Abstract

Are Indigenous and minority children guaranteed a right to learn both their own languages and at least a/the dominant language in their country of residence, up to a high formal level, through bilingual education of various kinds, most importantly including a right to mother-tongue-based multilingual (MTM) education (see Skutnabb-Kangas & McCarty 2008 for definitions)? Do schools support Indigenous/tribal/minority communities’ right to reproduce themselves as Indigenous/tribal peoples/minorities (ITMs), through enabling and encouraging intergenerational transfer of their languages? In other words, do ITM children enjoy linguistic human rights (LHRs) in education?

This chapter attempts to answer these questions. It analyses how bilingual education intersects with issues of language rights (LRs). It presents some of the important international and regional legal provisions and it discusses their implications.

The conclusion is that there are still relatively few binding positive rights to MTM education or bilingual education in present international law, including case law. Today most language-related human rights are negative rights, only prohibiting discrimination on the basis of language. Explanations and interpretations of human rights law and many court cases have made it clear that treating citizens de jure equally, i.e. identically (for instance, using an official language as the only medium of education for all children, regardless of their linguistic background and competencies), does not lead to de facto equality, and may often constitute discrimination. Identical treatment is not always equal treatment. “Positive discrimination” or “affirmative action” is necessary for substantive de facto equality. Neoliberal ideologies are disastrous for ITMs human rights.

Introduction

To what extent are indigenous and minority children guaranteed a right to learn both their own languages and at least a/the dominant language in the country where they live, up to a high formal level, through bilingual education of various kinds, most importantly including a right to mother-tongue-based multilingual education (see Skutnabb-Kangas & McCarty 2008 for definitions)? Do all children have the right to access high quality education, regardless of what their mother tongue is? Do schools support Indigenous/tribal/minority communities’ right to reproduce themselves as Indigenous/tribal peoples/minorities (hereafter ITMs), through enabling and encouraging intergenerational transfer of their languages? In other words, do ITM children enjoy linguistic human rights (LHRs) in education?

This chapter attempts to answer these questions by analysing how bilingual education intersects with issues of language rights (LRs), by presenting some of the important international and regional legal provisions and discussing their implications.
Much more about these human rights instruments (legal provisions of various kinds are called instruments in legal texts) is presented in Skutnabb-Kangas & Dunbar 2010.

Research on educational performance indicates that ITM children taught through the medium of a dominant language in submersion programmes often perform considerably less well than native dominant language speaking children in the same class, in general and on tests of both (dominant) language and school achievement. They suffer from higher levels of push-out rates, stay in school fewer years, have higher figures for unemployment and, for some groups, drugs use, criminality and suicide figures. There is strong evidence that such children do not benefit from the right to education to the same extent as children whose mother tongue is the teaching language of the school, and that this distinction is based on language. Those (mostly Asian immigrant minority) groups that show a more positive pattern (e.g. in Canada, the USA, even the UK) seem to do this not because of the way their education is organised but despite it.

Given the educational benefits of Mother-Tongue-Based Multilingual (MTM) education and, as importantly, the educational harm of education of ITM children mainly through another language, it can be forcefully argued that only MTM education, at least in primary school, is consistent with the provisions of several human rights documents (see Skutnabb-Kangas & Dunbar 2010 for elaboration). No other form of education seems to guarantee the full development of the human personality and the sense of its dignity, nor does it enable children who are subject to non-MTM education to participate as effectively in society. There is much research that shows that maintenance-oriented MTM education (with good teaching of a dominant language as a second language, with bilingual teachers) is often the best way to enhance ITM children’s high-level bilingualism, school achievement, a positive development of identity and self-confidence, and their future life chances (see May, this volume).

Early Developments

Particularly in the case of higher formal education, instruction has for millennia been in languages other than the students’ mother tongues, often in classical languages used for religious purposes (e.g. Sanskrit or Latin), but both the teachers and the students were usually multilingual. The “rules” for the diglossic/multiglossic division of labour between languages were in practice flexible. The learning of both languages and content was often life-long, for instance in monasteries, east and west. The education could be called bi- or multilingual in the sense that several languages were used in instructional situations, at least orally.

In contrast to deciding the religion (“cuius regio, eius religio”), feudal landlords globally were in most cases not interested in what languages their underlings spoke, as long as their labour could be exploited (“exchanged for protection”). Whatever education there was, was in most cases informal and through the medium of the various mother tongues. This was also the case with indigenous peoples worldwide before colonisation, even if many learned neighbouring and other languages through peaceful contacts or sometimes conflict.

Colonisation and creation of state borders had a decisive role in formally minorizing certain languages and, correspondingly, majorizing others. Religion has played a major role in denying ITMs educational LHRs. Indigenous peoples were to be “civilized” through assimilation into the colonisers’ “superior” cultures and languages
(see. e.g. Churchill, 1997; Crawford, 1995; Del Valle, 2003; Fesl, 1993; Milloy, 1999; Richardson, 1993, Skutnabb-Kangas, 2000). Some missionary work has ironically also “saved” some forms of Indigenous languages (in Africa, Australia, Canada, Latin America, the USA, etc); missionaries learned and wrote down (some of) these languages, to be more efficient in capturing the souls of the “pagans”. Initially, Indigenous peoples had the land (and their own religions); when they woke up, they had the bible but the states that the missionaries came from had the land. Often missionaries not only used distorted and reduced versions of indigenous languages in their “bilingual education”; they created new “languages” and divisions between “languages”, thereby further minorizing them. In colonies, several different models of language regimes coexisted in education, with colonial languages and local languages used as languages of instruction. The patterns and motivations varied hugely; they have still not been properly clarified globally (see, e.g. Phillipson, 1992, Pennycook, 1998), and are being vigorously debated.

In general, multilingualism and to a large extent MTM education have been accepted, and normalised among citizens outside the western world; colonisation was mainly responsible for the new negative linguistic inequalities. But even in the west, until the mid-1800s attitudes towards multilingualism and multilingual education were more relaxed or at least more indifferent and even tolerant than during the last 150 years. This was true more for national and sometimes immigrant minorities (who could be majorities in their own regions) than Indigenous peoples. Some “national” or “traditional” minorities did and still do have some language rights in Europe. These rights were also recognised in education already in the late 1800s, in both constitutions and in bi- and multilateral treaties, even if many were granted to religious minorities, and a religion different from the dominant one often coincided with speaking another language. In the US, laws were published in German and English in Ohio and Pennsylvania, in Spanish and English in California and New Mexico, and in French and English in Louisiana, while children had a right to minority language medium or bilingual education as a self-evident part of the system (Del Valle, 2003: 10-17). But even some Indigenous peoples controlled their own education, e.g. the Cherokee, Cree, Choctaw, Chickasaw and Seminole between 1830 and 1898 in the USA (Del Valle, 2003: 282).

During the last decades of the 1800s, with the labour and disciplining needs of industrialization, more children started to come into the realm of formal education, concurrently with the spread of nation-state ideologies (one nation – one state – one language). In the western world, “pernicious” boarding schools for Indigenous children arose “whose overt purpose was cultural genocide, including most prominently the eradication of Indian languages use”, writes James Fife about the USA (2005: 365, quoting Allison Dussias 1999). These residential schools have been “arguably, the most damaging of the many elements of Canada’s colonization of this land’s original peoples and, as their consequences still affect the lives of Aboriginal people today, they remain so” (Milloy, 1999: xiv).

According to Thomas (1994, 41-42), Handsome Lake (a Seneca prophet, born 1735) told his people:

> We feel that the white race will take away the culture, traditions, and language of the red race. When your people’s children become educated in the way of white people, they will no longer speak their own language and will not understand their own culture. Your people will suffer great misery and not be able to understand their elders anymore. We feel that when they become educated, not a single child will come back and stand at your side because they will no longer speak your language or have any knowledge of their culture.

Chief Thomas noted that the actual results of education imposed by the “white race” were as destructive as Handsome Lake had predicted:

> Two children were selected from each tribe to receive the white race’s education. The chiefs at the time believed that this education might benefit the native people. By following the Good Message, the chiefs discovered that the education received from the white race robbed their children of their language and culture. They realized the importance of educating their own children.

States and educational authorities (including churches) in many parts of the world (including the Nordic countries) have also at the latest since the end of the 1800s had the knowledge about the negative results of submersion education and the superior results of even transitional bilingual education (where the mother tongues are used as teaching languages for some years before transitioning children to a dominant language medium education). For instance, the USA Board of Indian Commissioners wrote in their 1880 report (quoted in Francis & Reyhner, 2002):

> … first teaching the children to read and write in their own language enables them to master English with more ease when they take up that study. […] A child beginning a four years’ course with the study of Dakota would be further advanced in English at the end of the term than one who had not been instructed in Dakota (p. 77). […] It is true that by beginning in the Indian tongue and then putting the students into English studies our missionaries say that after three or four years their English is better than it would have been if they had begun entirely with English (p. 98).

The earliest formal descriptions of various LRs (or, in many cases, lack of them), even in education, were mainly written by lawyers, often for administrative purposes. The time after the First World War produced, often inspired directly or indirectly by the League of Nations, a large number of language rights documents and research and other accounts about them. The LRs situation in Europe was then on paper better than it is internationally today: in the Minorities Treaties that were passed with the Peace Treaties in Paris, many minorities were granted LRs in education. The problem then – as to a large extent today too - was lack of implementation and enforcement.

**Major Contributions**
During the first three decades after the Second “World” War, various United Nations bodies, Non-Governmental Organisations (NGOs) and academic institutions engaged in lively discussions on the lack of language rights in (monolingual and bilingual) education. A variety of historical descriptions and analyses were written by sociolinguists, educationists and lawyers. New demands, including court cases with direct or indirect bearing on language rights in education started to come forward (see Del Valle, 2003, for the USA).

The UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities did suggest some positive measures, especially in a 1967 report (see Gromacki 1992: 544). But it was not until the UN Special Rapporteur on the Rights of Minorities, Francesco Capotorti, published his 1979 report that international and regional (human rights) law in the area of language rights and education started to develop. After some early discussions (e.g. Tabory, 1980), some language rights have started to be accepted as linguistic human rights during the last 15-20 years (see Skutnabb-Kangas & Phillipson, eds, 1994; de Varennes, 1996; 2000). There are many useful overview articles about LRs that include education (Google LHRs).

Indigenous peoples and minorities are provided with some general protections under various UN and regional charters and conventions. The UN Convention on the Rights of the Child of 1989 (CRC) has been ratified by more countries than any other UN human rights document – the only countries (as of April 2014) that have failed to ratify it are Somalia and the USA. But while Art. 17, para 1 of the African Charter on Human and Peoples’ Rights of 1981 provides that every individual shall have the right to education, the USA Constitution does not grant such a right. Para 1(c) of Art. 29 in CRC provides 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, 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.” Art. 13, para 1 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966 (in force 1976) provides that the States Party to the Convention recognise the right of everyone to education. Similarly, Art. 28, para 1 of the CRC provides that States Parties recognize the right of the child to education and specifies that States Parties shall “take measures to encourage regular attendance at schools and the reduction of drop-out rates” (subpara (e)). Given what we know about the effects of enforced dominant language medium educational policies, which tend to result not only in considerably poorer performance results but also higher levels of non-completion, etc., the pursuit of such policies could be said to be contrary to subpara 1(e) of Art. 28. Combined with the comments made with respect to Art. 13, para 1 of the ICESCR, it would seem clear that an education in a language other than the child’s mother tongue and which contains no recognition of that mother tongue is unlikely to contribute to the respect for the child’s own cultural identity, language and values, i.e. this kind of education violates the demands of the Conventions.

Art. 30 of the Convention on the Rights of the Child provides that “in those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own
language.” This provision echoes Art. 27 of the **International Covenant on Civil and Political Rights** of 1966 (in force, 1976). The precise implications of both provisions are, however, far from clear. The Human Rights Committee has noted in its General Comment No. 23 of 1994 on Art. 27 of the ICCPR that, although phrased in the negative, the Article requires States to take positive measures in support of minorities. Unfortunately, the Human Rights Committee has not spelled out what those measures are, or whether they include measures relating to MTM education.

ITMs are also protected by specific language rights regulations in some countries and regions. In contrast, other countries (e.g. Denmark, France) are even contemplating violating parents’ right to speak their own languages to their infants in their own homes.

The provisions which more specifically address minority language education rights - both the teaching of and through the medium of one’s mother tongue - are generally most developed in certain minority legal provisions. Binding treaty commitments have been established in two Council of Europe human rights instruments to which only members of the Council have thus far become party, the **Framework Convention for the Protection of National Minorities**, and the **European Charter for Regional or Minority Languages**. Other very influential non-treaty standards have been set within the Organization for Security and Co-operation in Europe (OSCE), the most significant of which is the 1990 **Document of the Copenhagen Meeting on the Human Dimension**. Influential principles have been developed through the office of the OSCE High Commissioner on National Minorities, the most relevant of which in the context of education is **The Hague Recommendations Regarding the Education Rights of National Minorities** of October, 1996, see [http://www.osce.org/hcnm/32180](http://www.osce.org/hcnm/32180) and [http://www.osce.org/hcnm/32180?download=true](http://www.osce.org/hcnm/32180?download=true). More particular guidance is provided in minorities-specific legal provisions. All of these standards apply mainly in Europe (loosely defined; Canada and the USA are also members of the OSCE).

**Work in Progress**

There are still relatively few binding positive rights to MTM education or bilingual education in present international law, including case law. Today most language-related human rights are negative rights, only prohibiting discrimination on the basis of language, as a prerequisite for the promotion of equality. Both various explanations and reinterpretations of human rights law and many court cases (see, e.g., de Varennes 1996, Higgins, 2003, Thornberry, 1997, 2002; Thornberry & Gibbons, 1997) have made it clear that treating citizens *de jure* equally, i.e. identically (for instance, using an official language as the only medium of education for all children, regardless of their linguistic background and competencies), does not lead to *de facto* equality, and may often constitute discrimination. Identical treatment is not always equal treatment; therefore, “positive discrimination” or “affirmative action” is necessary for substantive *de facto* equality. Substantive equality also includes a positive obligation on the state to protect conditions, which enable ITMs to maintain their special features, including their languages. Still, many court cases and UN Human Rights Committee’s General Comments and Communications have been satisfied with formal equality, even if there are also positive exceptions (most of the legal references above detail these), both in relation to LRs in general and also educational LHRs. At this point there are still many contradictions in, and confusion about, how to handle educational LRs legally and *de*
Today’s “free market” approach has also many really negative consequences for these rights (e.g. Devidal 2004).

UNESCO is mapping today’s situation in relation to which LMs do in fact have MTM education (see http://www.unesco.org/new/en/culture/themes/endangered-languages/).

In contrast to earlier, there seems today to be more understanding, on paper, for the demands of indigenous peoples educational LRs – presumably because most of them are numerically so small that their educational LRs (as opposed to those of minorities) do not seem to threaten the states - whereas their land rights demands do.

UNDRIP, the United Nations Declaration on the Rights of Indigenous Peoples (Resolution A/61/L.67, September 13, 2007) provides in Articles 13.1-2 and 14.1 the right for an Indigenous child to learn the mother tongue, and in 14.2 access to the “education of the State”; the child does not have this access without knowing the State language; hence high levels of at least bilingualism must be a goal in the education of an Indigenous child. But since state education through the medium of the dominant state language is “free” (although there are school fees even in elementary education in many countries where Indigenous peoples live), most Indigenous children are forced to “choose” the “state education.” Their parents are “free” to establish and control their own educational systems, with their own languages as teaching languages—but at their own cost. How many Indigenous and tribal peoples can afford this? There is nothing about the State having to allocate public resources to Indigenous-language-medium education.

Aspects of these recommendations bear some similarity to the educational provisions of the United Nations General Assembly Declaration of the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities of 1992 (UNGA Minorities Resolution). Art. 4, para 3 provides that “States should take appropriate measures so that, wherever possible, persons belonging to minorities have adequate opportunities to learn their mother tongue or to have instruction in their mother tongue.” (emphases added).

**Problems and Difficulties**

Despite both the positive tone of these and other recommendations, and the high level of awareness and networking of many ITMs, opt-outs and claw-backs in educational provisions for ITMs are significant. In order for children to have human rights in education, they must in the first place have a right to free compulsory education. This right is far from guaranteed in all countries to all children. Not even primary education is free in 91 countries (Tomaševski, 2004: 23); and immigrant or refugee children face threats of exclusion from schools in many countries (e.g. Del Valle, 2003: 331; Eurydice 2004: 33-34).

Secondly, however, as Katarina Tomaševski, the former UN Special Rapporteur on the Right to Education, states, “mere access to educational institutions, difficult as it may be to achieve in practice, does not amount to the right to education” (Tomaševski, 2004: para 57; see also her brilliant 2006). Educational State obligations in international law contain four elements — availability, accessibility, acceptability and adaptability. Tomaševski discusses “language of instruction” under “acceptability” (2001: 12-15, 29-30); it can also be seen as”accessibility” (see Skutnabb-Kangas & Dunbar 2010 for details). Barriers to “access” can be interpreted as physical (e.g. distance to school),
financial (e.g. school fees, already mentioned, or the labour of girls being needed at home), administrative (e.g. requirements of birth registration or residence certificate for school enrolment, ibid. para 4b; or, e.g. school schedules, Tomaševski 2001: 12); or legal. If the educational model chosen for a school (legally or administratively) does not mandate or even allow ITMs to be educated mainly through the medium of a language that the child understands, then the child is effectively being denied access to education. If the teaching language is foreign to the child and the teacher is not properly trained to make input comprehensible in the foreign language, the child does not have access to education. The U.S. Supreme Court acknowledged this in 1974 in the *Lau v. Nichols* case (414 US 563). Likewise, if the language of instruction is neither the mother tongue/first language or minimally an extremely well known second language of the child and the teaching is planned and directed towards children who have the language of instruction as their mother tongue (i.e. the norm is a child who knows the teaching language), the LM child does not have equal access to education. We see this as a combination of linguistic, pedagogical and psychological barriers to "access" to education.

The present practices of educating ITM children through the medium of dominant national/state languages are completely contrary to solid theories and research results about how best to achieve the goals for good education. They violate the parents’ right to intergenerational transmission of their values, including their languages. The human right to use one’s own language is made impossible if the children lose it during the educational process. These practices can be seen psychologically, linguistically, educationally and sociologically as genocide according to definitions 2b and 2e in UN’s Convention on the Prevention and Punishment of the Crime of Genocide; they can also be seen as crimes against humanity, as we show in Skutnabb-Kangas & Dunbar 2010.

**Future Directions**

Comparing the various developments in how human rights instruments, courts, and various regulations have handled educational LHRs during the last many decades, there seems to be a constant tension in how the place, function and future of ITMs (seen as Other) has been envisaged. States seem to strive towards some kind of unity, wholeness, integration, but ideas about how this can be achieved vary. Segregation versus integration, and bilingual versus monolingual are some of the main polarities here.

The Other has often been feared, despised, marginalised and excluded, and a separate physically segregated development has been seen as necessary and preferable. At the same time the Other has been strictly controlled and disciplined. South African (SA) apartheid Bantu education or U.S. (especially South) black and white schools are examples. The only positive aspect of this kind of education in SA was that ITMs often had MTM education. But the quality and financing of the education in both SA and the USA, including buildings, materials, teacher training, etc., were mostly dismal and the content often racist. Legally mandated (the Brown v. Board of Education 1954 case in the USA) or allowed (SA 1990s Constitution and education regulations) desegregation brought the Other into schools which were earlier reserved only for Self, the “whites”. Physically it may have meant permission for integration, but housing patterns interacting with class ensure that “race” turned “ethnicity” still keep most quality education for children of Self. And medium of education interacts with it; Kathleen Heugh’s (2000) countrywide longitudinal statistical study of final exam results for “Black” students in
South Africa showed that the percentage of “Black” students who passed their exams went down every time the number of years spent through the medium of their mother tongues decreased.

In the other polarity, a reproduction of minorities through MTM or proper bilingual education has been seen as a threat towards the unity of a state. Linguistic reproduction of minority mother tongues has been seen as a beginning of a conflict where states have feared that the existence of minorities can lead to a disintegration of the state. The Turkish oppression of Kurds is perhaps the worst example of this today; but in Europe both France and Greece violate LHRs for similar reasons, and the same reason has been frequently invoked in the USA, pointing at the possibility of Quebec separation from the rest of Canada as a threatening example. Many Asian and African conflicts also have elements of state elites connecting minoritized groups to disintegration threats and therefore denying them basic language rights. This seems to be one of the main reasons in state resistance against proper bilingual education in many countries. Even if the scientific evidence for bilingual education is compelling, assimilationist mainstreaming mostly wins because MTM maintenance-oriented education can reproduce minorities as minorities. Likewise, content in bilingual education is seen as possibly ideologically threatening because it cannot (for linguistic reasons) be completely controlled by the dominant group.

All this can lead to interesting contradictions – and their solution is a major future challenge. My article in the 2nd edition of this Encyclopedia has some examples from the USA and Europe.

Majority/dominant group children do not have any right to become high level bi- or multilingual through education either. This is so even if many states are in practice organising programmes for them to achieve this goal, e.g. immersion or CLIL – Content and Language Integrated Learning – programmes.

Thus, accepting temporary physical segregation as a means for achieving educational, psychological, societal and political integration of minorities and majorities later on is an absolute necessity for a human-rights-oriented education.

Many peace researchers have shown that it is often precisely lack of language rights that leads to conflict, and that LHRs, also in education, may be part of the solution. Yet, most states continue the schizophrenic and counterproductive policies of denying indigenous, and national and immigrant minority children basic linguistic human rights, including in education. States can expect to have to pay huge reparations if this is continued – the first court cases have already been won by ITMs. The whole human rights “business” has been impressively denounced by Hopgood (2013), but not in ways that invalidates arguments in this article. On the other hand, in my view, the neoliberal researchers sceptical of MTM, do not really have a case. The primary principles of neoliberalism are that market forces should determine everything in our societies, that all services can be commodified, and that this ‘freedom’ is in the interest of all. This ignores the reality of social classes, and the fact that those with financial or cultural capital, including linguistic capital, are structurally favoured in this economistic universe. Social justice is ignored. Dominant languages are privileged, ITM mother tongues are seen as unwelcome and obsolete. Deep ITM identity issues are ridiculed, and (forced) assimilation is seen as being in the best interest of ITMs, economically and politically. Education to achieve a harmonious, just society is not on the neoliberal agenda.
Cross-References[OG1]

References


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