sup> While minority groups have the right to maintain their culture and language, they are still a part of a bigger community, and have obligations towards it. If they can always use their mother tongue in public domain, they may not feel the need to learn the state's official language and therefore, threaten the state's unity.<sup>50</sup>

As it can be seen, there are two sides to the issue of minority rights within the states and how they affect peace and security; domestically and internationally. While it is important that minority groups are granted a certain level of fundamental rights, the state's integrity and unity needs to be protected as well. Obviously no unique solution can be suggested to all states, as each deal with different issues and circumstances regarding minority groups. But basic principles can be applied to ensure justice towards minorities on one hand and the state's sovereignty on the other.

The second approach is based on article 27 of the *ICCPR*.<sup>51</sup> Discrimination on the grounds of language is prohibited based on this article in international law. According to this approach, language rights should be protected in international law in order to ensure justice for individuals

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<sup>48</sup> Malksoo, *supra* at 435.

<sup>49</sup> *Ibid* at 439.

<sup>50</sup> *Ibid* at 438.

<sup>51</sup> *ICCPR*, *supra*, art 27.

and to promote their fair treatment. In other words, the second approach considers linguistic rights to be individual rights rather than collective rights.<sup>52</sup> However, as mentioned before, this article is interpreted differently by different scholars, and there are scholars that believe it is actually promoting linguistic collective rights.

This approach can be criticized for its focus on language rights as individual and not collective rights. The truth is, language is inevitably connected to collectivity, as individuals use it to communicate with other members of the community that share the same linguistic and/or ethnic background. While non-discrimination on the basis of language is an essential individual human right, it is not enough to secure linguistic rights for minorities. That being said, individual justice cannot be achieved unless linguistic rights are recognized both as individual and collective rights.<sup>53</sup>

The third and last approach focuses on language rights as a means to preserve linguistic diversity in the world. According to this approach, language death and “linguistic genocide”<sup>54</sup> are of such importance that require international law’s attention.<sup>55</sup> But why is it important to preserve the linguistic diversity of the world? While some believe that linguistic oligarchy is the means to a better communication and understanding between people from different backgrounds around the world<sup>56</sup>, arguments in favor of linguistic diversity seem to make more sense. In addition, the “homogeneity theory” has proven to be costly, usually ineffective and also adverse; as this theory

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<sup>52</sup> Malksoo, *supra* at 440.

<sup>53</sup> *Ibid* at 443.

<sup>54</sup> Linguistic genocide represents “(actively) killing a language without killing the speakers (as in physical genocide) or (through passivity) letting a language die.” (Skutnabb-Kangas, *Linguistic genocide*, *supra* at 312.)

<sup>55</sup> Malksoo, *supra* at 444.

<sup>56</sup> Boutros Boutros-Ghal, “Preface” in Michel Bastarache, ed, *Language Rights in Canada*, 2nd ed. (Cowansville, Québec: Editions Y. Blais, 2004) VI at VII.

does not take into account the commitment of minority communities to their language and culture.<sup>57</sup>

First and foremost, the humankind cultural heritage is preserved through language. When a language dies, a culture, a history, and most importantly, a vision of the world dies. What makes a society rich in culture is the history behind it, and the history cannot be carried on to the next generations without the means of language. Secondly, global democracy requires language diversity. Just as a society with only one party to decide is not considered to be democratic, the world needs plurilingualism to avoid a totalitarian system. In fact, cultural diversity is a means to maintaining democracy at the international level, and language being one of the main elements of culture, plays a great role in the establishment of such global community. Finally, it is important to discuss the role of cultural and linguistic diversity in global peace. When a language is promoted internationally, more people will be encouraged to learn about the culture, and this eventually creates a better understanding between nations. As a matter of fact, the first step to establish global peace is for different nations to accept and value differences, and this goal can be achieved by encouraging cultural diversity instead of eliminating it, and protecting languages instead of leaving them to extinct.<sup>58</sup>

Overall, the discussion of the potential goals that can be achieved by protecting linguistic rights in international law shows how complicated this issue can be. As said before, language rights as collective rights are closely linked to politics, which makes it even more difficult to be recognized in international law.<sup>59</sup> Clearly, not one unique reason can be given to support the recognition of language rights in international law, and each of the approaches that have been discussed can form

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<sup>57</sup> Magnet, *Official Languages of Canada*, *supra* at 4.

<sup>58</sup> Boutros-Ghal, *supra* at VIII.

<sup>59</sup> Malksoo, *supra* at 448.



part of the reasoning. By any means, states have realized the importance of providing some level of protection for linguistic rights, and at least, non-discrimination on the basis of language has become part of the states' practice.

## ***1.2. Laws and Regulations***

### **1.2.1. International Law**

Overall, the considerable difference in each state's language situation has made it difficult for international law to set anything more than minimum standards to protect linguistic rights.<sup>60</sup> Therefore, there is no existing body of international law that is solely devoted to the protection of linguistic rights, and the norms and standards regarding this issue are mostly found in the minority rights related international and regional instruments.<sup>61</sup> Notably, these rights are individual rights, i.e. beneficiaries are "persons belonging to minority groups" rather than the minority group itself.<sup>62</sup>

The prohibition of discrimination on the basis of language is the most basic protection provided for linguistic minorities by international law. This principle is recognized in the *Charter of the United Nations*, as article 1(3) provides:

"[t]o achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, *language*, or religion..."<sup>63</sup>

As can be seen in this article, one of the four grounds upon which discrimination is prohibited is language, which shows that the international community has recognized the significance of guaranteeing language rights at some level. However, this article provides only negative protection, and does not impose any obligations on states to enforce linguistic rights at the national level.<sup>64</sup>

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<sup>60</sup> *Ibid* at 465.

<sup>61</sup> Gromacki, *supra* at 520.

<sup>62</sup> Skutnabb-Kangas, *Linguistic Genocide*, *supra* at 483.

<sup>63</sup> *Charter*, *supra* [emphasis added].

<sup>64</sup> Gromacki, *supra* at 532.

The principle of non-discrimination on the basis of language can also be found in article 2 of the *UDHR*, which states:

“[e]veryone is entitled to all the rights and freedoms set forth in this declaration, without discrimination of any kind, such as race, colour, sex, *language*, religion, political or other opinion, national or social origin, property, birth or other status...”<sup>65</sup>

The same language is adopted in the *International Covenant on Economic, Social and Cultural Rights [ICESCR]*. According to article 2(2):

”[t]he States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, *language*, religion, political or other opinion, national or social origin, property, birth or other status.”<sup>66</sup>

This article also secures individual linguistic rights and no positive protections.

The *ICCPR* also protects non-discrimination on the basis of language, yet in a stricter manner. Article 4(1) which allows the states to derogate from their obligations under the Covenant in the times of emergency, prohibits measures that “involve discrimination solely on the ground of race, color, sex, language, religion or social origin.”<sup>67</sup> The *ICCPR* extends the principle of non-discrimination to children in article 24(1).<sup>68</sup> In addition, in article 26, non-discrimination on the basis of language is mentioned as a requirement of equality before the law:

“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any

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<sup>65</sup> *UDHR*, *supra*, art 2.

<sup>66</sup> *ICESCR*, *supra*, art 2(2).

<sup>67</sup> *ICCPR*, *supra*, art 4(1).

<sup>68</sup> *Ibid*, art 24(1).

ground such as race, colour, sex, *language*, religion, political or other opinion, national or social origin, property, birth or other status.”<sup>69</sup>

The *ICCPR* is actually the first international instrument to guarantee language rights in particular at some minimum level.<sup>70</sup> As mentioned before, in the context of criminal prosecution, article 14(3) of the *ICCPR* secures the right of the accused person to be informed of the charges in a language that they understand, and also to have access to an interpreter if he cannot understand the language of the court.<sup>71</sup> More importantly, as mentioned before, a fairly positive protection according to one certain interpretation is provided for linguistic minorities in article 27:

”[i]n those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or *to use their own language*.”<sup>72</sup>

In addition to specifying linguistic minorities, some scholars believe that this article is considerable since it seems to be protecting language rights as group rights: “... *in community with the other members of their group*.” While these scholars believe that the language of this article seems to suggest that such rights can be exercised in a group context,<sup>73</sup> there are others who disagree. These scholars suggest that the particular wording of this article –*persons belonging to such minorities*– promotes individual language rights and does not impose any positive obligations on the state. It seems that the drafters of the *ICCPR* left this ambiguity on purpose, and states’ practice is what defines the actual scope of this article. Currently, it seems that the narrow interpretation is favored by most states and language rights as collective rights have not been widely recognized.

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<sup>69</sup> *Ibid*, art 26 [*emphasis added*].

<sup>70</sup> Gromacki, *supra* at 535.

<sup>71</sup> *ICCPR*, *supra*, art 14(3).

<sup>72</sup> *Ibid*, art 27 [*emphasis added*].

<sup>73</sup> Gromacki, *supra* at 538.

The *UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* adopts the same language as the binding article 27 of the *ICCPR* in article 2.1:

“Persons belonging to national or ethnic, religious and linguistic minorities ... have the right to enjoy their own culture, to profess and practise their own religion, and to *use their own language*, in private and in public, freely and without interference or any form of discrimination.”<sup>74</sup>

Despite not being binding, article 4.2 of this *Declaration* encourages states to take positive actions in order to promote minority rights and help their cultures flourish:

“States shall 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 law and contrary to international standards.”<sup>75</sup>

Language rights are protected in regional treaties as well. In addition to the general principle of non-discrimination in article 14, The *European Convention on Human Rights [ECHR]* provides protection of positive linguistic rights concerning criminal prosecution in articles 5(2), 6(3)(a) and (e)<sup>76</sup>.

The *American Convention on Human Rights* also covers the principle of non-discrimination in article 1<sup>77</sup> and secures the positive linguistic rights in criminal prosecution in article 8(2).<sup>78</sup> The *African Charter on Human and Peoples’ Rights* does not contain any specific language rights but

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<sup>74</sup> *UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, *supra*, art 2.1 [emphasis added].

<sup>75</sup> *Ibid*, art 4.2.

<sup>76</sup> *Ibid*, arts 5(2), 6(3)(a) & (e).

<sup>77</sup> *American Convention on Human Rights*, 22 November 1969, 1144 UNTS 123 art 1 (entered into force 18 July 1978).

<sup>78</sup> *Ibid*, art 8(2).

the general principle of non-discrimination in article 2.<sup>79</sup> However, the protection of cultural rights in article 22(1) can be interpreted to include language rights as well:

“All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.”<sup>80</sup>

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<sup>79</sup> *African Charter on Human and Peoples' Rights*, 27 June 1981, 1520 UNTS 217 art 2 (entered into force 21 October 1986).

<sup>80</sup> *Ibid*, art 22(1).

### 1.2.2. Language Rights in Canada

As mentioned before, the regulation of language rights in the states' domestic law is closely linked to politics and the states' policies. This is also the case in Canada, where language rights in constitutional domain are considered to be a result of political compromise and reflect Canadian practice of language rights rather than protection of conventional human rights.<sup>81</sup> Historically, language issues have been a key element of the Canadian political system, as English, French and indigenous languages struggled to strengthen their legal position. Language rights enjoy a long history in Canada, and were gradually evolved from informal customs to the national language rights that are somewhat protected in the constitution.<sup>82</sup> However, as will be discussed later, for the most part language is actually ancillary to power in Canada. The system of official bilingualism in Canada has been designed to protect language rights at the federal level in particular, and while this system will be discussed in detail in chapter 4, in this section, the main provisions regarding linguistic rights will be briefly discussed.

The *British North America Act* (The *Constitution Act*/ The *BNA Act*), 1867 aimed to promote respect and tolerance between the English and French population, and sought to prevent linguistic conflict.<sup>83</sup> S.133, the only provision on language, provided a limited form of bilingualism by establishing English and French as the official languages of the Parliament and the courts of Canada and also of Québec.<sup>84</sup> S. 133 states:

“Either the English or the French Language may be used by any Person in the Debates of the House of the Parliament of Canada and of the Houses of the Legislature of Québec;

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<sup>81</sup> MacMillan, *The Practice of Language*, *supra* at 93.

<sup>82</sup> *Ibid* at 64.

<sup>83</sup> Magnet, *Official Languages of Canada*, *supra* at 11.

<sup>84</sup> Michele Bastarache, “Introduction” in Michel Bastarache, ed, *Language Rights in Canada*, 2nd ed. (Cowansville, Québec: Editions Y. Blais, 2004) 1 at 21.

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 Québec.

The Acts of the Parliament of Canada and of the Legislature of Québec shall be printed and published in both those Languages.”<sup>85</sup>

The *Official Language Act (OLA)* which was adopted in 1969, declared English and French as the two official languages of Canada, and sought to make the Federal Government accessible to both Anglophones and Francophones equally.<sup>86</sup> S. 2 of the act states:

“The purpose of this Act is to

(a) ensure respect for English and French as the official languages of Canada and ensure equality of status and equal rights and privileges as to their use in all federal institutions...”<sup>87</sup>

The *Canadian Charter of Rights and Freedoms (1982)*, significantly expanded the scope of language rights. The proclamation of this act was considered a milestone in regulating language rights as it contains provisions that secure a number of fundamental language rights.<sup>88</sup> According to Section 16:

“(1) English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.”<sup>89</sup>

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<sup>85</sup> *BNA Act, supra*, s 133.

<sup>86</sup> Magnet, *Official Languages of Canada, supra* at 29.

<sup>87</sup> *Official Languages Act*, SC 1969, c O-2, s 2.

<sup>88</sup> Bastarache, *supra* at 23.

<sup>89</sup> *Canadian Charter of Rights and Freedoms*, s 16, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [*Canadian Charter*].



The scope of official bilingualism is further defined in sections 17 to 20 of the *Charter*.<sup>90</sup> The *Charter* also contains provisions on minority language educational rights in section 23, aiming to make education in mother tongue accessible to all Canadian citizens<sup>91, 92</sup>

Even though the *Charter* had tried to complement the existing constitutional provisions concerning language rights and official bilingualism, there were still implementation problems in courts. In addition, the language of work had not be addressed in the existing body of law. That is why the *OLA* was reformed by *Bill C-72*<sup>93</sup> which was passed in 1987 to shed light on these issues.<sup>94</sup> By any means, it is worth mentioning that for the system of official bilingualism to function, it constantly needs to undergo revisions and adapt to the gradual changes in the society. That is the only way that the system's purpose which is protecting linguistic rights can be achieved.<sup>95</sup>

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<sup>90</sup> Magnet, *Official Languages of Canada*, *supra* at 102.

<sup>91</sup> MacMillan, *The Practice of Language Rights*, *supra* at 79.

<sup>92</sup> Further discussion on this section will be found at 5.2, *below*.

<sup>93</sup> *Official Languages Act*, RSC 1985, c 31 (4th Supp).

<sup>94</sup> MacMillan, *The Practice of Language Rights*, *supra* at 82.

<sup>95</sup> Joseph Eliot Magnet, "Canada's System of Official Bilingualism: Constitutional Guarantees for the Legislative Process" (1986) 18 *Ottawa L. Rev.* 227 at 229 (HeinOnline).

## ***Chapter 2: Education in Mother Tongue***

*Une langue qu'on n'enseigne pas est une langue qu'on tue.*

*You kill a language if you do not teach it.*

*(Camille Jullian)*

As was mentioned before, the right to education in mother tongue is one of the most important language rights. It is of great significance to acknowledge special education rights for the speakers of minority languages in order to ensure their equality with those of majority, as education is a matter of dignity and identity.<sup>96</sup> Before discussing the importance of education in mother tongue and its status in international law, it is critical to know to what language mother tongue exactly refers, and how it is determined in multilingual settings.

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<sup>96</sup> John Parcker, “Minority Education Rights in Europe” (2004) 2004 Special Issue Intl J Educ L & Poly 109 at 111 (HeinOnline).

### 2.1. *The Definition of Mother Tongue*

The basic assumption about mother tongue is the language that a person has learned since they were a child and has grown up with it. In *The Use of Vernacular Languages in Education* (1953) by UNESCO, mother or native tongue has been defined as “the language which a person acquires in early ages and which normally becomes his natural instrument of thought and communication.”<sup>97</sup> According to this definition, mother tongue is the language that the individual first learns to express themselves, and does not necessarily need to be the same as the parents’ language. In addition, it does not need to be the first language that the child learns to speak, as it is totally possible that they abandon it at an early age. The language that one acquires, i.e. the mother tongue, is actually a means to absorbing the cultural environment and shaping the child’s early concepts.<sup>98</sup>

Skutnabb-Kangas however, takes into account the relation between language and ethnicity, and gives four different definitions for mother tongue based on different criteria. The first factor is “origin”; based on this criterion, mother tongue refers to the language that the individual has learned first. Secondly, mother tongue can be defined by “identification”, either by the individual –internal- or by the others –external-, as the native-speaker of a specific language. The next criterion is “competence”, which refers to the language that the individual knows best. Lastly, “function” defines mother tongue as the language that the individual uses the most.<sup>99</sup> Obviously, for monolingual people, all the definitions lead to the same answer. This is also the case for linguistic majorities of a community. The importance of the distinction between these definitions

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<sup>97</sup> UNESCO, *supra* at 46.

<sup>98</sup> *Ibid* at 47.

<sup>99</sup> Tove Skutnabb-Kangas, *Bilingualism or Not – The Education of Minorities* (Clevedon, UK: Multilingual Matters, 1984) at 18.

is more apparent in the case of bilingual/multilingual individuals; as in some cases, according to each definition, the person's mother tongue is different. For example, the mother tongue of the child of a Chinese immigrant that goes to school in Québec changes with each definition. The first language that he has learned and communicates with his parents is Chinese, and this is also the mother tongue by internal identification. Then he goes to school and studies in French, which makes him fully competent in French. On the other hand, he speaks to his classmates in French, which makes the mother tongue by external identification to be French as this is the language that they recognize him to be the native-speaker. After graduation, he starts working at an English-speaking company, which means English will be the language that he uses the most. So which one of these languages will be his mother tongue? As this example shows, it is important to determine the best definition for mother tongue in order to identify it.

Skutnabb-Kangas suggests that for linguistic minorities, the fairest definition of mother tongue can be provided with the combination of the origin and internal identification criteria. So “the mother tongue(s) is/(are) the language(s) one has learned first and identifies with.”<sup>100</sup> However, as she indicates, there are situations where even this definition does not work, like the case of forcibly assimilated minority children.<sup>101</sup> Referring again to the example of the child of the Chinese immigrants in Québec, if he marries a Francophone girl, they will most probably speak French with each other, and chances are, their children will never know Chinese despite being from a Chinese ethnicity. In this case, the mother tongue can be defined only by internal identification.<sup>102</sup> While this approach is technically correct, it is possible that assimilation is not only linguistic but also so significantly cultural that even the individual does not identify himself as the native speaker

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<sup>100</sup> Skutnabb-Kangas, *Linguistic Genocide in Education*, *supra* at 110.

<sup>101</sup> Tove Skutnabb-Kangas, “Short Definitions of Mother Tongues”, *Tove Skutnabb-Kangas (blog)*, online: <[http://www.tove-skutnabb-kangas.org/en/concept\\_definitions\\_for\\_downloading.html](http://www.tove-skutnabb-kangas.org/en/concept_definitions_for_downloading.html)>.

<sup>102</sup> *Ibid.*

of the minority language anymore. Also, as Skutnabb-Kangas correctly points out, this approach does not take into account the individual's proficiency in the original mother tongue.<sup>103</sup> In fact, how can a language be someone's mother tongue if they do not even know how to speak it?

For the purposes of this thesis, the first definition of mother tongue given by UNESCO will be chosen. That is roughly the same as Skutnabb-Kangas's definition based on origin and internal identification. While this definition does not take into account linguistic assimilation and its effects, the present writer believes that mother tongue education will only be practical if the child knows the language and is looking to develop it. This implies that internal identification is as important as origin. That being said, if linguistic assimilation has already happened and the child is not competent in their language of origin, not only mother tongue education will not be beneficial, but also, it will lead to the child's frustration and lack of interest in learning the language.

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<sup>103</sup> Skutnabb-Kangas, *Linguistic Genocide*, *supra* at 109.

## ***2.2. The Benefits of Mother Tongue Education***

The truth is, linguistic majorities usually take for granted what seems absolutely natural to them; and that is, the fact that they can study in their own language, use it in official situations and be accepted and identified as the native-speakers of that specific language. However, what seems to be totally self-evident to linguistic majorities, could actually be a struggle for many linguistic minorities all around the world.<sup>104</sup> Some argue that education in the official language of the state is necessary to enable the students from other linguistic backgrounds to take part in the social, political and economic activities of the society. While the importance of learning the dominant language by the linguistic minorities cannot be denied, defining language only as a tool for communication and a technical skill is extremely superficial. Defining language through such approach is to ignore its close connection to history and culture, and its role in developing a social identity for the individual that is much broader than merely having access to the “money” language.<sup>105</sup> That is why some believe that the right of children to speak and educate in their mother tongue is as meaningful as the right to eating, safety and healthcare.<sup>106</sup>

To begin with, education is the most important tool for language preservation and prevention of language death; regardless of it being provided formally –through school- or informally –through homes or communities. The maintenance of a language mainly depends on its transmission from each generation to the next<sup>107</sup>, and without education, children will not have the opportunity to become proficient in their mother tongue. Clearly, formal education makes a more substantial

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<sup>104</sup> Skutnabb-Kangas, *Linguistic Genocide*, *supra* at 499.

<sup>105</sup> David Bloome, “Foreword: 3/5 of a Language?” in Jerrie Cobb Scott, Dolores Y. Straker, Laurie Katz, eds, *Affirming Students Right to Their Own Language: Bridging Language and Policies and Pedagogical Practices* (New York: Urbana, 2009) xi at xiii.

<sup>106</sup> Rick Meyer, “Portrait, Counterportraits, and the lives of Children: Language, Culture and Possibilities” in *Ibid*, 54 at 54.

<sup>107</sup> Tove Skutnabb-Kangas, “Human Rights and Language Policy in Education” in Ruth Wodak, David Corson, eds, *Encyclopedia of Language and Education*, vol 1 (Boston: Kluwer, 1997) 55 at 55.

contribution to achieving this goal than informal education. This is because children spend most of their time at school from early ages, learning in an academic environment that helps them develop advanced linguistic skills and expand their knowledge. A language is more in danger of death if the speakers of it do not have the right to learn and use it at schools, as they most probably will not end up passing it to the next generation.<sup>108</sup> Therefore, learning a language through formal education plays a critical role in the survival of that language. In fact, this has also been recognized by Capotorti, as in the *Study*, he suggests that one of the critical factors in determining the possibility of the maintenance of a minority group's values and culture is whether or not their language is used in the educational system. He believes that language is an essential element of a culture, and without formal instruction, it will be subject to death.<sup>109</sup>

Besides, education in mother tongue at least at the primary level, has proved to be the most effective way of teaching.<sup>110</sup> From a psychological point of view, the child has grown up hearing words and phrases that have turned into an automatic system of understanding. The mother tongue is also a tool for identification from a social perspective. Plus, educationally, the child will learn more quickly through the mother tongue rather than an unfamiliar language.<sup>111</sup> In other words, education in a language in which the student is not fully competent, is likely to result in their poor academic performance and therefore, a lower level of self-esteem.<sup>112</sup> Difficulty in mastering a foreign language vocabulary and expressing ideas in another language will prevent the student to achieve an adequate level of self-expression.<sup>113</sup> In addition, such students are more likely to drop-

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<sup>108</sup> *Ibid* at 55.

<sup>109</sup> Capotorti, *supra* note 167 at 96.

<sup>110</sup> UNESCO, *supra* at 6.

<sup>111</sup> *Ibid* at 11.

<sup>112</sup> De Varennes, *Language, Minorities and Human Rights*, *supra* at 157.

<sup>113</sup> UNESCO, *supra* at 47.

out of school at early levels of education.<sup>114</sup> This will also result in higher rates of illiteracy among linguistic minorities.<sup>115</sup> On the other hand, non-dominant students are more likely to feel defective and incompetent at school. Learning the dominant language could be a constant reminder for them that they are not from the privileged group of the community, and do not have the entitlements that they enjoy. They may not be physically or verbally assaulted, but are exposed to different forms of “microaggressions”<sup>116</sup>. Microaggression is actually the very first step to linguistic and cultural assimilation, as it pushes the student towards “monodimensionality” and the dissolution of difference.<sup>117</sup>

Furthermore, education, as one of the important mediums of forming the students’ ideological thoughts, can offer two approaches in teaching minority languages. First, it can be used as the medium of instruction, which leads to the active learning of the language by the student. But most states are in favor of promoting the majority language which is usually the official one, and prefer the second approach, which is offering the minority language as a subject to be taught at school. In this way, students are ideologically controlled, as they learn carefully chosen aspects of languages and cultures; both majority and minority.<sup>118</sup> In other words, children are hardly exposed to their mother tongue, and more importantly, for the most part they are under the influence of the majority language views and interests.<sup>119</sup> While teaching the minority language as a subject, few hours a week, can help linguistic minority children to maintain their sense of identity, it is not

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<sup>114</sup> De Varennes, *Language, Minorities and Human Rights*, *supra* at 196.

<sup>115</sup> *Ibid* at 197.

<sup>116</sup> Microaggressions are defined as “subtle, stunning, often automatic, exchanges which are ‘put downs’ of Blacks [or other non-dominant groups by offenders”. (C. Pierce, J. Carew, D. Pierce-Gonzalez & D. Wills, “An Experiment in Racism: TV Commercials” in C. Pierce, ed, *Television and Education* (Beverly Hills, CA: Sage, 1978) at 66, cited in Meyer, *supra* at 56.)

<sup>117</sup> Meyer, *Ibid* at 56.

<sup>118</sup> Skutnabb-Kangas, *Linguistic Genocide*, *supra* at 500.

<sup>119</sup> De Varennes, *Language, Minorities and Human Rights*, *supra* at 157.



enough for them to actually maintain and develop the language.<sup>120</sup> Generally, the main part of language development takes place at school and through formal education.<sup>121</sup> So it is important for children from linguistic minority communities who want to be able to speak to their parents and other members of the community in their mother tongue and learn about their heritage, culture and traditions, to learn their mother tongue properly. If formal education in mother tongue is not available to them, it is likely that they will be able to communicate in their own language, nevertheless, they most probably will not know how to read and write.

As a matter of fact, *The UNESCO Report* considers education in mother tongue to be so important that it should be used not only at primary levels of education but also higher levels; in other words “as far up as the educational ladder as the conditions permit”. *The Report* also suggests that the states should do everything in their power to support this approach, and minimize the harmful effects of transmitting from mother tongue to a second language for minority children.<sup>122</sup>

The significance of education in mother tongue has also been recognized by the *High Commissioner on National Minorities*.<sup>123</sup> In *The Hague Recommendations Regarding the Education Rights of National Minorities*, which was launched by the *High Commissioner on National Minorities*,<sup>124</sup> mother tongue medium education is considered as the preferred method of

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<sup>120</sup> Skutnabb-Kangas, *Linguistic Genocide*, *supra* at 503.

<sup>121</sup> *Ibid* at 501.

<sup>122</sup> UNESCO, *supra* at 52.

<sup>123</sup> This position has been created by the *Organization for Security and Cooperation in Europe* in 1992, “as an instrument of conflict prevention in situations of ethnic tension”. (Alexandra Rothenberger, compier, *Bibliography on the OSCE High Commissioner on National Minorities: Documents, Speeches and Related Publications* (The Hague: The Foundation on Inter-Ethnic Relations, 1997) cited in Skutnabb-Kangas, *Linguistic Genocide*, *supra* at 560.)

<sup>124</sup> *The Hague Recommendations* is a work of a small group of experts on human rights and education (mainly lawyers) and the guidelines included in it are based on international human rights standards about minority education. (Skutnabb-Kangas, *Ibid* at 560.)

instruction at all levels. This requires bilingual teachers –in both the official language and the minority one- that are trained under the states’ supervision. According to article 11:

“The first years of education are of pivotal importance in a child’s development. Educational research suggests that the medium of teaching at *pre-school* and *kindergarten* levels should ideally be the child’s language...”<sup>125</sup>

In articles 12 and 13, *The Hague Recommendations* refer to research that indicate the importance of mother tongue medium education in primary school and a substantial part of secondary school. In addition, the minority language taught as a subject, is considered to be a critical element of the school curriculum. It is also stated that the teachers should have a good understanding of the children’s cultural and linguistic background.<sup>126</sup>

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<sup>125</sup> Organization for Security and Co-operation in Europe (OSCE), *The Hague Recommendations Regarding the Education Rights of National Minorities*, High Commissioner on National Minorities, 1 October 1996 art 11 online: < <http://www.unesco.org/most/ln2pol6.htm> > [emphasis added].

<sup>126</sup> *Ibid*, arts 12 & 13.

### ***2.3. Mother Tongue Education in International Law***

As mentioned in the first chapter, not many provisions in international human rights instruments concern language rights; and the ones that do, mostly consist broad formulations to prohibit discrimination on the grounds of language. While the right to education has been recognized at the international level and states are obliged to provide education for all, no more details can be found in international instruments. The reason for this could be the difficulty in developing an educational plan that works for every state, as they each have different political, societal and also economic conditions. This means that they do not all have the same resources to allocate to promoting education and meeting the needs of people from different backgrounds. In this section, the existing educational provisions in international law will be discussed, and also the possible interpretations for these provisions will be explored.

The right to education is mentioned in article 26 of the *UDHR*,<sup>127</sup> but this article mainly focuses on free education for all and does not make any specific references to language. However, it is possible to interpret the parents' right to choose the kind of education for their children – article 26(3)<sup>128</sup> - as a right to choose the medium of instruction language.

The educational article of the *ICESCR* is article 13, which provides:

“The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the *full development of the human personality and the sense of its dignity*, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship

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<sup>127</sup> *UDHR*, *supra*, art 26.

<sup>128</sup> *Ibid*, art 26(3).

among all nations and all *racial, ethnic or religious groups*, and further the activities of the United Nations for the maintenance of peace.”<sup>129</sup>

While this article mentions racial, ethnic and religious groups, there is no reference to linguistic ones, which sounds like an inconsistency.<sup>130</sup> However, the article’s emphasis on education as a means to ensure the “full development of the human personality”, has the potential to be broadly interpreted to include the promotion of education in mother tongue as a tool to preserve the human’s dignity. The Committee on Economic, Social and Cultural Rights’ *General Comment No. 13* on the right to education seems to strengthen this approach as it recognizes the “full development of the human personality” to be the most fundamental educational objective.<sup>131</sup> In addition, according to this Comment, states have an obligation to “fulfil (facilitate) the acceptability of education by taking positive measures to ensure that education is *culturally appropriate for minorities* and indigenous peoples, and of good quality for all”.<sup>132</sup> A “culturally appropriate” and “good quality” education for minorities could easily mean education in their mother tongue. Nevertheless, even such broad interpretation does not offer anything more than guidance to the states, and cannot be considered obligatory.<sup>133</sup>

The *UN Convention on the Rights of the Child* (1989) does not refer to language in its general clause on education either. According to article 28:

“States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity...”<sup>134</sup>

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<sup>129</sup> ICESCR, *supra*, art 13 [*emphasis added*].

<sup>130</sup> Skutnabb-Kangas, *Linguistic Genocide*, *supra* at 525.

<sup>131</sup> Committee on Economic, Social and Cultural Rights, *General Comment No. 13: The right to education (article 13)*, 1999, UN Doc E/C.12/1999/10 (1999) para 4.

<sup>132</sup> *Ibid*, para 50.

<sup>133</sup> Patrick Thornberry, “Education” in Marc Weller, ed, *Universal Minority Rights: A Commentary on the Jurisprudence of International Courts and Treaty Bodies* (Oxford, NY: Oxford University Press, 2007) 325 at 338.

<sup>134</sup> *Convention on the Rights of the Child*, GA Res 44/25, UNGAOR, Supp No 49, UN Doc. A/44/49 (1989) art 28.

However, among the directions which education should take, it does mention language in article 29(C):

“The development of respect for the child's parents, *his or her own cultural identity, language and values*, for the national values of the country in which the child is living, *the country from which he or she may originate*, and for civilizations different from his or her own.”<sup>135</sup>

Obviously, this clause does not legally bind any state to provide education in mother tongue for linguistic minorities. Nonetheless, it demonstrates that the international community has recognized the importance of maintaining the minority's culture and identity, and at least, cultural and linguistic assimilation is not encouraged.

The *UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* (1992), contains a specific clause on linguistic rights in education. Article 4.3 provides:

“States should take *appropriate measures* so that, *wherever possible*, persons belonging to minorities may have adequate opportunities to *learn their mother tongue* or to *have instruction in their mother tongue*.”<sup>136</sup>

The particular wording of the article though is not that clear. For example, what exactly are “appropriate measures”? Also, the “wherever possible” clause weakens the obligatory position of the article with introducing an opt-out to the states.<sup>137</sup>

In the same manner, in article 8, the *European Charter for Regional or Minority Languages* (1992) adopts a vague language concerning the minority's educational rights. While this article promotes

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<sup>135</sup> *Ibid*, art 29(C).

<sup>136</sup> *UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, *supra*, art 4.3.

<sup>137</sup> Skutnabb-Kangas, *Linguistic Genocide*, *supra* at 534.

minority language medium of instruction, using words and clauses such as “as far as possible”, “relevant”, “appropriate”, “where necessary”, “pupils who so wish in a number considered sufficient”, “if the number of the users of a regional or minority language justifies it”, as well as offering a wide range of alternatives,<sup>138</sup> makes it possible for states to justifiably opt out of any requirement that does not match with their educational policies.<sup>139</sup> In other words, this article gives the states the option to promote minority language education as they see fit: whether by offering minority language medium of instruction or just teaching it as a subject at school or not at all.

So the study of international law regulations concerning the right to education shows that the right to education in mother tongue is not considered to be a linguistic human right. Namely, it seems like the right to education was never intended to include the right to education in mother tongue.<sup>140</sup> However, it is important to note that while states are not obliged to provide mother tongue medium of instruction education for linguistic minorities, international law’s tolerant-oriented approach to language rights and the general principle of non-discrimination requires them to recognize linguistic minority’s right to establish private schools in order to teach their language in the form of formal education. Accordingly, in article 5(c), the *UNESCO Convention against Discrimination in Education (1960)* states:

“It is essential to recognize the right of members of national minorities to carry on their own educational activities, including the *maintenance of schools* and, depending on the educational policy of each State, the use or the *teaching of their own language*...”<sup>141</sup>

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<sup>138</sup> Council of Europe, *European Charter for Regional or Minority Languages*, 4 November 1992, ETS No 148 art 18.

<sup>139</sup> Skutnabb-Kangas, *Linguistic Genocide*, *supra* at 535.

<sup>140</sup> De Varennes, *Language, Minorities and Human Rights*, *supra* at 199.

<sup>141</sup> UNESCO, *Convention Against Discrimination in Education*, 14 December 1960, 429 UNTS 93 art 5(c).

The wording of this particular article seems to be encouraging promotion-oriented language rights, and it follows conditions that intend to ensure its proper implementation.

#### ***2.4. Difficulties in Providing Mother Tongue Education for All***

All in all, as can be expected, the international community gives higher priority to the states' practice in educational rights which is normally promoting the official language than the linguistic minorities' potential education rights. This approach is justifiable on social, political, economic and practical grounds; and is currently adopted by many states. In this section, some of the difficulties associated with providing mother tongue education for all and possible solutions will be discussed.

First and foremost, claiming mother tongue education for minorities could be considered as a double-edged sword. On one hand, promoting mother tongue education rights suggests that the state is willing to recognize and develop the minority group's separate identity. From a political point of view, this could be considered to be a problem, as it may seem as a threat to the cultural unity of the state. That is actually why some states adopt the policy of cultural and linguistic assimilation, as such policy serves in accordance with the state's desire to integrate into a political and cultural whole.<sup>142</sup> On the other hand, denying linguistic minority's language rights and education rights in particular is not accepted in the international community anymore, and by doing so, states expose themselves to criticism. More importantly, such negligence is likely to result in political conflicts between the state and the minority group.<sup>143</sup>

In addition, economic reasons play a critical role in promoting minority language education especially within the public school system; since a challenge to developing minority language education is allocating adequate resources.<sup>144</sup> Obviously, special arrangements should be made by

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<sup>142</sup> UNESCO, *supra* at 12.

<sup>143</sup> *Ibid.*

<sup>144</sup> W.K. Hastings, "International Law and Education in a Minority Language" in Wodak & Corson, *supra*, 67 at 73.



the state in order to develop the use of minority language as medium of instruction, which means additional costs. For instance, new buildings need to be built, new textbooks to be printed, new staff to be hired, and most important of all, competent teachers to be trained.<sup>145</sup> Not every state is in an economic situation which allows it to spare such costs.

Another issue which was mentioned earlier in this chapter is the issue of learning the official language by linguistic minorities. Clearly, in order to play an active role in the society, one should be capable of speaking the language. Education in mother tongue while beneficial for the individual in terms of developing skills and acquiring knowledge, could result in their incapability to take part in social, political and economic activities of a society dominated by another language, and therefore, isolation.<sup>146</sup> The creation of “linguistic ghettos” is the result of the absence of majority language instruction, which would exclude minorities from employment or educational opportunities.<sup>147</sup> As a matter of fact, one of the reasons stated by those in favor of “assimilationist education” is providing a wider social mobility for minority students.<sup>148</sup> The possible solution to this problem is presented in the bilingual education models.

There are also linguistic factors involved in this issue. In countries where many small communities with different languages reside, it is simply not possible to provide mother education for all, as there are only a few children who speak that language. Another problem associated with such languages is the lack of proper grammatical and phonetic structure, working vocabulary and practical orthography, as these languages are often unwritten.<sup>149</sup> Besides, not enough educational

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<sup>145</sup> Capotorti, *supra*, note 169 at 99.

<sup>146</sup> Hastings, *supra* at 73.

<sup>147</sup> Fernand de Varennes, “The Existing Rights of Minorities in International Law” in Miklos Kontra, ed, *Language: a Right and a Resource* (New York: Plymouth, 1999) 117 at 131.

<sup>148</sup> Stephen May, *Language and Minority Rights* (New York: Routledge, 2011) at 181.

<sup>149</sup> UNESCO, *supra* at 12-13.

materials can be found for these languages. Even if the cost of printing new textbooks is not taken into account, it is not an easy job to find competent teachers and translators to provide such material.<sup>150</sup>

However, it is important to note that the practice of completely neglecting minority rights is not defensible in the modern age, and to some extent, it is accepted that states are expected to provide some level of services and facilities in the minority language when it is widely spoken in an area.<sup>151</sup> That is why states have been taking measures in promoting education rights for linguistic minorities. The degree of which such support is provided by the state depends on various factors, such as the extent of the demand by the minority groups, the level of use of the minority language, and the state's economic resources.<sup>152</sup> By any means, depending on the circumstances, states have developed different approaches to minority language education; including teaching their language at school as a subject and offering heritage classes. The system of bilingual/multilingual education has also been developed by some states, which aims to educate students who are proficient in more than one language, one of them their mother tongue.

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<sup>150</sup> *Ibid* at 51.

<sup>151</sup> Mey, *supra* at 204.

<sup>152</sup> De Varennes, "The Existing Rights of Minorities in International Law", *supra* at 130.

### ***Chapter 3: Discrimination on the Grounds of Language in International Law***

Since this thesis primarily deals with the question of discrimination in education on the grounds of language, now that language rights and the right to education in mother tongue have been discussed, it is time to define discrimination in international law. In this chapter, after defining discrimination in international law and discussing the relevant laws and regulations, the circumstances in which states' failure to provide mother tongue education for linguistic minorities amounts to discrimination are determined. Before proceeding to the first section, it is important to note the principles of non-discrimination and equality have been adopted by the international community in the hope to prevent the destructive consequences of discrimination from which last generations have suffered. So these principles are accepted at the international level as the basis of the modern society and the rule of law;<sup>153</sup> and some scholars suggest that due to their role as fundamental constituents of international human rights law, they could be regarded as *jus cogens*.<sup>154</sup> This view is based on the inclusion of fundamental humanitarian principles in *jus cogens*;<sup>155</sup> however, a general consensus over it has not yet been achieved, and the prohibition of genocide and slavery continue to be the most uncontroversial examples of *jus cogens* in international law.<sup>156</sup>

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<sup>153</sup> Natan Lerner, *Group Rights and Discrimination in International Law* (Boston: Kluwer Law International, 2003) at 2.

<sup>154</sup> Lord Lester of Herne Hill, "Non-Discrimination in International Human Rights Law" (1993) 19 *Commw L Bull* 1653 at 1653 (HeinOnline).

<sup>155</sup> W. A. McKean, *Equality and Discrimination under International Law* (Oxford: Clarendon Press, 1983) at 280.

<sup>156</sup> Christopher A. Ford, "Adjudicating Jus Cogens" (1994-1995) 13 *Wis Int'l LJ* 145 at 165 (HeinOnline).

### ***3.1. Discrimination in International Human Rights Law***

#### **3.1.1. Definition**

The word discrimination is defined as “the practice of treating somebody or a particular group in society less fairly than others”.<sup>157</sup> This definition captures the core concept of discrimination, but discrimination as a legal term has been defined by the Human Rights Committee in its *General Comment No. 18* as “any distinction, exclusion, restriction or preference which is based on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.”<sup>158</sup> Scholars have also tried to give definitions for discrimination in their work. For example, McKean suggests that in international law, discrimination is used in “the pejorative sense of an unfair, unreasonable, unjustifiable or arbitrary distinction,” applicable to “any act or conduct which denies to individuals equality of treatment with other individuals because they belong to particular groups in society.”<sup>159</sup>

So the notion of discrimination in international law describes a phenomenon which is negative, and should be prohibited as a rule unless justifiable on other grounds. Discrimination is always associated with the idea of treatment; i.e. to act or not to act with regard to an individual or a group, resulting in unjustified inequality. Nevertheless, it is important to note that not every act of differentiation or preference is considered to be discriminatory, and only acts affecting legally

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<sup>157</sup> *The Oxford English Dictionary*, online, *sub verbo* “discrimination”.

<sup>158</sup> UN Human Rights Committee, *CCPR General Comment No. 18: Non-discrimination*, 1989, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc HRI/GEN/1/Rev.1 at 26 (1994), para 7.

<sup>159</sup> McKean, *supra* at 10-11.

protected rights amount to discrimination.<sup>160</sup> Furthermore, when addressing the question of whether or not discrimination has occurred, the “effect” of the act should be considered and not the “purpose”.<sup>161</sup> Having defined discrimination, we can divide groups protected against discrimination in international law into three general categories: ethnic or racial groups, religious groups, and linguistic or cultural groups.<sup>162</sup> In the next section, discrimination on the grounds of language will be discussed in more details.

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<sup>160</sup> *Ibid* at 32.

<sup>161</sup> Lester, *supra* at 1656.

<sup>162</sup> Lerner, *supra* at 37.

### 3.1.2. Laws and Regulations

Firstly, the *Charter of the UN* guarantees “human rights and fundamental freedoms for all without distinction as to race, sex, language and religion” in Articles 1, 12, 55 and 76.<sup>163</sup> These four general grounds on which discrimination is prohibited are the basis for the introduction of additional grounds in the *ICCPR* and *ICESCR*. The *ICCPR* prohibits discrimination in a number of provisions, starting with Article 2(1) which provides:

“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as **race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.**”<sup>164</sup>

Article 3 of this Covenant also emphasizes the prohibition of discrimination on the basis of sex;<sup>165</sup> and Article 4, as mentioned in chapter one, does not allow the states’ derogation from their obligation under the Covenant to involve discriminatory measures.<sup>166</sup> In addition, according to Article 26, all persons are equal before law, and discrimination on any of the twelve grounds mentioned also in Article 2(1) is not allowed.<sup>167</sup> While the initial reading of these two Articles may imply that Article 26 is actually a duplicate, according to the Human Rights Committee *General Comment No. 18*, unlike Article 2, the application of the principle of non-discrimination based on this Article “is not limited to those rights which are provided for in the Covenant”.<sup>168</sup> So in the legislative domain, states are not allowed to adopt laws and regulations that amount to

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<sup>163</sup> *Charter, supra*, arts 1, 12, 55 & 86.

<sup>164</sup> *ICCPR, supra*, art 2(1) *emphasis added*].

<sup>165</sup> *Ibid*, art 3.

<sup>166</sup> *Ibid*, art 4.

<sup>167</sup> *Ibid*, art 26.

<sup>168</sup> *General Comment No. 18, supra*, para 12.

discrimination against any individual, and they are required to provide equal protection against discrimination for everybody.<sup>169</sup> The importance of this interpretation is highlighted in analyzing the occurrence of discrimination in education on the grounds of language in the following sections of this chapter.

Article 2(2) of the *ICESCR* adopts the same language as the *ICCPR*.<sup>170</sup> Discrimination is also prohibited in article 2 of the *UDHR*.<sup>171</sup> This is also the case for the *ECHR*, however, article 14 of this Convention adds another ground:

“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, **association with a national minority**, property, birth or other status.”<sup>172</sup>

This innovation can be associated with Europe’s efforts to promote minority rights and eliminate discrimination against them.

While all the grounds on which discrimination is forbidden are equally important, some required more attention. That is why conventions dealing with specific aspects of discrimination have been adopted; like the *Discrimination (Employment and Occupation) Convention*<sup>173</sup>, the *Convention against Discrimination in Education*<sup>174</sup>, the *International Convention on the Elimination of All*

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<sup>169</sup> Lester, *supra* at 1654.

<sup>170</sup> *ICESCR*, *supra*, art 2(2).

<sup>171</sup> *UDHR*, *supra*, art 2.

<sup>172</sup> *ECHR*, *supra*, art 14 [emphasis added].

<sup>173</sup> International Labour Organization (ILO), *Discrimination (Employment and Occupation) Convention*, C111, 25 June 1958, 362 UNTS 31.

<sup>174</sup> *Convention Against Discrimination in Education*, *supra*.

*Forms of Racial Discrimination*<sup>175</sup>, and also the *Framework Convention for the Protection of National Minorities*.<sup>176</sup>

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<sup>175</sup> *International Convention on the Elimination of All Forms of Racial Discrimination*, GA Res 2106 (XX), UNGAOR, 1966, Supp No 14, UN Doc A/6014.

<sup>176</sup> Council of Europe, *Framework Convention for the Protection of National Minorities*, 1 February 1995, ETS 157.



### 3.2. *Discrimination on the Grounds of Language*

As mentioned before, language is one of the four main grounds on which discrimination is prohibited in international law. Since this thesis deals with language rights, in this section discrimination based on language will be briefly discussed. First of all, in analyzing the occurrence of discrimination, it is important to once again emphasize that the act which leads to discrimination cannot be justifiable; and not all “unfavorable unequal treatments” mean discrimination. That being said, language rights are usually associated with minority rights, and also, being individual or collective, when considered as individual rights, in most cases linguistic preferences lead to economic and social inequalities that are not necessarily discriminatory. For example, not speaking the dominant language of the state inevitably means less career opportunities, and such exclusion is obviously not unjustifiable. When considered collective, language rights are usually regarded as one of the characteristics of ethnic minorities; and therefore, a secondary group-characteristic. So even if discrimination is constituted, in case of ethnic minorities, it is usually associated with discrimination on the basis of race and not language *per se*. That is why some believe that language as a forbidden ground for discrimination cannot be that effective.<sup>177</sup> However, the *Belgian linguistic case*,<sup>178</sup> decided by the European Court of Human Rights in 1968, shows how broad the principle of non-discrimination can be, and language in this case is referred to as a ground for non-discrimination; associated with linguistic identity rather than individual rights or ethnic minorities.<sup>179</sup> This case deals with the right to education in French for the Francophone minorities residing in the Dutch speaking region of Belgium. Belgium had

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<sup>177</sup> E. W. Vierdag, *The Concept of Discrimination in International Law: With Special Reference to Human Rights* (The Hague: Nijhoff, 1973) at 93.

<sup>178</sup> Case “*Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium*” v Belgium (*Merits*) (1968), ECHR (Ser A) 1 EHRR 241.

<sup>179</sup> Vierdag, *supra* at 94.

established a unilingual system of education which had set Dutch as the language of education in the Dutch-speaking region, French in the French-speaking region and German in the German-speaking region. Basically, the Court had to decide whether or not granting linguistic autonomy to the linguistic majority of each region amounts to discrimination against the linguistic minorities of that area.<sup>180</sup> Thus, language could be applicable as the sole basis for forbidden discrimination in some cases.

As a matter of fact, applying the principles of equality and non-discrimination in regulating language rights at the national level is a sensitive matter, as states tend to reflect the interests and priorities of the majority. As said before, while language rights are not necessarily part of the minority rights, they are usually associated with them. That is why determining whether or not an act of distinction is discriminatory is a complex task which requires creating a balance between the government's interests and those of the minority.<sup>181</sup> In order to achieve equality, it is important to acknowledge that an act should have an unequal "effect" on the individual, and not only if they were treated equally or not.<sup>182</sup> This position is also taken by the *ECHR*'s judgement in *Thlimmenos v. Greece*, a case concerning indirect discrimination:

"...the right ... not to be discriminated ... is violated when States treat differently persons in analogous situations without providing an objective and reasonable justification... However ... the right not to be discriminated ... is also violated when States without an objective and reasonable justification *fail to treat differently persons whose situations are significantly different.*"<sup>183</sup>

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<sup>180</sup> Nathaniel Berman, "Nationalism Legal and Linguistic: The Teachings of European Jurisprudence" (Summer 1992) 24 NYU J Intl L & Pol 1515 at 1526.

<sup>181</sup> De Varennes, *Language, Minorities and Human Rights*, *supra* at 55.

<sup>182</sup> *Ibid* at 57.

<sup>183</sup> *Thlimmenos v. Greece*, No 34369/97 [2001] 31 EHRR 411 para 44 [*emphasis added*].

So adopting this approach contradicts the idea that when a state imposes one language for all, everyone is treated equally, and therefore, there is no discrimination as there is no differentiation: everyone has access to the same public services and can attend the same classes, so equality has been achieved. The truth is, in analyzing this situation, it is important to note that the states' laws and regulations should be designed to benefit all the members of the society and not just a specific group; i.e. the majority. A one-language-for-all policy is based on a linguistic criteria which makes a distinction between those who speak the language and those who do not; inevitably resulting in the unfavorable treatment of some.<sup>184</sup> While the element of an act "being unjustifiable" for discrimination to occur has been discussed before, it is important to note that regulating language rights at the national level deals with language rights as collective rights. This implies that while not speaking the dominant language puts the individual at "justifiable" disadvantages; the differential treatment of linguistic minority groups can in some cases amount to discrimination.

All in all, based on the definition of discrimination adopted by the Human Rights Committee, and the government's role in regulating language rights, these elements can be said to constitute discrimination based on language:

**A. Denial or Exclusion on the Ground of Language:** According to this element, anyone who cannot comply with the language requirements of a certain service, benefit or opportunity provided by the government, will be denied from it.<sup>185</sup> This aspect of discrimination has been highlighted in *Lau v. Nichols*,<sup>186</sup> where the Chinese American students' equal education opportunities were being effectively denied due to their lack of proficiency in English. In this case, in 1974, the US Supreme Court ruled that the failure of the San Francisco school system to address the Chinese American

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<sup>184</sup> De Varennes, *Language, Minorities and Human Rights*, *supra* at 55.

<sup>185</sup> *Ibid* at 79.

<sup>186</sup> *Lau et al v Nichols et al*, 414 US 563 (1974).

students' educational needs had amounted to discrimination on the basis of national origin and language which was in contrary with section 601 of Title VI of the Civil Rights Act of 1964.<sup>187</sup>

**B. Language Distinction, Restriction or Preference:** The principle of non-discrimination obliges the state to avoid creating distinctions solely based on personal characteristics unless necessary or justifiable; and behave in a “language neutral” fashion. The idea underlying this approach is that individuals should not be put at disadvantage based on some fundamental human characteristics such as sex, age, color of skin, religion, language, etc.<sup>188</sup> The preference of one or more language by public authorities inevitably amounts to distinction based on language in allocating resources, services and benefits; and therefore, provided that all the elements are present, discrimination against those having a different primary language<sup>189</sup>

**C. Discriminatory Effect:** As mentioned before, discriminatory effect is sufficient to prove the commission of an act of discrimination, and there is no need for intention to act in a discriminatory fashion to be proved as well. Obviously, when speaking of discriminatory laws and regulations, it will not be reasonable to ask the individual to prove that the purpose of a certain law is to commit discrimination, as this is extremely difficult.<sup>190</sup> On the other hand, it is possible to provide evidence that an act had discriminatory effects, and the failure to do so will result in the denial of discrimination.

**D. Unfavorable Consequences of Preferential Treatment:** Considering that a state has adopted policies that show preference for a specific language or languages –with or without the intention to act discriminatorily-, it should also be demonstrated that some have been denied a benefit that

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<sup>187</sup> Title VI, 42 USC § 2000d (1964) s 601.

<sup>188</sup> De Varennes, *Language, Minorities and Human Rights*, *supra* at 81.

<sup>189</sup> *Ibid* at 82.

<sup>190</sup> *Ibid* at 83.

others were entitled to on the grounds of language.<sup>191</sup> That being said, imposing language requirements by the state for purposes of public services, employment, education, etc. necessarily favors those proficient in that language; and results in the different treatment of those not.<sup>192</sup> Clearly, not every different treatment is considered to be discrimination, and the constitution of discrimination is bound to the presence of all elements.

**E. Unjustifiable, Unreasonable and Unnecessary Treatment:** Even if all the above elements are present, it is possible that no discrimination has occurred due to the necessity of the treatment. Each and every state has a language preference, and obviously, this preference favors some and disadvantages others. There is no practical way to overcome this situation, as no state has the resources to provide services in all the spoken languages.<sup>193</sup> The more multicultural a country is, the more difficult it is to ensure the equal treatment of everyone in terms of language. However, the states' language policies that amount to differential treatment should be reasonable as each state has a duty to ensure the equal treatment of all its residents. There is no unique formula to what establishes a reasonable language policy; and it differs from one state to another depending on various factors such as the state's interests, demographical, historical and cultural context of the territory and also the extent to which the individual's rights and freedoms are being violated.<sup>194</sup> By any means, this is a complex issue in the field of State's Policy, and more discussion on it is out of the scope of this theses. It will suffice to say that at least, in areas where large number of linguistic minorities reside, language policies that put them at disadvantage could be considered to be discriminatory and therefore, prohibited by international human rights law. So the size of the minority group matters, and they should constitute a considerable proportion of the population for

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<sup>191</sup> *Ibid* at 85.

<sup>192</sup> *Ibid* at 87.

<sup>193</sup> *Ibid* at 88.

<sup>194</sup> *Ibid* at 90.

their claims to equal treatment in terms of language to be justifiable.<sup>195</sup> More details on this approach will be given in the next section.

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<sup>195</sup> Vernon van Dyke, "Equality and Discrimination in Education: A Comparative and International Analysis" (1973) 17:4 Intl Stud Q 375 at 395 (Jstor).

### ***3.3. States' Failure to Provide Mother Tongue Education and Discrimination***

In the previous chapter, the benefits of education in mother tongue were discussed. In summary, mother tongue education has proved to be the most effective way to instruct children especially at the early levels of education; and its significant role in maintaining cultural values and traditions cannot be denied. Also, as discussed before, equality sometimes requires different treatment. Education is one of the fields in which students' different needs call for different treatment in order for equality to be ensured and for discrimination to be eliminated. Nevertheless, adopting criteria for determining the extent to which differentiating is acceptable is not an easy task, and especially in areas where more than one language is spoken, choosing a language as medium of instruction that amounts to equality is extremely difficult.<sup>196</sup> Earlier in this chapter, elements amounting to discrimination were discussed as well, and we saw that (1) unfavorable treatment that places the individual at disadvantage because of their language and (2) is not justifiable, reasonable or necessary, constitutes discrimination on the grounds of language. Basically, the question that is intended to be answered in this section is whether or not failure to provide mother tongue medium of instruction places linguistic minorities at disadvantage; and therefore, amounts to discrimination.

Internationally speaking, as indicated before, the right to education in mother tongue has not been realized and states have no positive obligation to provide mother tongue education for the linguistic minorities residing on their territory. Regarding non-discrimination, in its final decision on the *Belgian Linguistic Case*, the European Court of Human Rights has interpreted Article 14 of the *ECHR* on discrimination<sup>197</sup> in conjunction with Article 2 of the *First Protocol of the ECHR* on the

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<sup>196</sup> *Ibid* at 384.

<sup>197</sup> *ECHR, supra*, art 14.

right to education<sup>198</sup> to not include the parents' right to choose the language of education. The Court states:

“... Article 14, even when read in conjunction with Article 2 of the Protocol, does not have the effect of guaranteeing to a child or to his parent the right to obtain instruction in a language of his choice. The object of these two Articles, read in conjunction, is more limited: it is to ensure that the right to education shall be secured by each Contracting Party to everyone within its jurisdiction without discrimination on the ground, for instance, of language.”<sup>199</sup>

The Court's reasoning for this narrow interpretation is that granting this right would lead to unreasonable results, as “it would be open to anyone to claim any language of instruction in any of the territories of the Contracting Parties.”<sup>200</sup> Obviously there is no practical way for a state to address the demands of all linguistic minorities by providing public education instruction in their mother tongue. Firstly, it is possible that too many languages are spoken in a territory; and secondly, it is highly unlikely that a state has the economic and academic resources to provide public education for all.<sup>201</sup> That is why the unqualified right to obtain instruction in one's chosen language does not exist.<sup>202</sup>

On the other hand, the one-language-for-all policy in education, i.e. choosing one exclusive language as the medium of instruction, could be considered as a disadvantage for children who do not speak that language, as they may not be as proficient and competent as the native speakers.<sup>203</sup> This means that they will have to struggle to keep up with the rest of their classmates, a struggle

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<sup>198</sup> Council of Europe, *Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, 20 March 1952, ETS 9, art 2.

<sup>199</sup> *Belgian Linguistic Case*, *supra* at 31.

<sup>200</sup> *Ibid* at 32.

<sup>201</sup> See section 4.2. for more details on difficulties in providing mother tongue education for all, *above*.

<sup>202</sup> De Varennes, *Language, Minorities and Human Rights*, *supra* at 200.

<sup>203</sup> *Ibid* at 195.



that is physically and emotionally frustrating for them. Results are usually lower grades and poorer academic performance, results that could have been avoided if the element of “struggle to understand the language” had been eliminated. In addition to an inferior education, such students are subject to higher dropout rates.<sup>204</sup> Clearly, the level of proficiency in the official medium of instruction is of great importance in determining whether or not discrimination has been constituted. Considering that a child has no knowledge of the language taught at school, it is not rational to expect them to be able to efficiently participate in the educational program. As mentioned before, this was the case in *Lau v. Nichols*,<sup>205</sup> where an actual discriminatory exclusion from education had occurred due to the Chinese students’ lack of knowledge in English. Once again, it is important to emphasize that in the case of children with no knowledge of the language taught at school “one-language-for-all education means no education at all”; and such students’ exclusion of benefits of public education because of their language is an obvious breach of the internationally-accepted principles of equality and non-discrimination.<sup>206</sup> Does this mean that if the child has some knowledge of the language taught at school, no discrimination is possible? Since it is already established that such students experience disadvantage as well, it is important to discuss whether or not the one-language-for-all policy in education is justifiable in these cases. As indicated in the previous chapters, linguistic human rights require states to recognize a minimum level of language rights for linguistic minorities; like the right to use their language to communicate in public and private spheres, and the right to an interpreter if the accused person does not speak the court’s language. Also, public services and education in particular were shown to be of considerable significance to be addressed by states. Obviously, the state’s negative duty

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<sup>204</sup> Christopher J. Reeber, “Linguistic Minorities and the Right to an Effective Education” (1972-1973) 3 Cal W Intl LJ 112 at 122.

<sup>205</sup> *Lau v Nichols*, *supra*.

<sup>206</sup> De Varennes, *Language, Minorities and Human Rights*, *supra* at 197.

to avoid laws that are discriminatory on the grounds of language should be towards all the linguistic minorities residing on its territory. However, some may argue that in terms of positive obligation, i.e. providing public services and education, not all linguistic communities are entitled to claim such services, and the state's historic minorities should have the priority to be granted these rights. While it is obvious that many states may prefer this approach, the present writer believes that the principles of equality and non-discrimination require that no such distinction is made and factors other than antiquity are taken into account. This implies that it is not unreasonable to expect states to provide mother tongue instruction in areas where a language other than the majority language is widely spoken. To put it more simply, the "sliding-scale" test can be used in these circumstances to determine whether or not the state's failure to provide mother tongue education is justifiable.<sup>207</sup> Naturally, if there are enough number of children who will benefit from mother tongue instruction provided by the state, the state's failure to do so will deprive them of the educational benefits that the linguistic majority is enjoying, and it is considered to be unjustifiable and therefore, amounts to discrimination in international law.

There is another aspect to the non-discrimination education policy as well. Considering that children who speak a language other than the official language are provided with public education in their mother tongue, there is a chance that they are not exposed to the majority language at all and therefore, do not learn it properly. This can place them at disadvantage, as knowing the official language of the country is a requirement for taking advantage of opportunities such as higher education and career and participating in the social and political life. That is why it is necessary for states to ensure that mother tongue medium of instruction does not prevent the children from

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<sup>207</sup> *Ibid* at 198.

learning the official language.<sup>208</sup> This matter has also been recognized in the *Convention against Discrimination in Education*. Article 5 has encourages State Parties to recognize the linguistic minority's right to carry on with their educational activities<sup>209</sup>, ensuring that “this right is not exercised in a manner which prevents the members of these minorities from understanding the culture and language of the community as a whole and from participating in its activities, or which prejudices national sovereignty”.<sup>210</sup> Thus, as it can be seen, for language education policies to be non-discriminatory, it is important that no child is treated unfavorably, either by providing mother tongue education or by failure to do so.

This is not a recent approach in international law, and the link between public schooling in the minority language where appropriate and the principle of non-discrimination had been recognized by the Permanent Court of Justice a long time ago. In its *Advisory Opinion on Minority Schools in Albania (1935)*, the court referred to this matter<sup>211</sup> by mentioning Article 6 of the *Declaration Concerning the Protection of Minorities in Albania* which provides:

“Provision will be made in the public educational system in towns and districts in which are resident a considerable proportion of Albanian nationals whose mother-tongue is not the official language, for adequate facilities for ensuring that in the primary schools instruction shall be given to the children of such nationals through the medium of their own language, it being understood that this provision does not prevent teaching of the official language being made obligatory in the said schools...”<sup>212</sup>

This was also the case in the *Treatment of Polish Nationals in Dazing (1932)*<sup>213</sup>, where the Court emphasized this matter by referring to Article 9 of the *Polish Minorities Treaty* which adopts the

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<sup>208</sup> *Ibid* at 207.

<sup>209</sup> *Convention Against Discrimination in Education*, *supra*, art 5(c).

<sup>210</sup> *Ibid*, art 5(i).

<sup>211</sup> *Minority Schools in Albania (1935)*, Advisory Opinion, PCIJ (Ser A/B) No 64 at 21.

<sup>212</sup> *Declaration Concerning the Protection of Minorities in Albania*, 2 October 1921, 9 LNTS 175, art 6.

<sup>213</sup> *Treatment of Polish Nationals in Dazing (1932)* Advisory Opinion, PCIJ (Ser A/B) No 44 at 39.

same language as the above Article for Polish nationals.<sup>214</sup> So while it is surprising that none of the obligatory human rights treaties mention this matter, it seems that it has gained general acceptance among states.

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<sup>214</sup> *Polish Minorities Treaty*, 28 June 1919, art 9 cited in *Ibid.*

### ***3.4. Conclusion – Effective Education for Linguistic Minorities that Eliminates Discrimination***

In conclusion, it can be said that while international law does not impose any positive obligation on states to provide mother tongue education for linguistic minorities, it is possible to interpret the negative obligation to non-discrimination to guarantee some level of language rights in certain circumstances. As the principles of equality and non-discrimination seek to ensure the equal treatment of all regardless of their language, and the right to education for all requires providing education with respect to human dignity, it is important that states oblige themselves to providing effective education for linguistic minorities, i.e. mother tongue education in some cases. So in the areas where a significant number of speakers of a minority language reside, the one-language-for-all education policy puts them at unjustifiable disadvantages. Therefore, in order to avoid discrimination and ensure effective education for all, states are under an obligation to provide mother tongue medium of instruction for the linguistic minorities as part of public schooling at least at the primary levels, so that they can gain the same benefits as the speakers of the majority language. This does not mean that teaching the majority language should be excluded, it actually means a fully bilingual educational program that is publicly-funded, where the medium of instruction is the minority language in addition to the majority language. Such approach can ensure that everyone is enjoying the benefits of an effective education.

So now that it is established under what circumstances states' failure to provide mother tongue education for linguistic minorities amounts to discrimination, it is time to apply these findings to a context. The jurisdiction chosen to carry out the analysis is Canada, as this country enjoys a great diversity due to the English, French and aboriginal populations in addition to a considerable number of immigrants from all around the world. Furthermore, Canada has adopted a distinctive

system in order to protect the language rights of English minorities in Québec and French minorities in the other provinces. This system of official bilingualism has also had impacts on language education rights. That is why before discussing language education rights in Canada, it is important that a brief overview on the system of official bilingualism as the system of protecting language rights in Canada is given. After this introduction, language education rights in Canada will be discussed and the primary question of this thesis will be answered.

#### *Chapter 4: Official Bilingualism in Canada*

In order to analyze language education rights in Canada and the status of third languages, it is necessary to first address the history and background of language rights in Canada and how the system of protecting minority language education rights was formulated. That is why in this chapter, the system of official bilingualism in Canada will be discussed. To begin with, “bilingualism” means the ability to speak two languages; the habitual use of two languages colloquially.<sup>215</sup> A “bilingual state” is a state that the majority of the population is capable of speaking and understanding two languages. Such states are rare, and Canada does not qualify to this definition either; at least not in the demographic sense.<sup>216</sup> However, in the legal sense, Canada is considered to be to some extent, an “officially bilingual” state. In short, official bilingualism refers to the constitutional equality of English and French in status, rights and privileges in the federal government services and courts. The structure of the system of official bilingualism stems from Canadian history and the role that language has played in developing the individual and national identity. This chapter will discuss the history of official bilingualism in Canada and the laws and regulations governing this system. Before proceeding to this discussion, it is important to address the distribution of power in Canada in terms of language legislation first. In the end, a short analysis of the system of official bilingualism will be given, and the status of “heritage languages”<sup>217</sup> will be briefly discussed.

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<sup>215</sup> *The Oxford English Dictionary*, online, *sub verbo* “bilingualism”.

<sup>216</sup> Magnet, *Official Languages of Canada*, *supra* at 91.

<sup>217</sup> “The term “heritage language” usually refers to all languages other than aboriginal languages of Native and Inuit peoples and the “official” Canadian languages (English and French).” (Jim Cummins and Marcel Danesicite, *Heritage Languages: The Development and Denial of Canada’s Linguistic Resources* (Toronto: Our Schools/Our Selves Education Foundation, 1990) footnote 1 at 8.) So in this thesis it refers to the languages spoken by Allophones.

#### ***4.1. Distribution of Powers over Language***

Firstly, language is not among the classes of subject enumerated in s. 91 of the *BNA Act (the Constitution Act) 1987* as part of the “exclusive legislative authority of the Parliament of Canada”<sup>218</sup> or the ones enumerated in s. 92 for the provincial governments to have the legislative power<sup>219</sup>.<sup>220</sup> This implies that language is not recognized as a “separate head of jurisdiction”;<sup>221</sup> and it is only regulated when necessary.<sup>222</sup> As Professor Hogg puts it, “language is not an independent matter of legislation” and therefore, the legislative power over this matter is divided between the Federal Government and the provincial ones on the basis of what institutions or activities the law affecting language covers.<sup>223</sup> This matter has also been mentioned in *Devine v. Québec (1988)*,<sup>224</sup> where the Supreme Court accepted Professor Hogg’s view on the legislative power over language and cited him:

“... for constitutional purposes language is ancillary to the purpose for which it is used, and a language law is for constitutional purposes a law in relation to the institutions or activities to which the law applies.”<sup>225</sup>

Furthermore, in *Jones v. Attorney General of New Brunswick (1974)*,<sup>226</sup> referring to s. 2(a) of the *OLA 1969*<sup>227</sup>, the Supreme Court of Canada noted that:

“This deliberate limitation of the official character of English and French to their use in the institutions of the Parliament and Government of Canada is relevant to any issue of the

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<sup>218</sup> *BNA Act, supra*, s 91.

<sup>219</sup> *Ibid*, s 92.

<sup>220</sup> Peter Hogg, *Constitutional Law of Canada*, 5<sup>th</sup> Student Edition (Toronto: Carswell, 2012) at 56-2.

<sup>221</sup> Armand L. C. de Mestral & William Fraiberg, “Language Guarantees and the Power to Amend the Canadian Constitution” (1966-1967) 12 McGill LJ 502 at 505 (HeinOnline).

<sup>222</sup> Claude Armand Sheppard, *The Law of Languages in Canada* (Ottawa: Information Canada, 1971) at 103.

<sup>223</sup> Hogg, *supra* at 56-2 & 56-3.

<sup>224</sup> *Devine v Quebec (Attorney General)*, [1988] 2 SCR 790, 1988 CanLII 20 (SCC).

<sup>225</sup> Peter Hogg, *Constitutional Law of Canada*, 4<sup>th</sup> edition (Toronto: Carswell, 1997) at 53-2 cited in *Ibid* at 808.

<sup>226</sup> *Jones v. A.G. of New Brunswick*, [1975] 2 SCR 182, 1974 CanLII 164 (SCC) [*Jones*].

<sup>227</sup> *OLA Act 1969, supra*, art 2(a).



concurrent authority of the provincial legislatures in relation to the use of English and French in provincial governmental agencies or, indeed, in respect of activities that fall within exclusive provincial competence.”<sup>228</sup>

Overall, it can be said that the legislative power over language can be determined in accordance with the matter which the law is trying to regulate. If within the legislative jurisdiction of the Federal Government –like federal governmental agencies and institutions-, the control over language will be exercised by the Federal Government. The contrary will be true for matters within the provincial jurisdiction. In addition, the Federal Government has the legislative competence over matters that are not exclusively within the provincial jurisdiction<sup>229</sup> -like the right to regulate education language rights under s. 93.<sup>230</sup> So it can be said that language is secondary to the exercise of jurisdiction.<sup>231</sup>

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<sup>228</sup> *Jones, supra* at 187.

<sup>229</sup> De Mestral & Fraiberg, *supra* at 506.

<sup>230</sup> *BNA Act, supra*, s 93.

<sup>231</sup> Sheppard, *supra* at 101.

## ***4.2. The Legislative Process of Regulating Official Bilingualism – A History***

### **4.2.1. The BNA Act 1867**

Canadian linguistic issues go back to the eighteenth century, to the time that the French settlers had built a society with a unique language, religion, legal system and economy, known as “New France”. In 1760, New France became part of the British Empire, and with the British government adopting the policy of assimilation, linguistic conflicts started to emerge.<sup>232</sup> However, because of the impracticality of this policy, and the revolt from the American Colonists to the south, Britain adopted a policy of linguistic duality in order to gain the loyalty of the French Canadians. The *Québec Act, 1774*<sup>233</sup> was Britain’s first attempt to protect the French language, religion and culture.<sup>234</sup> This policy continued in the *Constitution Act, 1791*<sup>235</sup> as well. This *Act* divided the Colony of Québec into Lower and Upper Canada, where the first accommodated a French majority and the latter an English one, each with their own representative assembly.<sup>236</sup> This regime existed for some years before rebellions within the legislature in Lower and Upper Canada resulted in the readopting of the unilingualism policy in the *Act of Union, 1840*.<sup>237</sup> Nevertheless, the adoption of this *Act* did not change the reality of the use of French. Furthermore, the constitutional actors realized the importance of collaboration between the English and French communities. That is why the *Union Act Amendment Act, 1848*<sup>238</sup> tried to restore the position of French in the

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<sup>232</sup> Magnet, *Official Languages of Canada*, *supra* at 5.

<sup>233</sup> *The Québec Act, 1774*, 14 Geo III, c 83.

<sup>234</sup> Magnet, *Official Languages of Canada*, *supra* at 6.

<sup>235</sup> *The Constitution Act 1971* (UK) 1791, 31 Geo III, c. 31.

<sup>236</sup> Magnet, *Official Languages of Canada*, *supra* at 7.

<sup>237</sup> *Union Act* (UK) 1840, App. II, No. 4.

<sup>238</sup> *Union Act Amendment Act* (UK) 1848, 11 & 12 Vict. c 56.

legislature.<sup>239</sup> But the situation did not improve until the threat of American expansionism urged the French and English communities to combine forces.<sup>240</sup>

In the end, the *BNA Act (Constitution Act) 1867*, sought to put an end to the ongoing conflict between English and French by establishing Canada as a bi-national state.<sup>241</sup> Basically, the *BNA Act* intended to ensure the equal treatment of English and French minorities throughout Canada. S. 133 of the *Constitution* aims to guarantee Anglophones' and Francophones' language rights by setting English and French as the official languages of the legislative bodies and courts of the Federal Government and also of Québec.<sup>242</sup> Nevertheless, the term "official language" is not used in this section, and the status of the languages is actually indicated by describing their use.<sup>243</sup>

The framers of the Constitution believed that they had reached an appropriate balance between the Anglophone and Francophone communities' demands. However, the circumstances did not turn out the way they expected, and linguistic conflicts continued to exist. French minorities in particular were subject to aggression in the provinces with Anglophone majorities. In addition, despite the protections provided by the Constitution, the provincial governments acted unfavorably in respect to French minorities' language rights; like forbidding the use of French in legislature, courts and schools.<sup>244</sup> The limited protection that s. 133 provided as the only "cornerstone of linguistic jurisdiction in Canada"<sup>245</sup> had lasted for a century before the need for a more comprehensive language policy arose.

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<sup>239</sup> Magnet, *Official Languages of Canada*, *supra* at 10.

<sup>240</sup> *Ibid* at 11.

<sup>241</sup> *Ibid* at 12.

<sup>242</sup> *BNA Act*, *supra*, s 133.

<sup>243</sup> Dirk Brand, "Constitutional Language Rights in Canada and South Africa" (1997) 1997 J S Afr L 689 at 690 (HeinOnline).

<sup>244</sup> Magnet, *Official Languages of Canada*, *supra* at 14.

<sup>245</sup> Sheppard, *supra* at 99.

#### 4.2.2. The Royal Commission on Bilingualism and Biculturalism and the Official Languages Act 1969

Meanwhile in Québec –where the majority of French Canadians resided- a new thinking was being developed. Being threatened by the power of English language and having in mind greater promotion and preservation of the French language, the Government of Québec demanded a higher status so that it can have more impact on the federal-provincial relations.<sup>246</sup> In response, the Royal Commission on Bilingualism and Biculturalism was created to examine the language issues and formulate coherent policies to address them.<sup>247</sup>

The *Preliminary Report of the Royal Commission on Bilingualism and Biculturalism* was released in 1965, stating that “Canada, without being fully conscious of the fact, is passing through the greatest crisis in its history”. The *Report* noted that “the source of the crisis lies in the Province of Québec”, which due to its size and strategic importance, had become a Canadian crisis. It was also mentioned in the *Report* that this crisis could actually destroy Canada, but if overcome successfully, it could lead to “the rebirth of a richer and more dynamic Canada”.<sup>248</sup> In order to address the concerns expressed by the Commission, the *Official Languages Act* was enacted in 1969. The principles of equality, pragmatism and considerations of national unity were considered to be the foundations of the new policies adopted in this Act.<sup>249</sup>

The Commission proposed that first, the provinces of Ontario, Québec and New Brunswick declare themselves as “officially bilingual”,<sup>250</sup> and second, the model of “bilingual districts”, based on

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<sup>246</sup> Magnet, *Official Languages of Canada*, *supra* at 25-26.

<sup>247</sup> MacMillan, “Federal Language Policies” in Larrivée, *supra* at 90.

<sup>248</sup> Royal Commission on Bilingualism and Biculturalism, *A preliminary report of the Royal Commission on Bilingualism and Biculturalism* (Ottawa: Queen’s Print, 1965) at 13.

<sup>249</sup> MacMillan, “Federal Language Policies” in Larrivée, *supra* at 93.

<sup>250</sup> Royal Commission on Bilingualism and Biculturalism, *Report of Royal Commission on Bilingualism and Biculturalism*, vol 1 (Ottawa: Queen’s Printer, 1967) note 292 at 96.

Finland's language planning, be adopted in other provinces.<sup>251</sup> The bilingual districts were defined as "special areas within which a defined language regime would be established for federal, provincial, and local jurisdictions. These districts would be areas where the official-language minority is numerous enough to warrant the kind of linguistic reorientation we feel desirable."<sup>252</sup> This concept was adopted by the *OLA* in sections 12 to 18<sup>253</sup> and the possibility of implementing this model was studied by the Bilingual Districts Advisory Boards; however, it was never carried out due to the problems that it encountered. While this model was inspired by Finland, the historical realities of this country were not taken into account.<sup>254</sup> That is why the Advisory Boards had difficulties in transplanting the concept to the Canadian setting; like selecting boundaries for districts, and more importantly, adapting bilingual districts to federalism.<sup>255</sup> In the end, the Federal Government decided to abandon the idea in 1977.<sup>256</sup>

The *OLA* intended to achieve two goals that seemed to contradict each other. On one hand, it aimed to eliminate the exclusion of French language from the Federal Government machinery and address the threat coming from Québec by offering concrete benefits to French speaking Québécois. The expansion of French language rights caused dissatisfaction among the Anglophone majority of the other provinces and brought Ottawa into conflict with them.<sup>257</sup>

On the other hand, the *OLA* proposed to maintain official language minorities by creating an environment in which anyone could live in many parts of the country using the language of their choice in the Federal Government services. While this goal was supposed to be in line with

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<sup>251</sup> *Ibid* note 249 at 84.

<sup>252</sup> *Ibid* note 331 at 106.

<sup>253</sup> *OLA 1969, supra*, ss 12-18.

<sup>254</sup> Kenneth McRae, "Official Bilingualism: from the 1960s to the 1990s" in John Edwards, ed, *Language in Canada* (New York: Cambridge University Press, 1998) 61 at 73.

<sup>255</sup> *Ibid* at 74.

<sup>256</sup> *Ibid* at 76.

<sup>257</sup> Magnet, *Official Languages of Canada, supra* at 29-30.

Québec's policies, it actually led to conflict between Québec and Ottawa. This is because the equal status of the two official languages also meant support for the Anglophone minority in Québec, and this policy conflicted with Québec's one of restricting the English language in the province.<sup>258</sup> By any means, despite the Federal Government's efforts, reports showed the migration and assimilation of the linguistic minority communities.<sup>259</sup> However, by the early 1980s, the two communities had accepted and promoted linguistic duality to some extent.<sup>260</sup>

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<sup>258</sup> *Ibid* at 30.

<sup>259</sup> *Atlas des Francophones de l'Ouest* (Winnipeg: Hignall Printing, 1979) at 20 cited in J. Henripin, *The English Speaking Population of Québec: A Demolinguistic Projection* (Montreal: Alliance Québec, 1984) at 19 cited in *Ibid* at 31.

<sup>260</sup> Magnet, *Official Languages of Canada*, *supra* at 33.

#### 4.2.3. Québec's Language Regulations

Since the government of Québec was not satisfied with the status of the French language in Canada; and due to reasons including socioeconomic and demolinguistic ones, it started to take a more active role in language planning.<sup>261</sup> So in 1968, the Commission of Inquiry on the Situation of the French Language and Linguistic Rights in Québec (*Commission Gendron*) was established to examine the situation of the French language in Québec.<sup>262</sup> This Commission tried to address “questions of French as the language of work, the integration of new Québécois into the French speaking community of Québec, and the language rights of the fellow citizens.”<sup>263</sup> The Gendron Commission recommended that the government of Québec proclaims “French as *the Official Language* of the Province of Québec” and “French and English as the two *National Languages*”.<sup>264</sup> With consideration to the Gendron Commission’s recommendations and in response to the *OLA*, Québec enacted the *Official Language Act [Bill 22]* in 1974 as its first significant attempt to promote the French language. Unlike the *OLA*, *Bill 22* recognized French as the only official language of Québec and widely restricted the use of English.<sup>265</sup> In 1977, *The Charter of the French Language [Bill 101]* expanded the obligatory use of French to the Legislature and Courts, civil administration, government agencies, labor, commerce, business and education.<sup>266</sup> Clearly, these new policies had a considerable impact on the Anglophone minority and also immigrants, causing migration or assimilation.<sup>267</sup>

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<sup>261</sup> Pierre A. Coulombe, *Language Rights in French Canada* (New York: P. Lang, 1995) at 94.

<sup>262</sup> R. Hudon, “Québec Language Policy”, *The Canadian Encyclopedia*, online:  
<<http://www.thecanadianencyclopedia.ca/en/article/Québec-language-policy>>

<sup>263</sup> Commission d’enquête sur la situation de la langue française et sur les droits linguistiques au Québec, *The position of the French language in Québec: Report of the Commission of Inquiry on the Position of the French Language and on Language Rights in Québec*, vol. 1 (Québec: Editeur officiel du Québec, 1972) at 3.

<sup>264</sup> *Ibid*, vol. 2 at 76.

<sup>265</sup> Bill 22, *Official Language Act*, SQ 1974 c 6.

<sup>266</sup> Bill 101, *The Charter of the French Language*, SQ 1977 c 5.

<sup>267</sup> Magnet, *Official Languages of Canada*, *supra* at 38.

#### 4.2.4. The Canadian Charter and Bill C-72

The *Canadian Charter of Rights and Freedoms* which came into effect in 1982<sup>268</sup>, tried to address the linguistic issues that had not been covered by the *OLA*. In this regard, the *Charter* contains a number of provisions concerning official bilingualism in Canada. S. 16 declares English and French as the official languages of Canada<sup>269</sup>, and a few other provisions define the scope of official bilingualism in the Federal Government domain. In 1987, inspired by the *Charter*, the *OLA* was revised by *Bill C-72*<sup>270</sup> which intended to address important issues that the *OLA* had failed to consider: like the language of work and specific provisions on the language of courts.

Before proceeding to the next section, it is worth mentioning that the declaration of French and English as official languages of Canada has had more effect in theory than in practice; namely, it is considered to be more of an ideal than a reality.<sup>271</sup> Therefore, the language rights protected by this system are quite limited and particularly within the federal government jurisdiction; namely, the governmental agencies and institutions and also courts.

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<sup>268</sup> *Canadian Charter, supra.*

<sup>269</sup> *Ibid*, s 16.

<sup>270</sup> *OLA 1985, supra.*

<sup>271</sup> Magnet, *Official Languages of Canada, supra* at 101.



### ***4.3. An Analysis of the System of Official Bilingualism***

In short, the system of official bilingualism as a system of linguistic protection is a fairly new concept which was developed in order to achieve two major goals: cultural duality and national unity.<sup>272</sup> To begin with, looking back to history, we learn that one of the reasons the system of official bilingualism was introduced was as a solution to the ongoing conflicts between the French and English communities; with the intention of preventing separatist tendencies that were starting to grow.<sup>273</sup> In the first chapter, it was mentioned that some believe the recognition of minority's identity and rights, language rights in particular, may be seen as a threat to the state's sovereignty. However, the sociolinguist, Joshua Fishman has noted in one of his publications that the roots of separation lie not in language but in other aspects of the minority-majority relations that are more broadly defined. He believes that bilingualism can even solve problems of communication rather than creating them.<sup>274</sup> So adopting the system of official bilingualism has been beneficial for Canada in this sense. Nevertheless, this system can be criticized for its focus on English and French as the language of the "founding" communities and ignoring the role of aboriginal peoples as the original inhabitants of the country.

On the other hand, the system of official bilingualism lacks some components to be fully functional, especially concerning the reality of the society. For example, the impact of linguistic duality on non-official minorities -i.e. the speakers of languages other than English or French- is one of the important aspects of the system of official bilingualism that needs to be considered. Firstly, some believe that while it makes "common sense" to have official languages so that people from different backgrounds could communicate with each other, it can also mean that the society

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<sup>272</sup> *Ibid* at 92.

<sup>273</sup> *Ibid* at 250.

<sup>274</sup> Joshua A. Fishman, "Bilingualism and Separatism" (1986) 487 Ann Am Acad Polit SS 169 at 169 (Jstor).

is divided into two groups of official and non-official people.<sup>275</sup> Secondly, linguistic dualism inevitably leads to inequality in enjoying certain rights between Allophones and the speakers of the official languages of Canada.<sup>276</sup> Thirdly, special protections for two languages may cause other ethnic minorities to feel that they are being treated as second-class citizens as their language is being treated so.<sup>277</sup> In order to address this issue, section 27 of the *Charter* on multiculturalism was enacted. By any means, this section and the relevant policy and Act will be discussed in the next section.

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<sup>275</sup> Bloome, *supra* at xii.

<sup>276</sup> Terrence Meyerhoff, "Multiculturalism and Language Rights in Canada: Problems and Prospects for Equality and Unity" (1993-1994) 9 Am. U. J. Int'l L. & Pol'y 913 at 918 (HeinOnline).

<sup>277</sup> Coulomb, *supra* at 103.

#### *4.4. The Status of Third Languages in Canada*

Before Canada was “founded” by the Europeans, it was inhabited by aboriginal peoples, who had their distinct culture, language and social system.<sup>278</sup> Also, as a major recipient of immigrants, Canada attracts lots of immigrants annually. That is why it is considered to be a country which enjoys a great cultural diversity. Because of the high number of speakers of third languages in Canada and the significance of language and cultural rights at the international level, it is important that the status of these languages be briefly discussed. While aboriginal languages are not the main concentration of this thesis, due to their significant role in the Canadian cultural identity, a short introduction to the status of these languages will be given as well.

In terms of language, the term “Allophone” refers to “a non-native Canadian whose first language is neither French nor English”<sup>279</sup>. While it is true that immigration is a choice and learning the dominant language is necessary for the economic and social survival of the immigrants; linguistic justice requires the acknowledgement of a minimum level of the Allophones’ language rights. Furthermore, the principles of equality and non-discrimination which are protected in section 15(1) of the *UN Charter*<sup>280</sup> call for equal treatment in comparable circumstances.<sup>281</sup> Generally speaking, “formal” equality means that the minority is entitled to receiving cultural, religious and educational services as the majority.<sup>282</sup> Obviously, factors such as the number of speakers of a language in an

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<sup>278</sup> Zack Parrot, “Aboriginal Peoples”, *The Canadian Encyclopedia*, online: <<http://www.thecanadianencyclopedia.ca/en/article/aboriginal-people>>

<sup>279</sup> *The Oxford English Dictionary*, online, *sub verbo* “allophone”.

<sup>280</sup> *Charter*, *supra*, s 15(1).

<sup>281</sup> MacMillan, *The Practice of Language Rights*, *supra* at 7.

<sup>282</sup> Jose Woehrling, “Minority Cultural and Linguistic Rights and Equality Rights in the Canadian Charter of Rights and Freedoms” (1985-1986) 31 McGill L J 50 at 52 (HeinOnline).

area, the importance of the language to its community life and the persistence of the language determine the level of entitlement.<sup>283</sup>

Statistics show that the population of Allophones in Canada differs in each province<sup>284</sup>, justifying a regional recognition of language rights rather than a national approach. As mentioned before, the most considerable language rights demanded by linguistic minorities are related to public services and education. That being said, it seems reasonable to expect the provincial government to take on a modest commitment on providing public services and education in the Allophone language.<sup>285</sup> As a matter of fact, the *Canadian Charter* also recognizes the rights and privileges of languages other than English and French. According to s. 22:

“Nothing in sections 16 to 20 abrogates or derogates from any legal or customary right or privilege acquired or enjoyed either before or after the coming into force of this Charter with respect to any language that is not English or French.”<sup>286</sup>

In addition, s. 27 of the *Canadian Charter* is devoted to cultural rights, providing that:

“This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.”<sup>287</sup>

The multiculturalism policy is the most considerable approach developed to promote ethnic minority’s cultural rights. This policy was first introduced in 1971, making Canada “a multicultural

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<sup>283</sup> MacMillan, *The Practice of Language Rights*, *supra* at 197.

<sup>284</sup> The 2011 Census of Population counted more than 200 languages spoken most often at home. In 2011, Allophone languages constituted the mother tongue of 20.6% of the Canadian population. (Statistics Canada, “Immigrant Languages in Canada”, online: <[https://www12.statcan.gc.ca/census-recensement/2011/as-sa/98-314-x/98-314-x2011003\\_2-eng.cfm](https://www12.statcan.gc.ca/census-recensement/2011/as-sa/98-314-x/98-314-x2011003_2-eng.cfm)>.) For example, in Toronto, Cantonese, Punjabi, Chinese, Urdu and Tamil were most frequently reported as immigrant home languages. This was the case for Arabic and Spanish in Montreal and Toronto; and Punjabi, Cantonese, Chinese or Mandarin in Vancouver. (Statistics Canada, “Linguistic Characteristics of Canadians”, online: <<http://www12.statcan.ca/census-recensement/2011/as-sa/98-314-x/98-314-x2011001-eng.cfm>>.)

<sup>285</sup> MacMillan, *The Practice of Language Rights*, *supra* at 200.

<sup>286</sup> *Canadian Charter*, *supra*, s 22.

<sup>287</sup> *Ibid*, s 27.

society within a bilingual framework”.<sup>288</sup> The introduction of this policy was a response to the Commission’s concerns that “other ethnic groups might be forgotten in the developing dialogue between Canadians of French and British origin”<sup>289</sup> and its recommendations in Book IV of their final report.<sup>290</sup> In addition, the multiculturalism policy tried to address the criticisms expressed by some ethnic groups against the *OLA*.<sup>291</sup> These groups, like the Ukrainians, felt that their contribution to the enrichment of Canada had been ignored, and insisted that multiculturalism should be part of the Canadian identity. Under the multiculturalism policy, there are two official languages but no official culture.<sup>292</sup> Eventually, the *Multiculturalism Act*<sup>293</sup> was passed in 1988, aiming to support non-English and French cultures through affirmative actions and anti-racism.<sup>294</sup> However, this policy has been criticized for being superficial as a result of unwelcoming political atmosphere.<sup>295</sup> More importantly, multiculturalism is not presented with a linguistic base, separating language and culture.<sup>296</sup> Some criticize that the current definition of multiculturalism only focuses on the cultural and folkloric aspect and not the linguistic aspect of the ethnic minority’s identity, therefore encouraging linguistic assimilation.<sup>297</sup> The critics of this policy argue that minority groups have more important needs that have not been addressed by this policy, like equal career opportunities, housing, education and access to public services.<sup>298</sup>

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<sup>288</sup> Sarah V. Wayland, “Immigration, Multiculturalism and National Identity in Canada” (1997-1998) 5 Intl J on Minority & Group Rts 33 at 33 (HeinOnline).

<sup>289</sup> Royal Commission on Bilingualism and Biculturalism, *A Preliminary Report*, *supra* note 36 at 50.

<sup>290</sup> Royal Commission on Bilingualism and Biculturalism, *Report of Royal Commission on Bilingualism and Biculturalism*, vol 4 (Ottawa: Queen’s Printer, 1969).

<sup>291</sup> Marcel Martel & Martin Pâquet, *Speaking Up; A History of Language and Politics in Canada and Québec*, translated by Patricia Dumas (Toronto: Between the Lines, 2012) at 153.

<sup>292</sup> Cummins & Danesicite, *supra* at 23.

<sup>293</sup> *Canadian Multiculturalism Act*, RSC 1985, c 24 (4th Supp).

<sup>294</sup> Barbara Burnaby, “Language Policy and Education in Canada” in Wodak & Corson, *supra* 149 at 153.

<sup>295</sup> Manoly R. Lupul, “The Political Implementation of Multiculturalism” (1982) 17: 1 J Can Studies 93 at 93.

<sup>296</sup> *Ibid* at 98.

<sup>297</sup> Meyerhoff, *supra* at 918.

<sup>298</sup> Wayland, *supra* at 48.

Nevertheless, in respect to linguistic minority's education rights, the government of Canada has taken measures in order to promote heritage language education. These measures will be fully discussed in the last chapter. But before that, aboriginal language rights will be shortly discussed.

There are about 60 distinct aboriginal languages spoken in different regions of Canada, classified into 10 language families.<sup>299</sup> In terms of legal protection, Canadian laws do not seem to address this question.<sup>300</sup> While sections 22 and 27 of the *Charter* seem to include aboriginal language and cultural rights as well, the most relevant section will be section 35(1):

“The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.”<sup>301</sup>

It seems that language rights could be considered to be protected under this section.<sup>302</sup> This provision only includes “Indian, Inuit and Métis peoples of Canada”.<sup>303</sup> While no other constitutional protection for aboriginal language rights can be found, in Nunavut, Inuktitut and Inuinnaqtun are official languages alongside the national languages of English and French;<sup>304</sup> and also in the Northwest Territories, the *Official Languages Act* declares that there are eleven different official languages.<sup>305</sup>

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<sup>299</sup> Keren Rice, “Aboriginal Languages of Canada”, *The Canadian Encyclopedia*, online: <<http://www.thecanadianencyclopedia.ca/en/article/aboriginal-people-languages>>.

<sup>300</sup> Lynn Drapeau, “Aboriginal Languages: Current Status” in Edwards, *supra* 144 at 153.

<sup>301</sup> *Canadian Charter*, *supra*, s 35(1).

<sup>302</sup> Drapeau, *supra* at 153.

<sup>303</sup> *Canadian Charter*, *supra*, s 35(2).

<sup>304</sup> Office of Language Commissioner of Nunavut, “Language Rights”, online: <<http://langcom.nu.ca/nunavuts-official-languages/language-rights-0>>

<sup>305</sup> Section 4: “Chipewyan, Cree, English, French, Gwich’in, Inuinnaqtun, Inuktitut, Inuvialuktun, North Slavey, South Slavey and Tâchô are the Official Languages of the Northwest Territories.” (RSNWT 1988, c.56, s 4.)

## *Chapter 5: Minority Language Education Rights in Canada*

The importance of education and education in mother tongue has been discussed in chapter 2. In multilingual countries such as Canada, the language of education is of great importance, so it is crucial that the relevant issues be regulated. In regulating language education rights, it is important that practical realities be taken into account. Factors such as the geographical distribution of the speakers of a specific language, the degree of the development of the language, the number of qualified teachers and costs of providing education in more than one language need to be considered when making provisions in respect of language rights in education.<sup>306</sup> In Canada, education has been one of the main sources of conflict between the English and French communities,<sup>307</sup> and in order to address this issue, the Canadian constitution has adopted a direct and detailed approach to the protection of minority language rights in education. With consideration to the primary question of this thesis on education in mother tongue and discrimination, it is necessary to review language education rights in Canada.

Turning to Canadian Constitution, it is important to note that the *BNA Act 1867* has made it a provincial responsibility to regulate language related rights;<sup>308</sup> however, these provisions should follow the conditions stated in section 93 of the *BNA Act* and section 23 of the *Charter*. This is considered to be a distinctive policy as it has made Canada the only Western Country that does not have a federal office of education.<sup>309</sup>

Clearly, the proper learning of the majority language is of high importance in each province, as language is considered to be an essential tool for the full development of the culture. So it is not

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<sup>306</sup> Brand, *supra* at 694.

<sup>307</sup> Magnet, *Official Languages of Canada*, *supra* at 139.

<sup>308</sup> *BNA Act*, *supra*, s 93.

<sup>309</sup> Ratna Ghosh, "Public Education and Multicultural Policy in Canada: The Special Case of Québec" (2004) 50: 5-6 *Int Rev Educ* 543 at 545 (Springer).

surprising that education related laws give a higher priority to the dominant language.<sup>310</sup> Nevertheless, as mentioned by the Commission, “equal partnership in a bilingual Canada” requires that “children of both linguistic groups have access to schools in which their own language is the language of instruction.” That is why the Commission recommended that “the rights of Canadian Parents to have their children educated in the official language of their choice be recognized in the educational systems.”<sup>311</sup>

Before proceeding to the first section, it is important to note that the term “minority language education” in this chapter refers to instruction in either English or French in the provinces which that language is considered to be the minority. Proper references have been made when addressing “bilingual” or “immersion” education and also education in any language other than English or French –Aboriginal languages and heritage languages.

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<sup>310</sup> Royal Commission on Bilingualism and Biculturalism, vol 1, *supra*, note 203 at 67.

<sup>311</sup> *Ibid*, note 389 at 123.



### ***5.1. Section 93 of the BNA Act***

Section 93 of the *BNA Act 1867* is the only provision in this Act to deal with education. This provision allowed the provincial governments to “exclusively make laws in relation of education”, following these conditions:

“(2) All the Powers, Privileges, and Duties at the Union by Law confined and imposed in Upper Canada on the Separate Schools and School Trustees of the Queen's Roman Catholic Subjects shall be and the same are hereby extended to the Dissentient Schools of the Queen's Protestant and Roman Catholic Subjects in Québec;

(3) Where in any Province a System of Separate or Dissentient Schools exists by Law at the Union or is thereafter established by the Legislature of the Province, an Appeal shall lie to the Governor General in Council from any Act or Decision of any Provincial Authority affecting any Right or Privilege of the Protestant or Roman Catholic Minority of the Queen's Subjects in relation to Education...”<sup>312</sup>

In discussing this section, it is crucial to note that it guarantees the existence of certain types of schools, namely, religious schools. However, no such guarantee is provided for schools with specific cultural or linguistic directions; so it seems insufficient in protecting linguistic minority language rights. Nevertheless, at that era, language, culture, religion and education were tied together; and in Québec in particular, Roman Catholic schools were predominantly Francophone, and Protestant ones Anglophone.<sup>313</sup> So in a way, it can be said that this section intended to informally encourage minority language education as part of denominational schooling.<sup>314</sup> However, this was not the case in Ontario and Western Provinces, where language of instruction was not necessarily associated with religion; for example in Ontario, there were a number of

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<sup>312</sup> *BNA Act, supra*, s 93.

<sup>313</sup> Royal Commission on Bilingualism and Biculturalism, vol 1, *supra*, note 206 at 68.

<sup>314</sup> MacMillan, *The Practice of Language Rights, supra* at 68.

English speaking Roman Catholic schools.<sup>315</sup> So the failure of the *BNA Act* to recognize language education rights had caused the speakers of the minority language, Francophones in particular, to be deprived of their right to education in their mother tongue.<sup>316</sup> In addition, the non-functionality of this section in the informal recognition of language rights in education was highlighted in several occasions; one of them was the Manitoba school crisis in 1890.

In this year, in Manitoba, the *School Acts*<sup>317</sup> established a unitary public non-sectarian school system which was funded by public taxes, replacing the existing system of separate denominational schools. This caused a controversy as the schools in which the language of instruction had been French were Roman Catholic.<sup>318</sup> In *City of Winnipeg v. Barrett*, the court ruled that depriving Roman Catholic schools of public funding because they would not accept the limitation of religious instruction was not against the law.<sup>319</sup>

Another case in which the real purpose of section 93 was highlighted was *R.C. Separate School Trustees v. Mackell*. The issue in this case was the question of whether or not Ontario could make French-speaking separate schools provide instruction in English only. To answer this question, the Judicial Committee of the Privy Council ruled that section 93 is designed to protect the religious aspect of education and the education right of people with the same religion; so the provincial governments are free to regulate any other aspect of education including the language of instruction.<sup>320</sup>

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<sup>315</sup> Royal Commission on Bilingualism and Biculturalism, *Book 1: The Official Languages* in *supra*.

<sup>316</sup> *Ibid*, note 384 at 121.

<sup>317</sup> *The Public Schools Act*, RSM 1985, c 38.

<sup>318</sup> William Tetley, “Language and Education Rights in Québec and Canada (A Legislative History and Personal Political Diary)” (1982) 45 *Law & Contemp Probs* 177 at 183.

<sup>319</sup> *The City of Winnipeg v Barrett* [1892] AC 445.

<sup>320</sup> *R.C. Separate School Trustees v. Mackell* [1917] AC 62 at 69.

In the end, the insufficiency of section 93 in protecting minority language education rights, Francophones' outside of Québec in particular, which was highlighted by the B & B Commission too, led to the adoption of section 23 of the *Charter*, with the intention to ensure equality between the minority language instruction rights throughout the country.<sup>321</sup> By any means, the relevance of this section has decreased over time as the non-denominational schools have become the major component of the public school system.<sup>322</sup>

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<sup>321</sup> Mark Power and Pierre Foucher, "Language Rights and Education" in Michel Bastarache, ed, *Language Rights in Canada*, 2nd ed. (Cowansville, Québec: Editions Y. Blais, 2004) 365 at 378.

<sup>322</sup> MacMillan, *The Practice of Language Rights*, *supra* at 69.

## 5.2. Section 23 of the Charter

Section 23 of the *Charter* could be considered as the most important provision concerning minority language education in Canada; as it imposes a positive obligation on the provincial governments to act in order to recognize the linguistic minority's education rights. This section is also considered to be a "remedial constitutional right" in Canada, and affirms and implements official bilingualism and linguistic duality in practical terms. Publicly-funded minority language schools in Canada have been found based on this section<sup>323</sup>, which provides:

"(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,

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."<sup>324</sup>

Therefore, according to this section, in order to assure the equality of the two official languages in Canada, if qualified, linguistic minorities have the right to require the state to provide the necessary

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<sup>323</sup> Power & Foucher, *supra* at 370.

<sup>324</sup> *Charter, supra*, s 23(1) & (2).

educational facilities.<sup>325</sup> The purpose of this section is to prevent assimilation and help official languages grow anywhere in Canada by offering strong education rights to them.<sup>326</sup>

However, the implementation of this right is subject to a condition. Section 23(3) establishes the “numbers warrant” test for the education rights of the minority language population of a province. According to this subsection:

“(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.”

So this subsection gives a narrow definition of the right to education in minority language, and emphasizes the group character of language rights in minority language education. For this right to be recognized, group membership should be established in three different ways: the individual should have membership, first, in an official linguistic group; second, in an official minority; and last, in a group large enough to satisfy the “numbers warrant” test.<sup>327</sup> So this subsection suggests that the exercise of this right differs from place to place based on the number of the speakers of the minority language.<sup>328</sup> What is important in understanding this subsection is that it speaks of a minority language instruction program where all the subjects –except for the foreign language- are

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<sup>325</sup> Brand, *supra* at 695.

<sup>326</sup> Anwar N. Khan, “Minority Language Education Rights in Canada” (1994) 23 J L & Educ 399 at 403.

<sup>327</sup> MacMillan, *The Practice of Language Rights*, *supra* at 79.

<sup>328</sup> Carole Aippersbach, “Constitutionally Protected Minority Official Language Rights in Canada” (2010-2011) 35 LawNow 31 at 34 (HeinOnline).

taught in the minority language, and students are also exposed to that language during breaks and extra-curriculum activities.<sup>329</sup> The courts have interpreted the steps to applying this section, considering the general historical background of this issue and also the political, economic, social and cultural circumstances.<sup>330</sup>

### **A. The “Numbers Warrant” Test**

First of all, the instruction of the minority language in a province is subject to the “numbers warrant” test. According to this test, in order for section 23 to be applicable, it should be determined whether or not the number of students who are entitled to minority language education is actually sufficient for the instruction in this language to be provided. Obviously, “where numbers warrant” does not provide an exact formula for determining the number of students, as different circumstances call for different approaches.<sup>331</sup> In defining this test, the interests of the minority community collide with the governments’, as on one hand, the minority community naturally tends to insist on the potential number of children of entitled parents, whether or not they decide to send their children to such schools. On the other hand, as opposed to potential demand, the governments tend to take into consideration the actual demand for the establishment of such schools.<sup>332</sup> In order to address this issue, the Supreme Court has adopted an approach in the middle.

According to the Supreme Court’s approach in determining the sufficient number of qualified children, “the number of persons who will eventually take advantage of the contemplated program or facility” should be considered. Obviously, the exact number can never be known; however, “it

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<sup>329</sup> Power & Foucher, *supra* at 406.

<sup>330</sup> Khan, *supra* at 410.

<sup>331</sup> *Ibid* at 406.

<sup>332</sup> Power & Foucher, *supra* at 420.

can be roughly estimated by considering the parameters within which it must fall –the known demand for the service and the total number of persons who potentially could take advantage of the service.”<sup>333</sup> But how does this system work? Technically, governments have a constitutional duty to promote minority language rights; therefore they are supposed to assist the minority community in determining the potential demand.<sup>334</sup> While the minority community’s demand for educational services is necessary for the enforcement of this right, it is not tied to the will of the majority of the minority group itself.<sup>335</sup> That means that the decision of some parents to have their children study at immersion or bilingual schools does not interfere with the right of others to demand instruction in the minority language.

So now it is determined that in a specific area, the number of children is sufficient to qualify them to receive instruction in the minority language. The next step would be determining what level of publicly-funded instruction should be provided for them.

## **B. The Sliding Scale**

So according to section 23, in the areas that the number of children who are entitled to this right calls for, two levels of entitlement to education in the minority language exist under Canadian Law: First, *instruction* of the minority language to be provided out of public funds; and second, minority language *educational facilities* are to be provided out of public funds. Presumably, the

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<sup>333</sup> *Mahé v. Alberta* [1990] 1 SCR 342, 1990 CanLII 133 (SCC) at 384 [*Mahé*].

<sup>334</sup> *Power & Foucher*, *supra* at 420.

<sup>335</sup> *Reference re Manitoba Language Rights* [1992] 1 SCR 212, 1992 CanLII 115 (SCC) at 862.

second level is associated with larger numbers.<sup>336</sup> Therefore, the structural environment of the instruction provided is based on the number of students entitled to this right.<sup>337</sup>

In *Mahé v. A.G. Alberta*, the Supreme Court explained the distinction between these two levels using the image of a sliding scale. According to this scale, when the number of students is high, a full and detailed right to instruction is established. The fewer the students, the more the content of education diminishes. In other words, at the higher end of the scale, an entitlement to “a measure of management and control” over minority language educational facilities exists for official language minorities; more clearly, the facilities *belong* to them. So the facilities need to be distinct and objectively identifiable with the minority community.<sup>338</sup> Generally, this right intends to ensure the minority group’s control over aspects of education that have an effect on their language and culture. By any means, the implementation of this right is a matter of practicality and necessity; that is why each province determines the appropriate structure for the minority school’s management and control, like establishing separate or shared school boards.<sup>339</sup> This is also the case for the structure of the facilities, as specific circumstances of each area (for example rural and urban areas) and the pedagogical and financial factors play a great role in the kind of facilities provided. As long as the distinct characteristic of the minority language facilities is maintained, it can be said that section 23 has been implemented. That does not necessarily mean that a separate school should exist, as sharing the school space with the majority community as a last resort could have the same result.<sup>340</sup>

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<sup>336</sup> Gail Starr, “Official Languages and Minority Language Education” (1981-1982) 6 Resource News 12 at 13.

<sup>337</sup> Khan, *supra* at 404.

<sup>338</sup> *Mahé*, *supra* at 370.

<sup>339</sup> *Ibid* at 375-376

<sup>340</sup> Power & Foucher, *supra* at 410.



On the other hand, if the number of minority language students is lower, they are entitled to a less intense instruction. This approach is justifiable as a small group of students forming a school leads to isolation and not the fulfilment of section 23.<sup>341</sup> So whereas such students are more likely to be deprived of proper education in their mother tongue, as there may not be as adequate number of them to form a separate school; instruction in a larger board or organization while being overseen by minority language representatives could result in better outcomes as it prevents isolation.<sup>342</sup> Again, it should be noted that “less intense instruction” does not refer to immersion programs or partial instruction of the minority language, but for section 23 to be truly implemented, the full program needs to be taught in the minority language.<sup>343</sup> By any means, it is important to mention that the issue of practicality is of higher importance in such cases, as in providing educational facilities for a small number of students, economic factors such as transportation, accommodation, buildings, equipment and staff should be taken into account.<sup>344</sup> Nevertheless, the remedial characteristic of section 23 requires more attention to be given to pedagogical considerations than financial factors; it does not seem just to use a simple “cost-benefit” analysis to make decisions about minority language education.<sup>345</sup>

The sliding scale as a broad interpretation of section 23 ensures the full protection of linguistic minority rights where numbers warrant on one hand, and imposes an obligation upon provincial governments to, depending on the situation, promote and preserve education language rights for minorities on the other.<sup>346</sup> Minority language education can benefit from such interpretation as it “guarantees whatever type and level of rights and services is appropriate in order to provide

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<sup>341</sup> Khan, *supra* at 406.

<sup>342</sup> *Ibid.*

<sup>343</sup> Power & Foucher, *supra* at 407.

<sup>344</sup> Magnet, *Official Languages of Canada*, *supra* at 165.

<sup>345</sup> Power & Foucher, *supra* at 423.

<sup>346</sup> Khan, *supra* at 410.

minority language instruction for the particular number of students involved”.<sup>347</sup> Determining the number which leads to either level of education varies from case to case, and it seems more reasonable for the minority language representatives to make decisions on this matter; respecting any possible guidelines provided by the governments and subject to revision by courts.<sup>348</sup>

To sum up, section 23 of the *Charter* complemented section 93 of the *BNA Act* which was missing language rights protection in education by imposing an obligation on the provincial governments to provide instruction in the minority language.

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<sup>347</sup> *Mahé, supra* at 365-366.

<sup>348</sup> *Power & Foucher, supra* at 423.

### 5.3. *Language Education Rights in Québec*

As said in the beginning of this chapter, the purpose of this thesis is not to deal with provincial laws. However, regarding language laws in particular, historically, Québec's regulations have been controversial. The most important reason for this controversy has been discussed in the previous chapter: the majority of the Francophone population of Canada resides in Québec; so the government of Québec has always tried to maintain French culture and language through legislation and prevent the potential assimilation as a result of the influence of the Anglophone minority. Québec language rights in education have been a subject of controversy as well, and had some impacts on the Allophone community, that is why they will be briefly discussed in this section.

We saw in the previous section that the *BNA Act* failed to recognize minority language rights, and this caused dissatisfaction among the French-speaking minority of Canada. Historically, Québec had adopted the policy of freedom of choice in education;<sup>349</sup> however, while the Anglophone minority in Québec enjoyed language rights at the same level of the Francophone majority, the situation was not the same for the Francophone minority in the other provinces. For example in Ontario, during the 1970s, the separate French schools were inadequately financed and not funded at all after grade 10, and parents had to pay for the school's expenses in addition to paying public school taxes. So the facilities and the quality of education received by the linguistic minority were not comparable to what was being offered in the majority public schools.<sup>350</sup> Obviously, the Francophones were not happy with this situation. As mentioned in the previous chapter, Québec

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<sup>349</sup> Magnet, *Official Languages of Canada*, *supra* at 143.

<sup>350</sup> *Ibid* at 142-143.

enacted the *Official Language Act [Bill 22]* in 1974 as a response to the federal *OLA* and declared French as the official language of Québec.

*Bill 22* restricted the English language instruction to the then existing English community, and did not permit any new enrolments. So French was declared as the only language of instruction in Québec, and board schools could only continue to offer English instruction to the students who possessed “sufficient knowledge” of English determined by language tests.<sup>351</sup> This new policy caused a considerable dissatisfaction among the Anglophone and Allophone community. The purpose of such vast restriction was stopping the development of English education and directing the more students, especially immigrants, into French education.<sup>352</sup>

The enactment of the *Charter of French Language [Bill 101]* in 1977 further restricted the use of English in different domains, including education. Section 72 states that “Instruction in the kindergarten classes and in the elementary and secondary schools shall be in French”; and this rule applies to all the public schools and private schools that are subsidized by the Québec Government.<sup>353</sup> The exceptions to this rule have been defined in different sections of *Bill 101*. According to section 79:

“A school body not already giving instruction in English in its schools is not required to introduce it and shall not introduce it without express and prior authorization of the Minister of Education, Recreation and Sports.

However, every school body shall, where necessary ... arrange for the instruction in English of any child declared eligible therefor.

The Minister of Education, Recreation and Sports shall grant the authorization referred to in the first paragraph if, in his opinion, it is warranted by the number of pupils in the

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<sup>351</sup> *Bill 22, supra*, s 40.

<sup>352</sup> Magnet, *Official Languages of Canada, supra* at 143.

<sup>353</sup> *Bill 101, Charter of the French Language*, RSQ c C-11.

jurisdiction of the school body who are eligible for instruction in English under this chapter.<sup>354</sup>

So instruction in English is only available where numbers warrant and upon the authorization of the Minister of Education. Students who are eligible to attend these schools are defined in other sections, first section 73. This section originally gave the option of receiving instruction in English to children whose one of the parents had been educated in English only in Québec.<sup>355</sup> This part has been amended to “Canada”<sup>356</sup> after being rendered ineffective by the Supreme Court’s decision in *Québec Protestant School Boards v. A. G. Québec (1984)*<sup>357</sup> as being inconsistent with section 23 of the *Charter*.<sup>358</sup> In fact, *Bill 101* has gone under revisions in order to comply with the *Charter* and also international norms. In this regard, it is important to address *Bill 178*<sup>359</sup> and *Bill 86*<sup>360</sup>. *Bill 178* was enacted as a response to Supreme Court’s decision in *Ford v. A. G. Québec (1988)*<sup>361</sup> regarding commercial signs and advertising. The Court held that Section 58 of *Bill 101* which had restricted the use of commercial signs and advertising in languages other than French was in violation of freedom of expression under the *Charter*.<sup>362, 363</sup> Nevertheless, *Bill 178* was not in compliance with the *Charter* either, that is why the government of Québec had to protect it from the Court’s review using the “notwithstanding clause” of the *Charter*.<sup>364</sup> After 5 years though, in

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<sup>354</sup> *Ibid*, s 79.

<sup>355</sup> The “Québec Clause”.

<sup>356</sup> The “Canada Clause”.

<sup>357</sup> *Québec Protestant School Boards v. A. G. Québec* [1984] 2 SCR 66 at 67.

<sup>358</sup> Section 52(1) of the *Charter* highlights the overriding power of constitutional provisions over provincial ones: “The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.”

<sup>359</sup> *Bill 178, An Act to amend the Charter of the French language*, SQ 1988 c 54.

<sup>360</sup> *Bill 86, An Act to amend the Charter of the French language*, SQ 1993 c 40.

<sup>361</sup> *Ford v. A. G. Québec* [1988] 2 SCR 712, 1988 CanLII 19 (SCC) [*Ford*].

<sup>362</sup> *Canadian Charter*, *supra*, s 2(b).

<sup>363</sup> *Ford*, *supra* at 714.

<sup>364</sup> *Canadian Charter*, *supra*, s 33.

1993, *Bill 101* was amended by *Bill 86* which had a broader scope than *Bill 178*.<sup>365</sup> In terms of language of instruction, the “Québec Clause”<sup>366</sup> and the “Sibling Clause”<sup>367</sup> were amended to comply with section 23 of the *Charter* as they were already addressed by the Court.<sup>368</sup> It is also important to note that section 23(1)(a) of the *Charter* is not applicable in Québec.<sup>369</sup> So according to the current section 73:

“The following children, at the request of one of their parents, may receive instruction in English:

(1) a child whose father or mother is a Canadian citizen and received elementary instruction in English in Canada, provided that that instruction constitutes the major part of the elementary instruction he or she received in Canada;

(2) a child whose father or mother is a Canadian citizen and who has received or is receiving elementary or secondary instruction in English in Canada, and the brothers and sisters of that child, provided that that instruction constitutes the major part of the elementary or secondary instruction received by the child in Canada.”

So as can be seen, the parents of eligible children to receive English language instruction need to make a request; the procedure for doing so has been regulated.<sup>370</sup> Section 76 also introduces another eligibility criterion for children whose “father or mother attended school after 26 August 1977 and would have been eligible to receive such instruction under section 73, even if he or she did not receive such instruction.”<sup>371</sup> Under section 81, children with learning disabilities may

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<sup>365</sup> R. Hudon, “Bill 86”, *The Canadian Encyclopedia*, online:  
<<http://www.thecanadianencyclopedia.ca/en/article/bill-86/>>

<sup>366</sup> *Bill 101*, *supra*, s 73(a).

<sup>367</sup> *Ibid*, s 73(b).

<sup>368</sup> William Green, “Schools, Signs, and Separation: Québec Anglophones, Canadian Constitutional Politics, and International Language Rights” (1998-1999) 27 *Denv J Intl L & Poly* 449 at 466.

<sup>369</sup> Section 59(1): Paragraph 23(1)(a) shall come into force in respect of Québec on a day to be fixed by proclamation issued by the Queen or the Governor General under the Great Seal of Canada.

<sup>370</sup> Requests for Instruction in English, OC 2851-77, 24 August 1977 (1977) GOQ.

<sup>371</sup> *Bill 101*, *supra*, s 76.

receive instruction in English “if required to facilitate the learning process”.<sup>372</sup> Section 85 provides exemptions for children staying in Québec temporarily.<sup>373</sup> Plus, section 86.1 states that the Government may authorize instruction in English for children whose parents have moved to Québec from another Canadian jurisdiction where instruction in French is comparable to instruction in English in Québec.<sup>374</sup> Other than shrinking the use of English, *Bill 101* seems to be targeting the immigrants, encouraging them to assimilate to French through schools and workplace rather than English. This matter will be discussed in more details in the next chapter.

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<sup>372</sup> *Ibid*, s 81.

<sup>373</sup> *Ibid*, s 85.

<sup>374</sup> *Ibid*, s 86.1.

## ***Chapter 6: Canada's Approach to Education, Discrimination or Not?***

In chapter 3 it was settled that states' failure to provide instruction in mother tongue as part of public schooling –at least at the primary level- for large numbers of linguistic minorities could amount to discrimination in international law. So in the very last chapter of this thesis, we try to answer the primary question posed: is the system of official bilingualism in Canada affecting the Allophones' right to education in mother tongue by imposing language requirements in education? Can Canada's language policy in education be considered discriminatory for the speakers of heritage languages? Since regulating education-related laws is a provincial responsibility, are provincial governments addressing this issue adequately? The present author believes that answering this question with a simple "yes" or "no" will not fulfil the purpose of this research, as sometimes in legal research "what should be done" is as important as "what is being done"; especially in international human rights law where many unresolved and controversial issues exist. That is why recommendations are tried to be made in addition to the analysis. The approach taken in this section is analyzing Canada's approach to education –at the federal and provincial level with more focus on the latter- within the discrimination framework provided by international law, and determining to what extent it could be considered discriminatory. In this analysis, it is tried to consider not only legal factors but practical ones, as they play a great role in providing educational facilities for linguistic minorities.



### ***6.1. The Federal Government's Approach***

As far as Canada's constitutional language education rights are concerned, the system of official bilingualism guarantees the official minority's right to education in mother tongue where the numbers warrant, provided that one of the parents has been educated in the minority language as well. The sliding scale test is used in determining the number of qualified students and providing public schooling on the basis of section 23 of the *Charter* for official linguistic minorities. Basically, the idea behind the Canadian Constitution's guarantee of the right to education in mother tongue is what has been discussed in chapter 3: ensuring that linguistic minorities are not placed at disadvantage because of their language. However, this right is only guaranteed for the "official language minorities"; namely, Anglophones and Francophones who have met the *Charter's* conditions, and not the speakers of heritage languages or aboriginal languages. In order to ensure that their rights are not denied, the policy of multiculturalism based on section 27 of the *Charter* was introduced. The teaching of aboriginal languages is out of the scope of this thesis, and heritage languages are considered to be a result of vast immigration to Canada.

Before proceeding to the analysis, it is important to note that immigration is not a new phenomenon in the history of mankind, and it is not surprising to see immigrants from the same ethnic background forming communities and preserving their culture and traditions through communication and social events. Generally, language being an essential aspect of culture, these communities tend to take measures in order to ensure their children learn their own language in addition to the dominant language, preventing assimilation. These privately-funded education methods take different forms depending on the number of qualified children and the economic resources. For example, while some may have the facilities and the number to establish separate schools, others may only be able to allocate a few hours in the weekends to offer classes at public

venues or schools or even homes. What is important in this analysis is the instruction of heritage languages in publicly-funded schools; namely, formal education offered by the government.

The truth is other ethnic groups in Canada –the speakers of non-official languages including aboriginal and heritage languages- have always been seeking an opportunity to preserve their language and culture within the English- and French-dominated school system.<sup>375</sup> The B & B Commission though, while recognizing the role of education in preserving other ethnic cultures<sup>376</sup> and encouraging the study of many languages in public schools, does not recommend any further development –at least not the same level as the official languages.<sup>377</sup>

To begin with, Canada’s Constitution does not provide any guarantees like section 23 to ensure non-official minority’s right to education in mother tongue. The *Multiculturalism Act* has declared it a policy of the Government of Canada to “preserve and enhance the use of languages other than English and French, while strengthening the status and use of the official languages of Canada”<sup>378</sup>; but no reference to education has been made in particular which is not surprising as making provisions regarding education is the duty of provincial governments. However, it cannot be denied that the constitutionally-protected right to education in mother tongue for Allophones can help for the multiculturalism policy to be truly effective. Nevertheless, the Federal Government has been committed to the effective implementation of the multiculturalism policy, which is why it commissioned the *Non-Official Languages Study* in 1976 and the *Majority Attitudes Study* in 1977 in order to examine the public opinion on this matter.<sup>379</sup> The first survey among ten ethnic

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<sup>375</sup> Eve Haque, *Multiculturalism within a bilingual framework: language, race, and belonging in Canada* (Toronto: University of Toronto Press, 2012) at 207.

<sup>376</sup> Royal Commission on Bilingualism and Biculturalism, vol 4, *supra*, note 367 at 137.

<sup>377</sup> *Ibid*, note 369 at 138.

<sup>378</sup> *Multiculturalism Act*, *supra*, s 3(i).

<sup>379</sup> Cummins & Danesicite, *supra* at 24.

communities in five metropolitan areas about topics relevant to language<sup>380</sup> showed that the majority of linguistic minorities were in favor of the “inclusion of the non-official languages in the courses of instruction and as vehicles of instruction in the public schools –especially in the elementary schools.”<sup>381</sup> On the other hand, the second study showed that while Anglophones and Francophones were in favor of the concept of cultural diversity, they were not that supportive of teaching of the heritage languages as part of public schooling.<sup>382</sup> These surveys led to the establishment of the “Multiculturalism Directorate’s Cultural Enrichment Program” in 1977 by the Federal Government in order to support the teaching of heritage languages as a component of the multiculturalism policy.<sup>383</sup> Although the Federal Government cannot provide that much support to public schools as education is under provincial jurisdiction, it does provide some support by funding language teaching development projects organized by the ethnic communities.<sup>384</sup> In the next section, the provincial governments’ approach will be discussed.

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<sup>380</sup> K. G. O’Bryan, Jeffrey G. Reitz & O. Kuplowska, *Non-Official Languages: A Study in Canadian Multiculturalism* (Ottawa: Minister Responsible for Multiculturalism, 1976) at 2.

<sup>381</sup> *Ibid* at 176.

<sup>382</sup> Cummins & Danesicite, *supra* at 25.

<sup>383</sup> *Ibid* at 26.

<sup>384</sup> Jim Cummins, “The Teaching of International Languages” in Edwards, ed, *supra* 293 at 295.

## 6.2. *The Provincial Governments' Approach*

In terms of language of education, generally immigrants and refugees whose first language is neither English nor French are not entitled under section 23 to receive the official minority language education. As discussed in the previous section, in Québec, any child not entitled under section 73 to study at English schools should enroll in French schools.<sup>385</sup> But there are reasons behind this policy that may not be applicable in other jurisdictions, so this issue is either left silent or the choice is the parents'.<sup>386</sup> So in general, it can be said that the children of speakers of heritage languages can study in either official language at publicly-funded schools; taking into account any conditions that may apply, like the approval of the minority school board, etc.<sup>387</sup> But what about their mother tongue?

As a matter of fact, in time, the provincial governments in Canada have acknowledged the importance of education in the survival of third languages. As mentioned in the previous section, as a result of the multiculturalism policy, provincial governments have been taking measures in order to enrich the status of third languages in the educational system. For example, in 1971, Alberta became the first province to recognize a language other than English or French as the medium of instruction. Ukrainian, German, and Hebrew were introduced as the language of structure in bilingual programs. Other languages such as Yiddish, Polish, Chinese and Arabic were added to the program in a few years. Saskatchewan and Manitoba also introduced a Ukrainian/English program in the education system.<sup>388</sup> In Ontario, after lots of debates, the “heritage language program” (HLP) was established as the broadest provincial program, providing

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<sup>385</sup> *Bill 101, supra*, s 73.

<sup>386</sup> Power & Foucher, *supra* at 403.

<sup>387</sup> *Ibid* at 405.

<sup>388</sup> Cummins & Danesicite, *supra* at 44.

funding for heritage language instruction whenever parents of twenty five students in one school board request.<sup>389</sup>

In Québec, as discussed before, language laws are designed to promote the French language as the language of the majority. Québec is also known as receptive of immigrants through immigration programs. The province has an agreement with the Government of Canada to choose immigrants based on its own rules.<sup>390</sup> In the 70s, most of the immigrants assimilated to the Anglophone community,<sup>391</sup> and given that *Bill 63* gave them the option to choose their children's language of education –provided that they acquire a working knowledge of French if English chosen-<sup>392</sup> they usually sent their children to English schools instead of French ones. Québec's new policies regarding the language of instruction in schools, had a major impact on immigrants. Basically, education in French is their only option if they want their children to attend public schools. In terms of heritage language instruction, two programs exist in Québec: the “Programme des Langues Ethniques” (PLE) and the “Projet d'Enseignement des Langues et des Cultures d'Origine” (PELCO). The PLE involves teaching of the third language outside of the regular school day by members of the linguistic communities themselves. While this program is funded by the government, most of the expenses is paid by the students' parents. The PELCO program however, is funded by the Ministry of Education, and the instructors can attend professional development courses offered by the Ministry.<sup>393</sup> The Québec government also subsidizes full-time heritage language private schools, covering about 80 percent of their expenses provided that some

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<sup>389</sup> Magnet, *Official Languages of Canada*, *supra* at 200.

<sup>390</sup> Government of Canada, “Québec-selected Skill Workers”, online:  
<<http://www.cic.gc.ca/english/immigrate/Québec/index.asp>>

<sup>391</sup> Magnet, *Official Languages of Canada*, *supra* at 24.

<sup>392</sup> *Bill 63, An Act to promote the French language in Quebec*, SQ 1969 c 9.

<sup>393</sup> Cummins & Danesicite, *supra* at 30-33.

conditions are fulfilled. Most of these schools are trilingual, and in addition to the heritage language, English and French are used as the mediums of instruction.<sup>394</sup>

The government of British Columbia does not provide major financial assistance for the teaching of heritage languages, however, it does not restrict the schools from offering such programs either. In this province, the Pacific Rim languages are taught in public schools, and there are several programs that teach languages such as Japanese and Mandarin Chinese at both elementary and secondary levels. In the Atlantic provinces however, neither financial assistance is provided by the governments, nor any classes are offered in the regular school day. Arabic is the most common language taught among the ethnic communities.<sup>395</sup>

These attempts show that Canada is committed to the promotion of cultural diversity through education, and the heritage language programs that are being carried out across the country seek to preserve minority language and eliminate linguistic assimilation. Such enrichment heritage language programs are designed to develop proficiency in the minority language as well as in majority language; so the framework is usually bilingual or trilingual education.<sup>396</sup> The goal of enrichment programs is to maintain the distinctive cultural identity and language while preserving national unity by teaching the majority language and preparing the individual to take an active role in the society. Taking such measures shows that multiculturalism is being accepted as an aspect of the Canadian identity. But are these attempts enough to eliminate discrimination based on language as described in international law? The analysis given in the next section will try to answer this question.

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<sup>394</sup> Cummins, *supra* at 296.

<sup>395</sup> *Ibid* at 297.

<sup>396</sup> Cummins & Danesicite, *supra* at 53.

### ***6.3. An Analysis based on International Law's Discrimination Framework***

As a brief overview of the provincial governments' approach to the teaching of heritage languages in public schools showed, most schools are committed to offering heritage language classes as subjects of instruction. While this approach is appreciated as a step to recognizing linguistic minority's language rights, full-time instruction in heritage languages in publicly-funded schools is fairly limited in Canada despite the large number of speakers of these languages. In fact, full language development is not possible if only a few hours a week is dedicated to it.<sup>397</sup> Although it is true that ethnic minorities always have the option of establishing their own separate schools, the necessary financial resources may not always be available. Based on the principles of equality and non-discrimination recognized at the international level as well as the national level, and also the importance of education in mother tongue as a means to preserve language and culture, it is only fair to expect provincial governments to provide mother tongue medium of instruction as part of public schooling where there are enough number of students.

As said in the beginning of this section, it is the purpose of this research to give a definite "yes" or "no" answer to the question of discrimination or not. The study of the discrimination framework provided by international law showed that discrimination based on language is constituted where a linguistic group is placed at disadvantage and cannot enjoy the same benefits as the majority because of their language, and this treatment can neither be justified nor is necessary. In this case, not being able to study in their own language, the speakers of third languages in Canada cannot enjoy the same benefits as the Anglophone or Francophone students as they may struggle to understand the language. This implies that they will not be able to enjoy the real benefits of an effective education despite being offered so. As mentioned before, lower academic performance

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<sup>397</sup> *Ibid* at 67.

and therefore, lower rates of self-esteem are the inevitable results of studying in a language in which the individual is not fully competent, placing them at disadvantage compared to the native speakers of that language. But more importantly, is this treatment justifiable or necessary?

The truth is, a lot of factors contribute in the issue of providing publicly-funded schools to teach heritage languages. Firstly, there are difficulties associated with providing mother tongue education for all in general. As discussed in the second chapter, these difficulties include the availability of economic resources, competent teachers and educational materials. In the Canadian context, the long-term financial cutbacks have affected the financial assistance previously provided for the heritage language teaching programs.<sup>398</sup> Secondly, public schools are funded by taxes that people pay, and not everyone would be happy about spending it on educating “immigrants” in their mother tongue. While this issue is completely out of scope of this theses, it is important to once again emphasize the role that politics play in such matters in forming the public opinion.<sup>399</sup> In addition, the element of “demand” should be taken into account as well. Some parents may actively want their children to assimilate in the English or French society, and there is no point in providing education in mother tongue if they are not willing to take advantage. Therefore, in determining whether or not Canada’s failure to provide public schooling for heritage languages amounts to discrimination, it is crucial to take into account all the relevant factors in order to make sure there had not been any reasonable excuses to justify this decision.

All in all, it seems to the present author that none of these factors are too severe to prevent the provincial governments from providing heritage language instruction in public schools at primary levels where there are adequate numbers of students who demand it. So the current approach does

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<sup>398</sup> Cummins, *supra* at 303.

<sup>399</sup> Cummins & Danesicite, *supra* at 49.



actually amount to violating the principles of equality and non-discrimination on the basis of language under international law. While it seems that the notion of multiculturalism is accepted in Canada and there are attempts to maintain cultural diversity through education, there is yet some way to go before equal access to power and resources is accepted as well.<sup>400</sup> The linguistic communities themselves believe that in the light of the multiculturalism policies in Canada, the governments' support for heritage language teaching is actually their right.<sup>401</sup> This view is also true from the international human rights law perspective considering the principles of equality and non-discrimination on the grounds of language. In addition to the benefits that mother tongue education has for individual, it can have economic and diplomatic benefits for the country as a whole as well.<sup>402</sup> These benefits that are associated with providing mother tongue education make it even more difficult to justify the differential treatment of linguistic minorities in terms of education. Therefore, failure to provide mother tongue education for adequate number of students could indeed amount to discrimination on the grounds of language under international human rights standards.

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<sup>400</sup> Cummins & Danesicite, *supra* at 49.

<sup>401</sup> Cummins, *supra* at 297.

<sup>402</sup> *Ibid* at 298.

### ***Conclusion and Recommendations***

The issues surrounding the linguistic minorities cannot be addressed in 100 pages. Hundreds and hundreds of pages have been written on this subject, and yet, so many questions unanswered. As said in the beginning of this thesis, a definite “yes” or “no” answer to the question of the right to education in mother tongue was not intended. Such issues have different dimensions, and it is not possible to provide a solution that will work in all territories and all times, as different situations call for different approaches. However, this thesis tried to discuss one of the many aspects of the right to education in mother tongue for the linguistic minorities in a multicultural society. As established, the right to education in mother tongue does not exist in international law. However, it has been recognized by some states due to the importance of mother tongue education in the survival of linguistic minorities and maintaining the world’s cultural diversity. On the other hand, providing mother tongue education for all, especially in states with great cultural diversity, is not an easy task. It requires economic and educational resources, and it is also an issue highly linked to the states’ policy in regard with the linguistic minorities. While the principles of equality and non-discrimination oblige states to avoid laws that are unjustifiably unfavorable to the minorities, positive obligations in this regard have not been imposed on them either. So this thesis tried to address one important question: can a positive obligation to provide mother tongue education for linguistic minorities be defined within the current framework of international law? As a multicultural society, can Canada’s language policies in education amount to discrimination in international law?

In order to address this question, the Canadian constitution guarantees for minority education language rights were discussed, and it was concluded that no such constitutional guarantee exists for the speakers of third languages, i.e. the Allophones. In addition, the discrimination framework

that is provided by international law was discussed in regard with language, and as education is a provincial responsibility in Canada, the provincial governments' approach was analyzed with consideration to this framework. According to this framework, discrimination is constituted if an individual or a group are treated unfavorably because of their language without any justifiable reason. While it is obvious that declaring an official language puts all the speakers of other languages at disadvantage, the element of "unjustifiability" distinguishes unfavorable discriminatory acts from the non-discriminatory ones. After careful discussions, it was concluded that if a large number of linguistic minorities reside in an area, the principle of equality places a positive obligation on states to recognize their language rights. This approach can be used in providing mother tongue education for linguistic minorities when they constitute a considerable number of an area's population. If the states fail to do so, they can be acting in a discriminatory fashion according to international law. With respect to Canada's approach to education, while the provincial governments have tried to address the Allophones' educational rights by teaching heritage language as subjects in public schools, mother tongue medium education is fairly limited, which means the international law's requirement is not being fulfilled, and therefore, discrimination on the grounds of language has occurred.

Whereas such theoretical approaches are valuable, I believe practical realities should be taken into account to make a sound judgement. That is why instead of accusing most of the states of violating international human rights law and the principle of non-discrimination, I want to propose a few suggestions that can help facilitate accommodating the linguistic minority's educational rights. In the jurisdiction chosen by this thesis, namely Canada, the Federal Government tries to protect the official linguistic minority's language education rights by proposing the "numbers warrant" test and the model of sliding-scale. I believe this approach can be extremely practical in terms of other

linguistic minorities: the number that entails the provision of publicly-funded schools for linguistic minorities can be determined using this model. The Canadian constitution also sets out another condition: one of the parents being educated in the minority language in Canada. Given that the parents' ability to speak the minority language properly plays an important role in the education of the child as well, this condition can be reasonably adjusted to the linguistic minority's needs. So in addition to adequate number of pupils, it is important that at least one of the child's parents are educated in the minority language, and therefore, proficient in that language. Finally, one last consideration would be demand. As mentioned earlier, some parents may actively want their children to assimilate into the majority community. While cultural values and traditions are important, people's personal choices and preferences should be respected, and if there is no demand, there is no need to burden the government. Most of the times the linguistic communities themselves acknowledge these conditions, and establish schools that fulfil their needs. The governments can start funding these schools in order to promote the linguistic minority's language rights.

All in all, even with the best efforts, there is no way that true equality is ever achieved. The important thing is that states try to address as many concerns and issues as possible, and constantly look for new ways to accommodate the needs of the members of the society, majority or minority. Only then it can be said that the states have fulfilled their duty to ensure the equal treatment of all.

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