

A Comparative Examination of Official Minority Languages in the Judicial System: Foundational Principles

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Pour mieux mettre en perspective le bilinguisme judiciaire au Canada, l'auteure propose une analyse sur une base comparée de plusieurs de ses éléments. D'abord, elle se demande quel est le contenu du droit d'être entendu, un contenu variable en fonction des juridictions. Puis, le bilinguisme judiciaire tel que pratiqué au Canada comporte non seulement un aspect personnel, mais aussi territorial ou régional, ce qui n'est pas sans causer d'importantes distorsions entre les domaines criminel et civil.

I. INTRODUCTION — FOUNDATIONAL PRINCIPLES

The protection and promotion of minority language communities is a fundamental thread in the fabric of Canadian society. The struggle for official minority language rights recognition long predates the Confederation of Canada,¹ and minority language rights have continued to evolve with the growth of our nation. To be sure, it has not been always been an easy process, but much progress has been made. Minority language rights are currently protected in several facets of our society: in education, in federal and some provincial and territorial legislative processes, and in federal, territorial and some provincial government functions. While each is essential, I will focus on the protection and

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¹ Consider the *Quebec Act, 1774* (U.K.), 14 Geo. III, c. 83, reprinted in R.S.C. 1985, App. II, No. 2 and the *Constitutional Act, 1791* (U.K.), 31 Geo. III, c. 31, reprinted in R.S.C. 1985, App. II, No. 3.

promotion of official minority language rights in Canada's judicial system.²

Language in the judicial system is regulated at the federal, territorial and provincial levels through both constitutional and legislative instruments. Rather than discussing these particular provisions and the rights and duties associated with each, I will discuss four principles which, in my view, form the foundation of minority language protection in Canada's judicial system. They are foundational because adherence to them ultimately dictates whether minority languages will be completely integrated into our legal infrastructure. In short, they are necessary to achieving true judicial bilingualism³ in Canada.

The first principle is the constitutional entrenchment of minority language rights in the judicial system. Constitutional protection is stronger than legislative protection, not only because of the relative ease with which legislation can be amended, but also because of the progressive interpretation of constitutional rights. The second principle is the right to use minority language rights in judicial proceedings, separate and apart from the right to an interpreter or, said differently, the right to be understood. The distinction between the right to use one's own language and the right to an interpreter is fundamental and one which is often not appreciated. The third principle is the recognition of language rights based on individual choice (personality) rather than location (territoriality). The sound determination has been made in Canada that while it is impossible to avoid territoriality completely, it is important to minimize rationing of minority language rights in the judicial system to minorities on the basis of their location.⁴ The final principle is the use of non-legislative tools to promote the integration of minority languages at the institutional level of the judicial system. These tools include legal education and the publication of legal articles and texts in the minority language; the creation of professional associations based on minority

² This paper draws on my recent work in Chapter 3: Bilingualism and the Judicial System in Michel Bastarache, ed., *Language Rights in Canada*, 2d ed. (Cowansville, Qc: Yvon Blais, 2004). This paper is intended to introduce and describe the foundational principles underlying the constitutional and legislative provisions discussed in that chapter.

³ Judicial bilingualism means the extent to which an individual can use either official language in the judicial system. Generally, the phrase "official languages" means French and English.

⁴ This is obviously not the case with other rights such as the right to education which depends to a certain extent on the size of the population. See Mark Power, "Language Rights and Education" in Bastarache, *supra*, note 2.

language status and the integration of minority languages in law societies. These initiatives play a vital role in strengthening Canada's linguistic legal infrastructure.

To better illustrate the contours of each of these principles, it is instructive to compare them with the choices other countries have made.⁵ Examining different approaches to minority language rights not only provides us with a deeper understanding of our own system, it also generates new ideas about how we can better protect minority language rights in Canada. It is important to note, however, that the usefulness of a comparative approach is limited by the complexities inherent in the protection of minority language rights and the important difference in historical, cultural and demographic contexts. As mentioned earlier, language rights are protected in many facets of society and therefore it is also difficult, if not impossible, to isolate and measure the effects of one facet on the whole. Thus, it is often difficult to measure the impact of judicial bilingualism policies on the protection of minority language rights.

I now turn to a discussion of each principle, broadly examining its implementation in the Canadian judicial system and drawing brief selective international comparisons.

II. CONSTITUTIONAL VS. LEGISLATIVE PROTECTION OF MINORITY LANGUAGE RIGHTS

The constitutional protection of minority rights is generally considered to be paramount to legislative protection. Constitutions are subject to more rigorous amending formulae than legislative provisions. Further, constitutional provisions unlike their legislative counterparts are to be interpreted progressively to reflect the changing nature of society.⁶ The constitutional recognition of a minority right carries a significant symbolic weight or importance; it constitutes recognition that the minority right is a fundamental tenet of society.

In Canada, the constitutional protection of minority language rights reflects our commitment to the flourishing of both official language

⁵ These comparisons are not intended to be comprehensive or exhaustive but are merely used to illustrate the contours of the protection of official language rights in Canada.

⁶ Peter W. Hogg, *Constitutional Law in Canada*, loose-leaf (Scarborough: Thomson Canada, 1997), at 15.9(f).

communities. The constitutional provisions entrenching minority language rights in the judicial system include section 133 of the *Constitution Act, 1867*,⁷ section 19 of the *Canadian Charter of Rights and Freedoms*,⁸ and section 23 of the *Manitoba Act, 1870*.⁹ These provisions cannot be unilaterally amended by the legislature of the day.¹⁰ Further, as constitutional provision, each is to be interpreted progressively, as a "living tree capable of growth and expansion within its natural limits."¹¹ There is no doubt that these constitutionally protected language rights are essential to judicial bilingualism. However, these constitutional guarantees represent a "minimum"; they are the basic framework upon which federal and provincial legislative schemes are grafted.¹²

Thus, to get a complete picture of language rights in Canada, reference must be made to the numerous legislative provisions which provide a more comprehensive web of protection.¹³ Indeed, these legislative provisions are of such great importance that, in some cases, Canadian courts have elevated their status above that of ordinary legislation. For example, the federal *Official Languages Act* has been afforded quasi-constitutional status by the Federal Court of Appeal while the Supreme Court of Canada has affirmed a progressive interpretation of section 530 of the *Criminal Code*.¹⁴

⁷ (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

⁸ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

⁹ (Can.), 33 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 8.

¹⁰ In fact the amendment of s. 133 of the *Constitution Act, 1867* and s. 23 of the *Manitoba Act, 1870* as they apply to federal institutions and subs. 19(1) of the *Canadian Charter of Rights and Freedoms* requires the unanimous consent of Parliament and the provinces pursuant to para. 41(c) of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. Section 133 as it applies to institutions of Quebec, s. 23 as it applies to institutions of Manitoba and subs. 19(2), by contrast, would appear only to require the approval of Parliament and the province bound: *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 43(b).

¹¹ *Edwards v. Canada (Attorney General)*, [1930] A.C. 124, at 136 (P.C.), per Lord Sankey, L.C. Although this progressive interpretation of language rights was not accepted in *MacDonald v. Montreal (City)*, [1986] S.C.J. No. 28, [1986] 1 S.C.R. 460, the Supreme Court affirmed this approach in *R. v. Beaulac*, [1999] S.C.J. No. 25, [1999] 1 S.C.R. 768.

¹² *MacDonald v. Montreal (City)*, *id.*, at 496. For a discussion of the extent of Canada's constitutional protection of minority languages in the judicial system, see Chapter 3 of *Language Rights in Canada*, *supra*, note 2.

¹³ For a description of the various federal, territorial and legislative provisions, please see Chapter 3 of *Language Rights in Canada*, *supra*, note 2.

¹⁴ *Canada (Attorney General) v. Viola*, [1990] F.C.J. No. 1052, [1991] 1 F.C. 373 (C.A.); *R. v. Beaulac*, *supra*, note 11.

The degree to which a country constitutionally entrenches language rights may reflect its commitment to their protection. Different countries protect language rights to varying degrees in their constitutions, and thus appear to ascribe different degrees of importance to the recognition of language rights in certain contexts. For example, some countries, such as Haiti and France, simply recognize a certain language or languages as official or national.¹⁵ Others, such as Italy, recognize a general right to non-discrimination with respect to language and in some cases a general duty to protect minority language communities.¹⁶ Those countries that protect the right to use a minority language in the judicial system offer the most rigorous protection of judicial bilingualism. However, while important, the inclusion of minority language rights at the constitutional level does not necessarily guarantee fulsome protection. As we will see, more is required.

It is important to note that most countries recognize the constitutional right to an interpreter under the auspices of minority language rights.¹⁷ The categorization of the right to an interpreter as a minority language right is problematic for reasons to which I now turn.

III. MINORITY LANGUAGE RIGHTS PROTECTION VS. TRIAL FAIRNESS

The right to use a minority language in the judicial system and the right to an interpreter are distinct rights; the latter is not a minority language right. While both are concerned with "language", these rights are not intended to achieve the same objective. Confusing the right to an interpreter with minority language right has serious implications for official minority language communities.

¹⁵ *Constitution of Haiti, 1987*, art. 5. *Loi constitutionnelle de France* (4 October 1958), art. 2.

¹⁶ These include *Constitution of Italy, 1948*, arts. 3 and 6; *The Constitution of The Hashemite Kingdom of Jordan, 1952*, arts. 2 and 6; *Basic Law for the Federal Republic of Germany*, art. 3. There are several others as well. For a current listing of the constitutional language provisions for many sovereign states, see Sally Holt & John Packer, "OSCE Developments and Linguistic Minorities" (2001) 3:2 *International Journal on Multicultural Societies* 107.

¹⁷ Fernand de Varennes, *Language, Minorities and Human Rights* (The Hague: Marinus Nijhoff, 1996), at 182-83. These countries include Albania (art. 3); Antigua and Barbuda (art. 15); Bahamas (art. 20); Barbados (art. 18); Belize (art. 5); Botswana (art. 10); Dominica (art. 3); Congo (art. 17); Ethiopia (art. 19); Jamaica (art. 15); Kenya (art. 72); Lithuania (art. 117); New Zealand (s. 24). For a current listing: see Holt & Packer, *id.*

The right to use a minority language in the judicial system is one component of a broader scheme of minority language rights concerned with the protection and promotion of a minority language culture or community. It corresponds, for example, to the right to use either French or English in the Parliament of Canada and in the legislatures of Quebec and of New Brunswick. The right to an interpreter, on the other hand, is concerned with trial fairness or due process. As Bastarache J. explained in *R. v. Beaulac*:

The right to full answer and defence is linked with linguistic abilities only in the sense that the accused must be able to understand and must be understood at his trial. But this is already guaranteed by s. 14 of the Charter, a section providing for the right to an interpreter. The right to a fair trial is universal and cannot be greater for members of official language communities than for persons speaking other languages. Language rights have a totally distinct origin and role. They are meant to protect official language minorities in this country and to insure the equality of status of French and English. This Court has already tried to dissipate this confusion on several occasions.¹⁸

At the constitutional level, bilingualism in the judicial system is entrenched in section 133 of the *Constitution Act, 1867* which provides:

Either the English or the French Languages may be used by any Person in the Debates of the Houses of the Parliament of Canada and of the Houses of the Legislature of Quebec; and both those Languages shall be used in the respective Records and Journals of those Houses; *and either of those Languages may be used by any Person or in any Pleading or Process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec.* (emphasis added.)

Section 19 of the *Canadian Charter of Rights and Freedoms* also provides:

19(1) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court established by Parliament.

(2) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court in New Brunswick.

¹⁸ *Beaulac*, *supra*, note 11, at para. 41.

The Charter protects the right to an interpreter, separately from other legal rights, such as the right to counsel. Section 14 of the Charter provides:

A party or witness in any proceeding who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance to an interpreter.

A brief examination of the nature and objectives of these two rights reveals their differences. Minority language rights are intricately intertwined with the right to cultural protection. Language has “intrinsic value as a cultural inheritance and [is] part of an ongoing way of life.”¹⁹ The degree to which the state protects minority language, and therefore protects a minority culture, varies with the state objective — assimilation, tolerance or promotion.²⁰ The means required to promote the minority culture require the state to provide for equal use of the minority language within public institutions. The complete integration of a minority language in the judicial system ensures that the values and culture of society as a whole, not just the majority, are represented at the institutional level. As Réaume points out, the more fully institutional bilingualism is realized, “the more the minority can feel comfortable with these institutions as representative of their linguistic community, and the more they can feel that public institutions are open to them, belong to them.”²¹ Ultimately, the integration of minority language at the institutional level is one mechanism that protects and promotes the minority culture. Requiring the judicial system to operate in both official languages is deeply symbolic of Canada’s bilingual heritage.

¹⁹ Denise G. Réaume, “The Demise of the Political Compromise Doctrine: Have Official Language Use Rights Been Revived?” (2002) 47 McGill L.J. 593, at 617.

²⁰ Where assimilation is the objective, the use of the particular language would likely be prohibited. Where the objective of the state is mere tolerance, a non-discrimination clause would likely be the norm chosen. Non-discrimination provisions and the question of whether this type of norm is sufficient to protect minority language rights is beyond the scope of this paper. It appears, however, that the affirmative obligations beyond non-discrimination is required as “a pure non-discrimination norm could have the effect of forcing persons belonging to minorities to adhere to a majority language, effectively denying them their rights to identity by treating them just like any member of the majority.” Organization for Security and Co-operation in Europe, High Commission on National Minorities, “Report of the Linguistic Rights of Persons to National Minorities in the OSCE Area,” online at: <www.osce.org/documents/hcnm/1999/03/239_en.pdf> (last accessed 4 November 2005).

²¹ Réaume, *supra*, note 19, at 619.

Conversely, fair trial rights are procedural in nature. Procedural rights flow from the principle of full answer and defence which is a fundamental tenet of most legal systems. Such rights have no regard for the language being spoken or its status as an official language, nor are such rights concerned with the culture of the speaker. The objective is not to protect the minority culture or recognize Canada's bilingual heritage, but rather to ensure that the individual accused has the opportunity to fully defend himself or herself against the state. The right to an interpreter does not add to the linguistic legal infrastructure.

As mentioned above, many countries provide a constitutional right to an interpreter, some under the auspices of language rights.²² Similarly, international instruments such as article 14(3) of the *International Covenant on Civil and Political Rights*,²³ articles 5(2) and 6(3) of the *1950 Convention for the Protection of Human Rights and Fundamental Freedoms*,²⁴ and article 10(3) of the *1995 Framework Convention for the Protection of National Minorities*²⁵ ensure that individuals facing criminal charges, whether nationals or not, are informed of the charges against them in their own language and are therefore provided with the opportunity to full answer and defence.

The implications of not recognizing this distinction are serious. Those who argue that the right to an interpreter is a language right conflate these separate kinds of rights on the basis that both confer a right to be understood in court. This line of reasoning does not appreciate the difference between a proceeding in the official language of one's choice and a trial with an interpreter. In effect, this approach places official language minorities on the same footing as other linguistic minorities in the judicial system by failing to recognize the distinct cultural and political position of the official language communities. It therefore fails to appreciate the nature of minority language rights and misunderstands

²² For example de Varennes, *supra*, note 17, at 182 includes these states in his discussion of language rights although he does explain that "when a sufficiently high numerical threshold of speakers of a language has been reached, states should provide for an appropriate level of use of this language in its institutions," *id.*, at 185. Countries having a constitutional right to an interpreter are cited *supra*, note 17.

²³ *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, arts. 9-14, Can. T.S. 1976 No. 47, 6 I.L.M. 368 (entered into force 23 March 1976, accession by Canada 18 May 1976).

²⁴ (4 November 1950), E.T.S. No. 005 (entered into force 3 September 1953).

²⁵ E.T.S. No. 5, 213 U.N.T.S. 221.

the actions required to protect an official minority language. If no distinction is made, the members of the minority who are bilingual could be forced to use the majority language for reasons of administrative convenience.

IV. TERRITORIALITY VS. PERSONALITY

The third foundational principle is the exercise of minority language rights in the judicial system based on personality as opposed to territoriality. The tension between these two approaches often arises in federal countries where there is a geographical concentration of official minority language communities. A comparison of minority language rights protection in the judicial systems of Canada and Switzerland illustrates the distinction nicely. These categories are not mutually exclusive but rather represent two ends of a spectrum. In my view, an approach tending towards individual choice is preferable.

The principles of territoriality and personality are discussed by Goreham in *The Principles of Individual Choice and Territoriality in the Implementation of Language Rights: A Report Submitted to the Commissioner of Official Languages*.²⁶ Language rights based on territoriality are regionally based rights and therefore protect a critical mass of minority language speakers in a particular area.²⁷ Conversely, rights based on personality do not depend on the region in which they are exercised. Ideally, in a personality based system, the minority language can be used with the same ease no matter the location. Two federal countries illustrate the difference in approaches; Canada striving for a system based on individual choice and Switzerland for a territorial division of language communities. I will start with the latter.

Switzerland has adopted a territorial approach to language rights protection. Minority language rights are constitutionally protected at both the federal level and the cantonal level. Article 70 of the federal Constitution recognizes German, French, Italian and Romansh as the

²⁶ Richard Goreham, *The Principles of Individual Choice and Territoriality in the Implementation of Language Rights: A Report Submitted to the Commissioner of Official Languages* (Canada: March 1994).

²⁷ *Id.*, at 4.

official languages of the Federation.²⁸ The cantons, however, designate their official languages and provide for their institutional use.²⁹ As a result, minority language rights protection varies from canton to canton. Interestingly, many of the bilingual cantons organize language use into zones or districts. The regulation of language in the legal system occurs at the cantonal level rather than the federal level with one exception. The result is almost completely regionally-based language rights recognition with little room for individual choice.

Two cantons, one bilingual and the other unilingual, evidence an intention to adopt a territorial distribution of language rights in Switzerland, but as in Canada, have not done so completely. The Canton of Berne is bilingual yet its bilingual character must be appreciated in relation to its districts. The Canton's constitution establishes French as the official language in the Jura Bernois district; French and German as the official languages in the Bienne district; and German as the official language in the other districts.³⁰ The right to use a particular language in the legal system depends on the district where the court or tribunal is located. The language of the proceedings is in German in the German districts, French in the French districts and the choice of either in the bilingual district.³¹

In the unilingual cantons, such as Geneva, only one language is recognized as official: French. It is this language that is used in the cantonal judicial system although the right to an interpreter generally exists.³² This approach, in effect, regionalizes language groups and lacks the flexibility necessary to accommodate those who do not fit neatly within the protected categories.

²⁸ *Federal Constitution of the Swiss Confederation* (18 April 1999), art. 70. The Constitution is available online at: <<http://www.swissemb.org/legal/const.pdf>> (last accessed 5 November 2005).

²⁹ Switzerland has 26 cantons.

³⁰ *Constitution of the Canton of Berne* (6 June 1993), art. 6. The Constitution is available online at: <http://www.admin.ch/ch/f/rs/131_212/index.html> (last accessed 4 November 2005).

³¹ *Code de procédure pénale*, E 4 20 (Grand Conseil de la République et du Canton de Genève: 29 September 1977; in force: 3 April 1978), art. 59(1); online Site officiel de l'Etat de Genève : service de la législation: <http://www.geneve.ch/legislation/rsg/f/s/rsg_E4_20.html> (last accessed 4 November 2005). See also *Loi sur l'organisation des juridictions civile et pénale* (14 March 1995), art. 2, online Recueil systématique des lois bernoises: <http://www.sta.be.ch/belex/f/1/161_1.html> (last accessed 4 November 2005). Interestingly, s. 83 of the *Loi sur l'organisation des juridictions civile et pénale* requires that every person who acts as a lawyer or notary for the Minister of Justice must know both national languages.

³² *Code de procédure pénale de Genève*, *id.*, s. 283.

There is, however, some room for individual choice at the federal level. Switzerland's Federal Tribunal has the jurisdiction to hear certain criminal cases. At this level, parties are permitted to use the official language of their choice regardless of the location of the proceedings.³³

Turning to Canada, there is a history of competition between the principles of territoriality and individual choice in the context of the judicial system. This is largely the result of the division of powers between the federal and provincial governments with respect to language. Today, language rights are generally based on individual choice although some variation still exists. To understand this regional variation, a brief word on the division of powers with respect to language is necessary.³⁴

Language does not appear as a specific head of legislative jurisdiction in the *Constitution Act, 1867*. The power to legislate in relation to language is therefore ancillary to the classes of powers belonging to the federal and provincial governments respectively. The legislative authority to regulate language use in the judicial system depends on the nature of the court and the matter before it. In many instances, the federal and provincial legislatures have concurrent jurisdiction to regulate official language use in the judicial system.³⁵ At the federal level, language use in the administration of justice is provided for in three respects. First, the *Official Languages Act* is authorized as ancillary to the federal power to make laws for the peace, order and good government of Canada.³⁶ Second, the use of official languages in the federal courts is authorized pursuant to section 101 of the *Constitution Act, 1867*. Third, providing for the use of language in criminal proceedings is ancillary to section 91(27) of the *Constitution Act, 1867* which authorizes the federal government to legislate in respect of the procedure in criminal matters.

Provincial governments are authorized to regulate the language of the legal system in two areas. Pursuant to section 92(14) of the *Constitution Act, 1867*, the province is empowered to enact laws respecting the administration of justice. In *Jones*, the Supreme Court of Canada explained that "in the absence of federal legislation competently dealing

³³ Goreham, *supra*, note 26, at 13.

³⁴ For a complete discussion on the division of powers in respect of language, please see the discussion in Chapter 3, Bastarache, *supra*, note 2, at 148.

³⁵ *Jones v. New Brunswick (Attorney General)*, [1975] 2 S.C.R. 182.

³⁶ *Id.*

with the language of proceedings or matters before provincial Courts which fall within the exclusive federal legislative authority," it is open to a provincial legislature to legislate the use of the official languages in a provincial court.³⁷ The language of prosecution of provincial offences and civil proceedings is determined by the province. The provincial governments also have the authority to regulate the provincial law societies and their membership.

The constitutional provisions mentioned earlier, the provisions of the *Official Languages Act*³⁸ and section 530 of the *Criminal Code* of Canada,³⁹ are intended to provide a high level of individual choice at a national level. In my view, this personality based approach to minority language rights is preferable. I agree with Goreham who notes that language policy based on individual choice counterbalances the weight of demographics in a region by guaranteeing language choice in institutions and enhances mobility within a plurilingual country.⁴⁰ Further, enabling individuals to use either official minority language in the judicial system, enhances the ability of minority language speakers to use their language in a majority setting which, in turn, promotes the vitality of the minority language community. Enabling individual choice also has the indirect effect of increasing the number of bilingual lawyers and judges across the country. As Leckey explains, this in turn, increases the number of lawyers and judges who are capable of appropriately construing bilingual legislation by referring to both language versions.⁴¹ In sum, a personality based approach to judicial bilingualism is one mechanism which promotes a high level of personal bilingualism on a national level; it encourages the use of both official languages among all Canadians.⁴²

The division of powers, however, makes it impossible for language regulation in the administration of justice to be completely based on personality. Some variation exists from province to province and territory to territory. While each province has a basic level of bilingualism

³⁷ *Id.*, at para. 22.

³⁸ *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.).

³⁹ R.S.C. 1985, c. C-46.

⁴⁰ Goreham, *supra*, note 26, at 5.

⁴¹ Robert Leckey, "Bilingualism and Legislation" in Bastarache, *supra*, note 2, at 122-28.

⁴² However, there are many more significant ways, such as education, to encourage personal bilingualism.

as a result of the federal provisions, there is disparity among the provinces in the areas of provincial matters such as provincial offences, small claims courts and provincial administrative tribunals. Some provinces provide a high level of judicial bilingualism, others very little. At one end of the spectrum is New Brunswick, which has declared itself to be officially bilingual and has enacted extensive legislation providing for the use of both languages in its courts and the translation of certain judgments.⁴³ At the other end of the spectrum is British Columbia, which offers little opportunity for individuals to choose the minority language in the judicial system.⁴⁴

The most recent study of access to justice in both official languages conducted by the Department of Justice, *Environmental Scan: Access to Justice in Both Official Languages*, confirms these regional disparities at a provincial court level but also reveals a more worrisome trend, namely regional disparity of rights protection at the federal level.⁴⁵ While a small sample of lawyers was used for this study, the results — if indicative of a larger trend — are troubling. The study concluded that in the 12 provinces and territories where French is the minority language, there is a relatively high level of dissatisfaction with a number of aspects of the judicial system and legal services in French. English lawyers in Québec, on the other hand, were largely satisfied with judicial and legal services delivered in the official minority language. They regularly complain that there is little translation of judgments. With respect to the use of French as a minority language, some of the reported dissatisfaction arose from the use of section 530 of the *Criminal Code* which provides for the right to use a minority language in criminal proceedings. Given the national nature of this right, it should be immune to regional variation.⁴⁶

⁴³ *Official Languages Act*, S.N.B. 2002, c. O-0.5, s. 16.

⁴⁴ British Columbia has incorporated the provisions of the *Criminal Code* into the prosecution of provincial offences: *Offences Act*, R.S.B.C. 1996, c. 338. In addition, British Columbia, like most of the other provinces, also provides that an individual who does not understand the official language of the accused will be ineligible to serve as a juror: *Jury Act*, R.S.B.C. 1996, c. 242.

⁴⁵ Department of Justice, *Environmental Scan: Access to Justice in Both Official Languages*, online at: <<http://canada.justice.gc.ca/en/ps/franc/enviro/toc.html>> (last accessed 4 November 2005) [hereinafter “*Access to Justice*”].

⁴⁶ The study also looked at the level of satisfaction in the areas of family law and bankruptcy, *id.*

The study examined various components of criminal law proceedings. The regional disparities of the application of this right are glaring.⁴⁷ In New Brunswick, most lawyers have an awareness of section 530 of the *Criminal Code* and advise their clients each time the opportunity to make a linguistic choice arises.⁴⁸ Further, there are usually forms available in both official languages and judges in New Brunswick generally advise the accused of their linguistic options each time the opportunity arises. In contrast, in Alberta, approximately half of lawyers are aware of section 530 and advise their clients accordingly. No lawyer reported that forms were available in the minority language or that the accused was advised of his or her official language rights by the presiding judge.⁴⁹

Based on the statistics, the authors of the study concluded that access to justice in Canada appears to follow a supply and demand curve. The authors explained in their general conclusion:

In some jurisdictions, particularly those where the official language minority is numerically small, there is a tendency to say that the low number of requests for judicial and legal services in the minority language justifies a somewhat limited supply of services.⁵⁰

This notion of "supply and demand" is certainly more consistent with the principle of territoriality rather than the principle of individual choice. The reality portrayed by this study is in direct contradiction with the intention of section 530 which is to ensure that members of official minority language communities are able to use the official language of

⁴⁷ Forty per cent of lawyers who are aware of s. 530 and its implications believe that judges inform accused individuals who are not represented by counsel of their language rights, 49 per cent of lawyers believe that it is easy to obtain services in French from judges in criminal cases, and 46 per cent of lawyers believe that it is easy to obtain services in French from prosecutors (both federal and provincial), and 35 per cent say that it is easy to obtain services in French both from officers of the provincial and superior courts and from support staff at the courthouses, *id.*

⁴⁸ In New Brunswick, 85 per cent of lawyers have an awareness of s. 530 of the *Criminal Code*; 82 per cent of lawyers advise their clients each time the opportunity of making a linguistic choice arises; 75 per cent of lawyers indicated that judges advise the accused of their linguistic options each time the opportunity arises; and 50 per cent of lawyers reported that the relevant forms were available in French, *id.*

⁴⁹ Sixty per cent of lawyers have an awareness of s. 530 of the *Criminal Code*; 50 per cent of lawyers advise their clients each time the opportunity of making a linguistic choice arises; zero per cent of lawyers indicated that judges advise the accused of their linguistic options each time the opportunity arises; and zero per cent of lawyers reported that the relevant forms were available in French, *id.*

⁵⁰ *Id.*

their choice in the judicial system. While the number of persons surveyed was small, the results of the study indicate that more research on the implementation of language rights needs to be done.

V. INSTITUTIONALISM AND NON-LEGISLATIVE TOOLS

Constitutional and legislative protection of minority language rights is the first step in the integration of a minority language at the institutional level. The institutionalization of a language requires much more. Two components necessary for the integration of language in the judicial system include the publication of statutes and regulations and the ability to communicate with court staff in the minority language which are regulated by statute.⁵¹ For a minority language to become a "language of the law," certain non-legislative mechanisms are also required, including legal education, translation and publication of court decisions, the creation of law dictionaries, bilingual sources in the Bar and the formation of professional associations based on language.⁵² Similarly, case digests and case reports must be available in both official languages so that all lawyers may gain a complete understanding of the law. These components are essential but are often forgotten. I will begin by briefly discussing the situation in Tanzania which is illustrative of the need for non-legislative tools in implementing language rights. I will then briefly describe the use of non-legislative tools in Canada, focusing particularly on French as a minority language.

The inability to fully integrate Kiswahili into the legal system in Tanzania illustrates the conditions necessary for a language to thrive in the legal system.⁵³ The Tanzanian government has demonstrated an intention to integrate Kiswahili into the judicial system, but has been

⁵¹ I will not address these aspects, but refer you to Chapters 2 and 4 in Bastarache, *supra*, note 2.

⁵² Barthazar A. Rwezaura, "Constraining Factors to the Adoption of Kiswahili as a Language of the Law in Tanzania" (1993) 37 J. Afr. L. 30, at 31.

⁵³ Kiswahili may not, strictly speaking, qualify as a minority language. While Kiswahili is the mother tongue for few Tanzanians, most have a working knowledge of this language. Given its wide use among the population, Kiswahili served to unify the country during the campaign for political independence. The use of Kiswahili in Tanzania is motivated, in part, to eliminate the remaining vestiges of colonialism. Nevertheless, the Tanzanian government's attempt to adopt Kiswahili as a language of the law nicely illustrates the conditions necessary for integrating a language in the judicial system.

unable to in the absence of legal education, legal dictionaries, or the availability of judgments in Kiswahili.

By way of background, the *Magistrates Court Act, 1984*, and Chapter Five of the *Constitution of the United Republic of Tanzania* create Tanzania's legal structure.⁵⁴ The primary courts are the lowest tier of a five tier court system while the Court of Appeal sits at the apex.⁵⁵ Section 13 of the *Magistrates Court Act, 1984* provides for language use in the Tanzanian legal system. The use of Kiswahili in the courts differs from tier to tier.⁵⁶ Kiswahili can be used in all Tanzanian courts where all parties appearing before the court can speak Kiswahili. At the lower court levels where there are no professional lawyers, Kiswahili is the language of the law. At the higher court levels, which are presided over by persons who have legal training, the courts may conduct their proceedings in Kiswahili but the court record and the judgment must be in English.⁵⁷ While access to justice in Kiswahili is available at lower court levels, the incomplete integration of Kiswahili at the appellate level is problematic.

While there may have been a genuine effort on behalf of the government to adopt Kiswahili as a language of the law in Tanzania, two obstacles have blocked the complete integration of Kiswahili into the legal system. The first, and most obvious, is the legislative requirement that the record be produced in English. This could be easily remedied by amending the *Magistrates Court Act, 1984*. The second problem is more pervasive and consists of a lack of non-legislative elements of a bilingual judicial system.⁵⁸ These elements include creating tools which promote the use of Kiswahili in the courts, providing authoritative ver-

⁵⁴ Rwezaura, *supra*, note 52, at 33.

⁵⁵ The structure of the judiciary is set out in Chapter Five of the *Constitution of the United Republic of Tanzania, 1977* and the *Magistrates Court Act, 1984*. For more information on the judicial system in Tanzania please go to the Tanzania National Website, online at: <<http://www.tanzania.go.tz/administration.html>> (last accessed 4 November 2005).

⁵⁶ Rwezaura, *supra*, note 52, at 35.

⁵⁷ *Magistrates Court Act, 1984*, s. 13.

⁵⁸ Rwezaura, *supra*, note 52, at 37-39. He explains that the Minister of Justice convened a law dictionary committee which produced a compilation of Kiswahili terms and phrases; basic statutes used in the lower courts were translated including the *Penal Code*, a shorter version of the civil procedure and evidence codes and eventually the *Law of Marriage Act* in 1971 and the possibility of producing a Kiswahili version of the Law Reports of Tanzania was also considered but the idea was never implemented. The use of Kiswahili as the language of legal education was also discussed but many obstacles blocked its implementation.

sions of legislation in both languages; and legal education. The latter is especially important as education is the “agent of implementation” of language policy.⁵⁹ In short, the elements of a bilingual legal system are missing in Tanzania.

Many of the non-legislative tools mentioned earlier have been essential in the implementation of Canada’s constitutional and legislative provisions. Currently, a few Canadian universities offer both common law and civil law programs in both or either official language, reflecting Canada’s bilingual and bijural legal system.⁶⁰ Further, legal tools such as law dictionaries, texts and articles, lexicons, forms for civil procedure, professional training courses and admission exams in both official languages are available in certain jurisdictions. These tools are prepared by jurilinguists who also play an essential role in standardizing legal terminology.⁶¹

Professional associations also play a vital role in accomplishing the aforementioned tasks. In Canada, there are several such organizations at the federal and provincial level.⁶² These associations ensure that lawyers encourage and promote the use of French in the legal system and also encourage lawyers to practice in the minority language where possible.

⁵⁹ Stephen M. Neke & Jan Blommaert, “Consolidating the Colonial Language Policy: English in Education in Tanzania” (Paper presented at the International Symposium on “Text and Context: African Languages between Orality and Scriptuality”, University of Zurich, Switzerland, 18-20 October 2001), at 10. While a review of Tanzania’s language education policy is beyond the scope of this paper, there is no question that the fact that English is the language of post-primary education in Tanzania directly impacts language use in the legal system. In the absence of a legal education policy, it will be difficult if not impossible for Kiswahili to be effectively used at the appellate level.

⁶⁰ The Faculty of Law of the University of Ottawa has offered French common law courses since 1977. Currently, the French Common Law program accepts 60 students each year; it provides skills in legal drafting and advocacy in French. The Université de Moncton also offers a complete common law training program in French. Conversely, McGill University offers a civil law program with bilingual instruction as does the University of Ottawa.

⁶¹ There are currently four jurilinguist centres in Canada: le Centre de traduction et de terminologie juridiques (CITJ) at the University of Moncton (est. 1977), the Centre for legal translation and documentation at the University of Ottawa (est. 1981), Quebec Research Centre of Private and Comparative Law, Institut Joseph Dubuc in Manitoba.

⁶² At the provincial level, les associations de juristes d’expression française exist in New Brunswick, Nova Scotia, Ontario, Manitoba, Saskatchewan, Alberta and British Columbia. Sub-committees of provincial and federal bar associations which focus on language rights in the judicial system are also useful.

In addition, these associations offer economic, social and educational support to French language lawyers.⁶³

Law societies are also key players in promoting the use of a particular language. Support from law societies is required in several areas.⁶⁴ Continuing legal education is the most obvious as it ensures that lawyers who practice in French continue to be competent in French. As Annis explains “[l]anguage enters into the competence paradigm because it represents the basic communication skill, a matter of form if you like, but something every lawyer recognizes as essential to a successful practice.”⁶⁵ At the entry level, bar admission courses and exams should also be offered in the minority language. Students who have completed their legal education in a minority language should not be disadvantaged by having to complete the bar admission in the majority language. The institutional component of a law society and its obligation to communicate with the public and its own members in both official languages must also be considered.

Historically, many of these non-legislative tools and actors have played an important role in developing a strong legal infrastructure in both official languages, but more progress is required. This is evident in the Department of Justice study discussed earlier.⁶⁶ The study lists possible solutions for improving judicial bilingualism across the country, including the appointment of more bilingual prosecutors and judges, as well as greater bilingualism among court staff. While these solutions are necessary, these regions should not forget about the importance of these non-legislative tools.

The constitutional and legislative protection of minority language rights are often the only mechanisms of protection that are considered. The non-legislative tools and actors necessary to implement and reinforce a language at the institutional level are often overlooked. While there is still more to be done, Canada’s progress to date makes it a model for countries such as Tanzania that wish to integrate a language, whether minority or not, into the judicial system.

⁶³ Peter Annis, “Bilingualism and the Law Society of Upper Canada” (1983), 17 *The L. Soc’y Gaz.* 175, at 191-92.

⁶⁴ *Id.* The discussion in this paper is based largely on his discussion in the context of the Law Society of Upper Canada but is applicable in many respects to other provinces.

⁶⁵ *Id.*, at 204.

⁶⁶ *Access to Justice, supra*, note 45.

VI. CONCLUSION

The protection of minority language rights in judicial systems around the world varies both in the degree of protection offered and in the nature of that protection. An examination of these different systems reveals that four main principles determine the extent to which language can be used in the judicial system. These include: (1) the constitutional and/or legislative protection of minority language; (2) the right to use a minority language in the judicial system as opposed to the right to an interpreter; (3) the right to use a minority language based on region and/or individual choice; and, (4) the creation of non-legislative tools to promote the institutionalization of a minority language in the judicial system.

In Canada, the development of judicial bilingualism has rested on the choices we as a society have made *vis-à-vis* these principles and our future progress depends on them as well. This is evident when one looks at the historical development of language rights in Canada's legal infrastructure and the evolution of the provisions regulating language use in our judicial system. Much progress has been made on the constitutional and legislative front, but we must be diligent in ensuring that these rights are effectively implemented to protect and promote the vibrant English and French communities that exist across the country.