Mother Tongue Education and the Law: A Legal Review (2005)

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« Une langue qu'on enseigne pas est une langue qu'on tue. »

This phrase written by Jules Renard would seem to make a rather self-evident point: you kill a language if you do not teach it.

This would lead most people to assume therefore that in an era that of course there has to be some right to mother tongue education in law, and especially international law, since democracy seems to be the only viable political system in most parts of the world and as most of us are told to believe, democracy is inherently receptive to the panoply of cultural and linguistic diversity which is the reality of most societies.

While many linguists and educationalists often refer to a "right to language" or to a "right to be educated in one's own language", and have done some in extremely detailed and well researched work, the purely legal point of view at the international level has not been so accommodating. Only in the last few years have international legal instruments – those which imposed legally binding rules rather than noble aspirations –recognise strictly speaking such a right, and even here one needs to be somewhat cautious as to what exactly is in place in legal terms.

An increasing variety of documents such as the United Nations' **Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities** and the 1996 **The Hague Recommendations regarding the Education Rights of National Minorities** prepared on behalf of the High Commissioner on National Minorities of the Organization for Security and Cooperation in Europe (OSCE) have more recently articulated such a "right" more clearly, but caution must be used in their use since, from a legal point of view, they are not binding in international law.

It is nevertheless true that at least from the point of view of the Council of Europe, two separate treaties – the **Framework Convention for the Protection of National Minorities**

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and the **European Charter for Regional or Minority Languages** - have more recently enshrined unambiguously a right to be educated in one's language, though in both cases this right is circumscribed to particular situations and conditions and is not a right available in all situations.

Additionally, developments in the application of the rights to education and non-discrimination in international law suggest that further clarifications as to the impact of this law on education in a minority language are emerging and will take some time before there is a fuller understanding of the role international law plays in this area.

What I should say is that there has been until recently a rather schizophrenic reaction to the claims of a right to mother tongue instruction from a legal point of view. Many lawyers, judges and legal scholars – indeed, probably many of you here today- were taught in law schools, on the basis of the European Court of Human Rights famous judgment known as the Belgian Linguistics Case, that there is absolutely no right to mother tongue education, at least under the European Convention on Human Rights. At the other extreme – and really to say that these are extreme positions is pretty accurate – there are those that say that of course there must be a right to mother-tongue education in international law, in spirit at the very least, since many of our human rights treaties are premised on tolerance and acceptance of diversity.

The problem with spirits of course is that they are but fleeting ghosts with no substance, and the reality in purely legal terms is somewhere in the middle of these two positions at both ends of a spectrum.

So what exists today in terms of mother-tongue education? First, let me make the point that most of the early legal developments after the Second World War rejected any reference to minorities having specific rights in relation to education in their own language. Indeed, a suggestion for such a clause on the Universal Declaration on Human Rights was clearly rejected as undesirable.

But as international law is not stagnant, the apparent *tabula rasa* in relation to the rights of minorities in the immediate aftermath of the Second World War was soon be displaced by the gradual appearance of a number of treaty provisions. These quickly started to acknowledge that there are rights which can be invoked in relation to educational rights and language preferences,.

Initially, a small number of bilateral peace treaties concluded after the war provided for minority schools to operate and use a minority language in their activities. For example, the 1946 **Treaty of Peace with Italy**, specifically guaranteed the right of the German-speaking minority in the province of Bolzano (Bozen) to "elementary and secondary teaching in the mother-tongue".

These localised steps in relation to the rights of minorities in the area of education would however only begin to extend to the global scene a decade later, first with the adoption of a treaty which provided a degree of protection for indigenous and tribal populations (which may in some states constitute minorities but are not necessarily so) and then with a truly international treaty dealing with discrimination in education. The International Labour Organisation **Convention No. 107 of 1957 concerning Indigenous and Tribal Populations** provides for protected indigenous populations the right to be taught in their mother tongue or, where this is not practicable, in the language most commonly used by the group to which they belong.

The more significant treaty at the global level for minorities from a legal point of view would be however the UNESCO **Convention against Discrimination in Education** of 1960 which makes it clear, in Article 2(b), that it does not constitute discrimination to establish or maintain, for linguistic reasons, separate educational systems or institutions. The UNESCO **Convention** also provides in Article 5(1)(c), that it is essential to "recognise 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", provided 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".

The wording of the above provisions almost half a century ago does not necessarily grant a right of minorities to be educated in their language. On the one hand, the treaty acknowledges the fundamental entitlement of minorities to have their "own", meaning private as opposed as to state-operated, educational activities. On the other hand, the UNESCO **Convention** does not appear to extend this right automatically in terms of the choice of the language of instruction to be used in these private minority schools, as this choice is not left to the parents but is dependent "on the educational policy of each state". Furthermore, even if a state's educational policy permits the use of a minority language in these schools, it must never prevent "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". It is at

the very best a timid, undemanding provision in terms of language requirements (Hastings, 1988, 21).

There is therefore some ambivalence in this treaty which impairs the usefulness of Article 5 as a basis for the right of minorities to receive education in their own language: first, Article 5 only deals with the creation of private schools and does not actually require that state authorities establish publicly-funded schools for minorities. Secondly, the treaty does not guarantee that the language used in these schools actually be the language of the minority. It is permissive rather than mandatory in this regard, meaning that this will only eventuate if the state's educational policy permits the use of a minority language. While some would have thought that a minority should be entitled automatically to freely determine the language of instruction used in its own schools, this early treaty – while not rejecting outright such use – did not go so far as to actually require it of all states from a strict reading of Article 5.

Still, the general tone of the UNESCO **Convention** is far from antagonistic to minorities being educated in their own language, quite the contrary. Read as a whole, it could be said to actively encourage states to permit minorities to use their language in their own schools even, even if not making it a strict legal obligation on states. In this sense, the UNESCO **Convention** can be seen as an early precursor to later legal developments in international law of the modern post-war period.

The main developments in the last 25 years in terms of international law need to be divided into two parts: those at the truly global level which have been more timid and restrained, and those at the regional level of the Council of Europe that have been very significant in giving a truly legal recognition and structure to an actual right for minorities to be educated in their own language.

At the global level the legal instruments dealing with education in minority (or indigenous) languages are limited to provisions such as Article 27 of the **International Covenant on Civil and Political Rights** (**ICCPR**) which provides that "[i]n those states in which...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...or to use their own language" (silent on education but widely believed to at least protect private minority schools), and the International Labour Organisation's **Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries**, in relation to indigenous and tribal peoples, guarantees a right to education in indigenous languages, but only "where practicable" and an entitlement to measures to preserve and promote the development and practice of

indigenous languages. Even more recently at the global level, the 1989 **Convention on the Rights of the Child** asserts in Article 29 that the education of the child shall be directed to the development of respect for the child's parents, his or her own cultural identity, language and values. Here again, however, the wording clearly does not require any use of a minority language as a medium of education, or even any suggestion that it should be taught: it only requires that states must direct education in a way that develops respect for his/her language, cultural identity and values.

Other documents at the global level often referred to as proving a more direct or general "right" to education in a minority language, such as the UN **Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities** and the draft UN **Declaration on the Rights of Indigenous Peoples**, are unfortunately not legally binding instruments. While they are indicative of a growing trend towards acceptance in international law of the principle that a right to be educated in one's language should be guaranteed, the fact remain that there is not yet a general, unambiguous and legally binding obligation for such a right clearly established. The limitations and vague wording of Article 27 of the **ICCPR** and Article 29 of the **Convention on the Rights of the Child**, the small number of ratifications of the **Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries**, and subjecting the Article 5 right in the UNESCO **Convention** to a state's policy all suggest that there is still, in strictly legal terms at the global level, some difficulty in getting the broad international consensus in order to make this a legally binding norm.

Developments within the Council of Europe in the last 20 years have been dramatically different and offer a much more solid basis for education in minority languages from a strictly legal point of view. Two legally binding treaties have given definite form and structure to this right: Article 14 of the **Framework Convention for the Protection of National Minorities** and Article 8 of the **European Charter for Regional or Minority Languages** both indicate that "in appropriate circumstances" states must make available in schools the teaching of or in a minority language. While both treaties have been criticised for the various ways states could circumvent the impact of their provisions (such as limiting the treaties' application to national minorities or traditional languages, the possibility for states to "opt out" from some clauses or even only nominate certain specific minorities are being allowed to be protected) and the weakness of both treaties' enforcement mechanisms, it remains that in legal terms they are the clearest expression of a right to not only learn, but in some cases to also receive some part of their education in their own language.

Some scholars have urged caution in relation to these "European" legal standards. The right as expressed in the two treaties of the Council of Europe is either restricted to undefined "national minorities" under the **Framework Convention for the Protection of National Minorities**, a category seemingly different from the more inclusive concept of minorities contained in United Nations treaties, or to "regional or minority languages" as defined in the **European Charter for Regional or Minority Languages**. Furthermore, even in the case of either a national minority language or a regional language, education this language is not automatic: it is limited to situations where it is "justified", "reasonable", or where the number of students in part of a territory is "substantial" or "sufficient". It would seem that the extent of the right depends, and that tiny minorities would in practical terms not be entitled to such a right.

Thus, the exact degree of use of a minority language as medium of instruction required will vary according to the particular context of each situation: the extent of demand for such instruction, the degree of use medium of instruction, the state's ability to respond to these demands, etc.

A national minority or speakers of a regional language would have under these European treaties, at minimum, the right to be taught their language in schools where practical and justified, even if their numbers are not sufficient for the use of their language as medium of instruction.

The most detailed treaty in this area, the **European Charter for Regional or Minority Languages**, indicates for example that the numbers must be "sufficient" for this purpose. This could suggest that the mere presence of one or a handful of pupils in a district would not automatically give rise to a right to be taught a minority language in a public school. However, in light of the many international and European instruments which generally refer to a state's obligation to protect and promote the language (and culture) of minorities, it would seem that what is "sufficient" should be interpreted in a generous and flexible way, and that the number of pupils required in order to be able to claim the right to be taught the minority language should be quite small if a State's resources make it reasonably practical to accommodate them.

There are beyond these legal developments numerous political and other pronouncements which together create an impressive foundation acknowledging the validity of providing education in a minority language. Amongst the more prominent are of course the UN **Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities**, the draft UN **Declaration on the Rights of Indigenous Peoples**, the Organisation on Security and Cooperation in Europe's **Document of the Copenhagen Meeting**

of the Conference on the Human Dimension, the **The Hague Recommendations regarding the Education Rights of National Minorities**, as well as a very large number of resolutions from bodies such as the European Parliament.

While this corpus may appear as eloquent recognition of the right to education in one's language, these are not strictly speaking legally binding instruments, and thus cannot alone form the basis for such a right in international law. Confusingly, some writers in this area tend to refer to these documents as evidence of an "implicit" right, not distinguishing the provisions which create clear legal obligations from those which may later form the basis of an emerging standard for "what the law ought to be" (*lege ferenda*).

Work in Progress

The relative youth of the **Framework Convention for the Protection of National Minorities** and the **European Charter for Regional or Minority Languages** and other instruments means that there are still a large number of uncertainties as to the exact parameters for the exercise of these rights, and indeed some degree of inconsistency can be noted in the way the monitoring bodies under their supervisory mechanisms interpret the obligations from these two treaties (Weller, 2005, chapter 14).

Much of the earlier work on education in a minority language supposed that there was in international law, somewhere and almost mystically somehow, an implicit "right to identity" which could be used to buttress claims to education in a minority language (Smith, 130-132), even though no treaty actually spelled this out. Most treaties, with the exception of the two more recent Council of Europe treaties, in fact appear to subject any use of a minority language as medium of instruction, outside of private schools, to the whims of state authorities' educational policies rather than providing for such instruction as of right under specific conditions.

Interestingly, a perhaps more "traditionalist" stream adopted the completely opposite point of view, claiming on the contrary that there was absolutely no basis for a right to minority instruction, at least in public schools, either because such a right was not specifically spelt out in a treaty provision or the right to education itself (see the European Court of Human Rights comments in the **Belgian Linguistics Case**, where it stated that the right to education does not automatically or necessarily include the right to education in a particular language), or because once a state has determined an official language, no other language could be used officially in state institutions, including presumably state schools and education provided in these schools

(some of the minority views of the UN Human Rights Committee in **Diergaardt v. Namibia**.

The latter views must not be underestimated. Most lawyers, judges and legal scholars in the world were advised during their legal training, and probably still hold the opinion, that "[o]nce a State party has adopted any particular language or languages as official language or languages, it would be legitimate for the State party to prohibit the use of any other language for official purposes…" (**Diergaardt v. Namibia**, dissident views, par. 5). In other words, there is no obligation for state authorities to use any minority language for any purpose whatsoever, including in public schools, if a State so decides.

A better understanding, somewhere in the middle, is now starting to take shape. In Europe, the presence of specific treaties that enshrine a right to be educated in a minority language, at least where there is a sufficient critical mass to make this practical, means that more and more work from a purely legal perspective is proceeding as to the implementation and a better understanding of these legal obligations.

At the global level, despite the lack of an international treaty clearly protecting an unambiguous right to education in a minority language, two new trends are appearing: first, the relatively rigid view that no international law is applicable in language matters once a state has chosen an official language is starting to make way to the recognition that rights such as non-discrimination may permit the use of other languages in addition to an official one. In other words, it may be unreasonable and unjustified in some circumstances – such as where a large number of people use a minority language – and therefore discriminatory not to provide for some use by state authorities by public authorities. This is in effect the reasoning which can be extrapolated in the majority position in **Diergaardt v. Namibia** and a more considered reading of the **Belgian Linguistics Case**. It is only very recently starting to be taken up by jurists (de Varennes, 1996, chapter 4).

Additionally, and surprisingly, the right to education itself is being "revisited" by some courts in a way which directly contradicts the more traditional views. In **Cyprus v. Turkey** (Judgment of 10 May 2001, Grand Chamber, the linguistic policies of Northern Cyprus authorities in the area of public education were essentially described as so inadequate in view of the circumstances as to constitute a violation of Article 2, Protocol 1 which deals with the right to education.

The Court noted that children of Greek-Cypriot parents in northern Cyprus wishing to pursue a secondary education through the medium of the Greek language were obliged to transfer to

schools in the south, though children could continue their education at a Turkish or English-language school in the north.

On the basis of the court's previous reasoning in the Belgian Linguistics Case, most of the more traditionalist lawyers and experts on the right to education had assumed that this would be the end of the matter, since once a state has an official language, it can choose not to use any other language for official purposes, including public education. The European Court, however, completely upset that logical edifice.

The logic used by the European Court is rather perplexing, to say the least. It admits on the one hand that Article 2 of Protocol No. 1 is devoid of a linguistic component, but then says there is a linguistic component for secondary education because authorities in Northern Cyprus provided Greek-language primary education, and therefore to stop offering it after primary school "negated" the right to education. Indeed, commentators have for the most part remained so unsure on how to interpret the European Court of Human Rights seemingly contradictory approaches that most have referred to it without trying to explain it any further (de Varennes, 2004).

Perhaps the European Court intended to say, in line with its previous reasoning in the Belgian Linguistics Case, that in light of the circumstances, the restrictions on public education in the Greek language in Northern Cyprus were unreasonable and unjustified because they were so blatantly inappropriate, and therefore discriminatory.

It is probably in this way that the judgment should be properly understood: otherwise, if the main reason - the absence of Greek language secondary education - was in breach of the right to education under Article 2 of Protocol No. 1, it would mean that the authorities of Northern Cyprus could avoid this human rights violation by simply abolishing all education in Greek provided in primary public schools: this is unlikely to be the direction and spirit of tolerance and inclusion the European Court had in mind.

Be that as it may, the above judgement of the European Court of Human Rights raises a new view of the right to education, since it rejects in effect the official language used by authorities in Northern Cyprus as the exclusive language of education at the secondary level, and imposes the use of another language for purposes of public education, contrary to legislation in place. The traditionalist view as expressed by the dissident views in **Diergaardt v. Namibia** thus finds itself also – albeit perhaps implicitly – rejected by the European Court of Human Rights.

Few legal experts have however fully considered, or even acknowledged, the potential ramifications of both of these results. One of the main problems still currently facing most jurists formed along the more traditional lines of international law is that it is not easy to accept that language rights exist, sometimes on the basis of the right to non-discrimination, and require the use of a minority language even if it is not permitted under a state's official language legislation. For most of them, any language right, including language in a minority language in a public school, is a "special" or "positive" measure which can only exist if and when specific legislative "permission" is granted by state authorities.

On the other end of the spectrum, jurists who had assumed that the right to education in a minority language in international law naturally had to exist "somewhere" now have another provision which can solidify such claims. The problem here is that even if more reliance may be had on the right to education, in combination with non-discrimination or the right to family life may help, it is not an unqualified right to education in a minority language. As shown by the **Belgian Linguistics Case** and the European Court of Human Rights rather hesitant and contradictory position in **Cyprus v. Turkey**, the exact extent or parameters of a linguistic component for such a right in international law are far from crystal clear, and will probably require many more cases before there is a much greater degree of certitude in this area from a legal point of view.

One of the problems with this is that, in the absence of a specific international treaty provision setting out the conditions where a right to education in a minority language in public schools is guaranteed, those two more extreme positions among jurists will probably be battling out this matter in various international for many years to come. It also means that for minorities in most parts of the world, any recourse to the limited remedies and mechanisms available at the international level will likely be fraught with uncertainties and risks.

From a legal point of view at the European level, however, results are likely to be better, at least in states which have ratified one or both of the Council of Europe treaties that impact on the issue of language and education. There are undoubtedly difficulties in terms of the weakness of both implementation mechanisms for these treaties and inconsistencies of interpretation of the rights under the **European Charter for Regional or Minority Languages** and the **Framework Convention for the Protection of National Minorities** by the Advisory Committees charged with the supervision of these legal obligations. At least from a legal perspective, however, there is a formally recognised right to education in a minority language where practical which can be built upon.

Future Directions

It was never intended in international law that the right to education include the right to education in one's own language (Lebel, 1974, 231-232). While various UN and other documents would frequently laud the benefits of providing some degree of instruction in a minority language, these documents were either not treaties (UN **Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities**) and therefore not a source of international legal obligations, or they contained ambiguous provisions which in the end seemed to leave the matter of choice of language of education in public schools to the discretion and determination of state authorities.

For legal traditionalists, this meant that while a state could be generous and provide for education in a minority language if state authorities decided to take "special positive measures", it was not a right which anyone could claim.

For jurists seeking to protect and promote minorities and their languages, there were attempts to construct arguments for an implicit, if somehow amorphous, right to identity, or culture, or some other bases in support of an international right to education in a minority language.

While the latter's methods and arguments cannot be said to have won the day, it would seem that for the most part the direction of international law may be reaching the same ultimate goals in the future.

At the level of the Council of Europe, the legal obligation is now entrenched in two treaties: state authorities in countries having ratified these treaties must provide for education in a minority language where it is practical to do so, though acquisition of the official language must also always be assured. Future clarification of these legal norms is however still needed and likely to focus on the circumstances where it can be said to be practical, or not, for this right to be applied.

At the global level, the absence of a clear legal provision in any international treaty for states to unambiguously having the obligation to provide education in a minority language would seem initially to hamper any further recognition of such a right. There are nevertheless two distinct trends that may have considerable impact in the future: first, the fairly recent development at the global level of various instruments such as the UN **Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities** which, while not

creating directly any legal obligations, still indicate an acceptance of the validity of, and perhaps leading up to the adoption of an eventual right to education in, a minority language. Secondly, the even more recent re-assessment by legal scholars and adjudicative and monitoring bodies such as the European Court of Human Rights and UN Human Rights Committee of the right to education and non-discrimination may breathe new life in existing legal standards. While not necessarily a view shared by most jurists trained to consider an official language policy in education and other areas of state involvement as exclusive, it would seem that the international human rights standards such as non-discrimination and education not been widely understood or applied in the area a language. This therefore may be another new frontier that could be increasingly examined and clarified in the years to come, and have some potential for minorities in the area of education.