

A TRENT' ANNI
DALLA *PATRIATION*
CANADESE.

RIFLESSIONI
DELLA DOTTRINA ITALIANA

A cura di ELEONORA CECCHERINI



GENOVA
UNIVERSITY
PRESS



è il marchio di



UNIVERSITÀ DEGLI STUDI
DI GENOVA

edito da



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Realizzazione editoriale
© De Ferrari Comunicazione S.r.l.
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L'editore rimane a disposizione per gli eventuali diritti sulle immagini pubblicate. I diritti d'autore verranno tutelati a norma di legge.

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SOME REFLECTIONS ON THE CASE-LAW OF THE SUPREME COURT OF CANADA ON MINORITY LINGUISTIC RIGHTS: THE DANGERS OF AN INSTRUMENTAL APPROACH

*di Riccardo de Caria**

SOMMARIO: 1. *A constructive dialogue (with occasional fights) as a means to build the Canadian identity.* – 2. *Categorizing the Canadian case-law on language rights according to different criteria.* – 3. *The dangers of an instrumental approach to language rights: general remarks.* – 4. *The dangers of an instrumental approach to language rights: the Canadian case.*

1. A constructive dialogue (with occasional fights) as a means to build the Canadian identity.

In their very famous 1997 article¹, Hogg and Bushell (now Thornton) «respond[ed] to the argument that the Canadian Charter was illegitimate because it was almost always undemocratic, [by] [...] suggest[ing] that where a judicial decision is open to judicial reversal, modification or avoidance, then it is meaningful to regard the relationship between court and the legislative body as a dialogue. In such a case the judicial decision causes a public debate in which Charter values play a more prominent role than they would if there were no judicial decision. The legislative body is in a position to devise a response which is properly respectful of the Charter values that have been identified by the court, but which accomplish the social or economic objectives that the judicial decision has impeded»².

The case-law of the Supreme Court of Canada on language rights³ is arguably a fairly good example of that dialogue in action: on some important occasions, the Court struck down legislation (such as in *Blaikie No. 1* and *No. 2*, *Protestant School Boards* and *Nguyen*), but other times it also gave legislators some advice on how to reform laws that it was declaring unconstitutional, like in *Mahe*, *Arsenault-Cameron*, and especially *Ford*. Also the choice to recur to the *de facto* doctrine and delayed declarations of invalidity, in *Manitoba Language Rights* and *Bilodeau*, provides evidence of the Court's leaning towards dialogue: in such rulings, the justices showed to be aware that a plain declaration of invalidity would sometimes have devastating consequences for the Provinces involved, and chose to avoid creating such a scenario, preferring to maintain an acceptable relationship even to the cost of sacrificing individuals' rights on the altar of *Realpolitik*.

But big cases like *Ford* itself, or the main one related to the so called *Quebec Veto controversy*⁴, or the *Reference re Secession of Quebec*⁵ also show that dialogue can often give way to an open fight between judges and politics. To be sure, the major clashes between courts and legislators happened with regard to Quebec, reflecting and at the same time reinforcing the tension in the relationship between this Province and the Canadian Federation⁶, the most recent example of which was a bill, introduced during the past legislature by the Quebec government before that Province's National Assembly, that would have amended the Quebec Charter of Rights and Freedoms and Charter of the French language in order to limit education rights of non-francophones⁷.

Elsewhere, the dialogue seems to prevail, while in Quebec the case-law seems to show that adversarial tones are still quite strong. However, there were significant instances of dialogue in Quebec too: even when the Court ruled that that Province could not lawfully make French its only official language, like it did in *Blaikie No. 1*, the Quebec Legislature immediately re-enacted also in English all its French-only laws⁸. Less politically sensitive cases than *Ford*, the *Quebec Veto controversy* or the *Reference re Secession* case, like *Solski*, *Gosselin* and *Nguyen*, provide further evidence that the dialogue paradigm is working with Quebec as well, presumably also thanks to the effect of the institutional choice of appointing three out of the nine judges of the Supreme Court «from among the judges of the Court of Appeal or of the Superior Court of the Province of Quebec or from among the advocates of that Province»⁹.

2. *Categorizing the Canadian case-law on language rights according to different criteria.*

This leads us to one of the possible keys to a categorization of the Canadian Supreme Court case-law on language rights: indeed, a first criterion can be the Province where the case arose. We can then distinguish cases from Quebec, on the one hand (the *Quebec Veto* case, *Blaikie No. 1 and No. 2*, *Protestant School Boards*, *MacDonald*, *Forget*, *Ford*, *Devine*, *Solski*, *Gosselin* and *Nguyen*), and cases from other Provinces (all the other ones). The picture seems to be that «the case law of the Supreme Court [...] on several occasions has showed to favour the use of French more by minorities living in anglophone provinces than within Quebec»¹⁰. This seems a way by the Court to counter the tendency by Quebec to regulate language issues according to the principle of separatism and territoriality, while the anglophone Provinces tend to privilege the principle of bilingualism¹¹.

But the cases could as well be divided along a different line, namely the topic involved¹²: we will therefore have several cases about education rights¹³ (*Protestant*

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School Boards, Mabe, Reference re Public Schools Act, Arsenault-Cameron, Doucet-Boudreau, Solski, Gosselin, and Nguyen), but also others about linguistic rights before courts and in general public bodies, and the language of official acts (*Blaikie No. 1 and No. 2, Manitoba Language Rights, Bilodeau, MacDonald, Société des Acadiens, Mercure, and Beaulac*),¹⁴ others about the language of signs, company names, leaflets and paperwork (*Ford and Devine*),¹⁵ others on more typically political controversies (the *Quebec veto* controversy and the *Reference re secession of Quebec*), and one too on language as a professional requirement (*Forget*) (interestingly, no cases involved election rights, unlike for example in the U.S., where election law litigation has always been a very significant tool to advance minority rights protection¹⁶).

Anyway, overall the Court seems to apply a similar approach to all the different subjects, even though it elaborates principles specific to each one: for instance, the «sliding scale» of requirement is typical of the case-law on language education rights, while in the cases about rights before courts, the structure of the constitutional questions usually does not lend itself to a «sliding scale» approach, rather requiring more clear-cut, black-or-white answers. Except for *Ford* and *Nguyen*, the proportionality analysis seems to have lesser relevance in the case-law on linguistic rights, compared to what can be observed in many other areas of the Supreme Court's case-law.

A still different criterion is the one that tries to measure how effective the dialogue has actually been in the area considered: from this point of view, attention shall be paid to whether the laws and administrative measures reviewed by the Court were deemed to comply with the constitutional obligations, or in fact they fell short of them. The most striking example of the latter cases is *Ford*, while the opposite end of the spectrum would arguably be *Gosselin*.

Another interesting way to look at the case-law on language rights is to focus on the level of agreement among justices in each case, and a further step would be to investigate whether the dissenting justices tend to be the same, and maybe if the justices from Quebec tend to cast similar votes. In this vein, the ruling that formally saw the most divided court was *Doucet-Boudreau*, the only 5-4 decision, but here the disagreement did not concern the most relevant issue for our purposes. The most controversial cases can be considered *Forget*, which was decided with a 6-3 majority, and *Mercure* (a 7-2 judgment), while in *Bilodeau* and *MacDonald* there was only one dissenter, namely Justice Wilson; *Beaulac* is a self-standing ruling in this categorization, because two of the nine justices (the Chief Justice Lamer and Justice Binnie) agreed only on the outcome, but found it necessary to re-assess *Société des Acadiens*: however, they agreed with the majority on the interpretation of the disputed provision (s. 530 of the Criminal Code), and therefore concurred in the judgment.

As for the geographic origin of the dissenting judges, they come almost exclusively from Ontario and Quebec: Justice Wilson (a dissenter in *Forget*, besides the already mentioned *Bilodeau* and *MacDonald*) was from Ontario, just like Justices Estey (dissenting in *Mercure*) and Binnie (dissenting in *Doucet-Boudreau* and only concurring in judgment in *Beaulac*, as mentioned); instead the dissenting judges from Quebec were Justice L'Heureux-Dubé in *Forget* and Justices Le Bel and Deschamps in *Doucet-Boudreau* (to which it has to be added the concurring opinion by C.J. Lamer in *Beaulac*). The other dissenting votes were cast by Justice McIntyre from British Columbia in *Mercure*, by Justice Dickson from Manitoba in *Forget*, and by Justice Major from Alberta in *Doucet-Boudreau*. The remaining cases were decided unanimously¹⁷. The overall picture does not seem to convey any evidence of a particularly marked tendency of judges from any province to have a pattern of voting consistently different from that of the judges from the other provinces.

A further criterion is finally the most common¹⁸, namely the chronological one. What is usually derived is the finding of a first phase – until *Manitoba Language Rights* – when the Court adopted quite a liberal interpretation of linguistic rights, proving to be quite open to their enhancement; a second phase, when the Court was much more restrictive, as was clear especially in the three 1986 cases (*Bilodeau*, *MacDonald* and *Société des Acadiens*); a third phase, already anticipated by judgments like *Ford* and *Mahe*, but definitely inaugurated by *Beaulac*, the case overturning *Société des Acadiens*, where the Court has returned to a purposive and wide-open interpretation of linguistic rights, an approach so far confirmed, up to the latest case on linguistic rights, *Nguyen*.

3. *The dangers of an instrumental approach to language rights: general remarks.*

In the remaining part of this work, we will set aside some topics that have already been extensively covered by a vast literature on the subject¹⁹, and concentrate on making a few final remarks on one particular aspect that has earned less attention in the scholarship so far, namely the fact that several of these rights, and therefore several of these judgments, bear a cost for the public budget (such issue emerged in particular in *Arsenault-Cameron* and *Doucet-Boudreau*). This is not true for all of them: commercial speech cases like *Ford* are different, in that the language provisions they rely on, directly require expenditures from individuals and businesses, and it is therefore easy to see such expenditures and arguably to be very sceptic on their advisability.

But when the cost is borne – through taxes – by the public budget, it tends to go unseen, and yet it is far from negligible (as documented recently, as far as provinces

are concerned, by a very deep study by the Fraser Institute²⁰). This raises some policy questions: is this money effectively spent? Does it meet the desired objectives? Could the same goals be achieved more efficiently? These are important questions, but they would require a self-standing analysis, which is by far outside our goals and competences. In fact, there is another, conceptually preliminary question, that we would like to briefly address here, by relying on the extremely stimulating studies of the American linguist Daniel W. Hieber:²¹ are these expenses unavoidable?

The answer seems to be two-fold: «given the current organization of modern-type post-westphalian democracies», it seems quite fair to provide some public funds to avoid impairing the rights of people who do not speak the «official» language of the state. Indeed, when the state is exercising its powers, by requiring a certain behaviour from its citizens, it had better put them in the position to comply with such obligations.

In other words, when it establishes a system of mandatory education, it seems quite reasonable for it to afford its citizens the right to request that such system be in the language of their choice (as indeed acknowledged in *Protestant School Boards, Mahe, Reference re Public Schools Act, Arsenault-Cameron, Doucet-Boudreau, and Solski*); when it is exercising its criminal jurisdiction, or anyway affirming its punitive powers also in administrative violations, the least is to require that it allow the accused to fully understand the law on which his/her charge is based (*Bilodeau*) and the exact terms of the charge (contrary to what stated in *Bilodeau* and *MacDonald*), to express him or herself in the language of his/her choice (*Mercurie*), and to have a judge who fully understands him/her (*Beaulac*).

However, if we adopt a different paradigm, in particular a praxeological one²², in looking at language issues like the ones we have considered, things appear in a different light. We find indeed that the risk of death for a language comes in part from the voluntary choices of its individual speakers. When this is the case, we should arguably not worry too much, or anyway we could and should not do anything against it: after all, languages were not invented or planned by anyone, instead they developed spontaneously²³, and in the same way their users should be left free to use them until they wish, without being forced to abandon them by laws that require the use of a different one, or symmetrically to keep using them if they do not wish so.

In fact, a closer look shows that the greatest threat to the survival of many languages, and of the cultures with which they are associated, arguably comes from wrong state policies: indeed «[g]overnments necessarily adopt nonoptimal language policies. They are incentivized to violate the rights of minority language speakers and support fewer languages rather than more»;²⁴ after all, «[e]ach nation must at some point address the question, “What is the optimal number of languages for the state?” The answer that states tend to give is simply “one”»²⁵,

and this is due to the fact that «[m]inorities» are political outsiders who challenge the prevailing principle of legitimacy. [...] For at its core, the “problem of minorities” is what Isaiah Berlin has termed a “collision of values” between diversity and community to which there can be no permanent resolution»²⁶.

In order to fulfil minorities’ claims, several States, like indeed Canada, have started to adopt two (or more) official languages, something that apparently is also beneficial to their citizens’ brains²⁷; but «[h]ow “does” the state determine the optimal number of languages to support? The answer, of course, is that it cannot»²⁸, and thus it downplays other languages, like those of the aboriginal peoples of Canada, some of which have in fact official status in some Territories, but that again are protected through government intervention, that leaves out even less fortunate dialects, in the medium-to-long run presumably sentencing them to death or anyway confining them in an extremely marginal place. It is not by coincidence, then, that language laws are «often counterproductive to [their] [...] very ends»²⁹.

Which brings us to the institutional dimension³⁰: «[s]tates do not cope well with diversity or decentralization».³¹ Arguably, in much smaller political communities than modern nation-states, and in particular in voluntary communities, languages would be able to thrive, or least to survive much better than what happens within the context of our modern-times democracies. Presumably, some *lingua franca* would develop or spread, as it always has, for communications between different communities, but this could happen without displacing the several local languages: the *lingua franca* for business or anyway cross-border relationships would simply add to the existing languages, but it would not wipe them out, like official languages do with non-official ones in post-westphalian nation-states³².

A fascinating metaphor to describe such ideal condition of minority groups is the one that we owe to the Australian scholar Chandran Kukathas, Chair in Political Theory at the London School of Economics: a Jaffna Tamil born in Malaysia, Kukathas has experienced belonging to minorities throughout his whole life, and – as he himself acknowledges – this has significantly influenced his research interests and shaped his way of thinking. His metaphor is the one that characterizes society «as an archipelago of different communities operating in a sea of mutual toleration. Unlike its more famous twentieth-century namesake, the gulag archipelago, the liberal archipelago is a society of societies which is neither the creation nor the object of control of any single authority, though it is a form of order in which authorities function under laws which are themselves beyond the reach of any singular power. Implicit in this is a rejection of nationalism, and of the idea that we should start with the assumption that the nation-state is the ‘society’ which is properly the object of concern when we ask what is a free society.

The liberalism presented, and defended here is not the liberal nationalism that is standard in contemporary political theory. It is a liberalism built on different foundations, and issuing in different conclusions»³³.

From this point of view, minority policies to which we are used to, including the ones we have reviewed in this article, are often an expensive though unsatisfactory way by governments to cope with problems they themselves have created, in order to satisfy their need for homogeneity and uniformity: «the state is not highly incentivized to recognize minority languages. Running a multilingual government is a logistical nightmare (just ask India), and multilingualism is a direct affront to the ideas of national identity and standard education»³⁴.

This has not always been the world's scenario, but is directly connected to the rise of modern nation-states and nationalisms, whose ideologies could not but trump minorities with their cultures and languages: «[t]he very existence of a modern nation-state, and the ideology it encompasses, is antithetical to linguistic diversity. It is predicated on the idea of one state, one nation, one people. In "Nation, State, and Economy", Mises points out that, prior to the rise of nationalism in the 17th and 18th centuries, the concept of a "nation" did not refer to a political unit like "state" or "country" as we think of it today. A "nation" instead referred to a collection of individuals who share a common history, religion, cultural customs and – most importantly – language. Mises even went so far as to claim that "the essence of nationality lies in language". The "state" was a thing apart, referring to the nobility or princely state, not a community of people [...] In that era, a state might consist of many nations, and a nation might subsume many states. The rise of nationalism changed all this»³⁵.

Nationalism, *i.e.* the fervent glorification of a nation and of its supposed collective virtues, sees linguistic diversity as a threat to the unity of the state. One of the most famous examples of such view is represented by Carl Schmitt's works. In his «Constitutional Theory», he wrote that «[a] democratic state that finds the underlying conditions of its democracy in the national similarity of its citizens corresponds to the so-called nationality principle, according to which a nation forms a state, and a state incorporates a nation. A nationally homogeneous state appears then as something normal. A state lacking this homogeneity has an abnormal quality that is a threat to peace»³⁶.

However, nationalism sometimes has to come to terms with a strong resistance to unity: in this case, nation-states tend to prefer conceding to bilingualism, rather than having to afford independence to a minority nation under their power, which is reluctant to adhere to the (majority's) nationalist story (this will eventually translate into the nation-state enacting the usual set of measures meant to safeguard the minority language, which was made official, but which is not strong enough to compete on a par with the predominant one³⁷).

This claim is reinforced by the words of Professor Kukathas (whose case against nationalism we already mentioned), who makes a very compelling point when dealing with language rights in his enquiry into the «liberal archipelago» and its «enemies», shall we say by paraphrasing Popper's masterpiece: «Even if governments take steps to ensure that minorities can preserve their languages, there are limits to the benefits this can bring. Small groups are simply going to be disadvantaged to the extent that their numbers cannot support the variety of activities in which people engage without going beyond the linguistic group. There may not be enough people to supply the writers, newspaper editors, television journalists, radio show hosts, and teachers in the vernacular to sustain the language. In the modern world the division of labour is not equally hospitable to all forms of diversity.

To the extent that language policy does succeed in allowing some groups to see their languages in use, however, it will not do so equally. Larger linguistic groups will have the advantage over smaller ones; and policies aiming at linguistic equality may benefit large minorities at the expense of small ones. For example, in a society in which three languages are spoken, one (say English) may be dominant or nearly universally spoken, another (say French) may be spoken by a significant minority primarily in a particular region, and a third may be spoken by a small minority. Linguistic 'equality' may in fact impose the heaviest burden on the smallest minority. The English speakers may be able to get away with learning only one language, as may be the French; but the smallest minority, especially if it is located within the French region, may have to learn two or three languages if it is to survive. It may be better off if there were only one other dominant language to learn since that would leave the members with more resources to devote to preserving their own»³⁸.

4. The dangers of an instrumental approach to language rights: the Canadian case.

Canada was not mentioned explicitly in this last passage. However, it really does sound like a very insightful description of the Canadian case. The author goes on to explain very clearly that his «argument here [...] is not an argument against policies accommodating linguistic diversity; it is only an argument to suggest that they may not serve equality»³⁹. Nonetheless, Kukathas here captures extremely well the point we have been trying to make in this final paragraph, *i.e.* that most of the linguistic policies adopted, with striking similarities, all over the world, appear to be, at a closer look, an attempt by nation-states to remedy the consequences of its nationalist ideology, grounded as it is on a «unitary» apparatus of symbols and legitimation⁴⁰.

Such policies may be useful for this purpose, and indeed in Canada they may be effective in pursuing the federal Government's goal of counteracting Quebec's inclination to independence and secession (how effective and for how long, only time will tell), but in fact they end up creating on their turn other «second-level» problems, first of all for those that we could term «second-class» minorities, a category that in Canada includes the whole, diverse group of the aboriginal peoples⁴¹. The real extent of such problems tends to go unseen, and anyway they tend to be left without satisfactory remedies (the whole discourse on multiculturalism emphasizes the need to take them duly into account, but generally without questioning the nation-state paradigm, which is in our view the key aspect to rethink). From this point of view, multilingualism is a happy exception to the predominance of single nationalist ideologies, but when it is framed, as it is, in the context of modern nation-states, it is not able to remove the threat that nation-states, with their regular recourse to the majority principle, pose to the survival of minority languages and cultures⁴². In fact, like Kukathas points out, it may even increase such threat.

Indeed, this seems to have been Canada's story too, a story where the Charter was conceived as instrumental to national unification and the so called Charter patriotism was the underpinning ideology of this process, and where the granting of language rights was first of all a *compromise*⁴³ to avoid the break-up of the country, a concession meant to soothe requests for greater independence. In the words of two other scholars: «Unifiers see the Charter, and the judicial power it fosters, as helping to solve Canada's national unity crisis. Former Prime Minister Pierre Trudeau, the "father" of the Charter, most prominently represents this wing of the Court Party. From the beginning, Trudeau saw the Charter as much more than a rights-protecting document. Indeed, he saw it mainly as a counterweight to the forces of decentralizing regionalism and provincialism. The Charter, he hoped, would lead Canadians to define themselves more in terms of rights they held in common and less in terms of geographical communities that divided them. As early as 1967, Trudeau described his Charter project as "essentially testing, and hopefully establishing, the unity of Canada". Fifteen years later, in debating the Charter in parliament, Trudeau described it as defining "the common thread that binds us together", overcoming "the forces of self-interest [that threaten to] tear us apart". Peter Russell has described this position as "Charter patriotism"».

For Trudeau and the unifiers, the centerpiece of the Charter is language rights. Entrenching language rights in the Constitution culminated Trudeau's long-standing strategy to use bilingualism to undercut the appeal of Quebec nationalism and preserve Canadian unity⁴⁴. From this perspective, Canadian nationalism would have been a means to counter Quebec nationalism. The latter is indeed a source of concern, at the least for the serious threats it poses on its turn for the

anglophones' (and other minorities') rights, to which the Supreme Court may not always be in the position to react like it did for example in *Ford* (to be sure, the situation of Quebec anglophones would probably be worse were Quebec to become eventually independent: it would still be a modern-type nation-state, with its inevitable inclination to disregard minority rights, and in particular it is very hard to imagine that language minority rights would be on the top of its agenda. And things would presumably be even worse for other, much smaller minorities, as is typical of separatist models such as Belgium, Region Trentino-Alto Adige in Italy and to a certain extent Spain, while legal systems more inclined to the bilingual model, such as India, Finland, or Switzerland are if anything more sensitive to the needs of smaller minorities).

Anyway, what the advocates of Canadian nationalism seem to overlook is that it should concern us as well, or actually even more. As far as the scope of this work is concerned, the main problem is that the Court itself seems to have lent itself to feed such Canadian nationalism, under the guise of «Charter» patriotism: the dialogue on fundamental rights, of which we have reviewed some of the most significant examples by looking at the case-law in the field of language rights, can be seen as instrumental for the Court to the encouragement of the civic religion of the «Charter», that ultimately had the goal of creating a new unitary identity for all Canadians, irrespective of their language, and rather based on their passport.

Today's result of this instrumental use of language rights is that nation-states end up sending misaligned incentives to their citizens, who are thus led to lay some contradictory claims: indeed they often find themselves to want their cultural and linguistic heritage to be protected and passed along to their children, but they also fear this might come as a handicap for their children towards members of the nation-state's majority. Clear evidence of this trend in *Gosselin*, where some francophone parents residing with their school-age children in Quebec sought access for them to publicly funded English language education; another example was the recent decision by state schools in Quebec to start offering intensive English courses: as explained in an interesting article in the «Financial Times», this is quite «[o]dd, because in the past half-century, much of the Quebecois identity has been built on resisting English. Authorities throw the book at people for doing things that would be normal elsewhere in Canada. [...] Now, school authorities in Quebec City are questioning whether the time is ripe for introducing those English classes after all. Their hesitation has left French-speaking parents angry»⁴⁵.

Whatever the outcome of such debate, this recent story would seem to provide fresh evidence that the characterization of «linguistic duality» as «both a blessing and a curse for Canada», made by Marcel Côté, was very well conceived. As problematic as handling this double-edged «gift» may be, the words that the same

same author added immediately thereafter arguably said it all: «managing this duality is Canada's greatest challenge, [...] and whether or not Canadians like it, the language issue will fuel the Canadian constitutional debate forever»⁴⁶.

NOTE:

*Università di degli studi di Torino. I would like to thank my former classmate at LSE Grégoire Poulin for his great help, particularly in the early stages of my research. This article is a shorter version of CDCT Working Paper 5-2012 / European Legal Culture 4, available at <http://www.cdct.it/Pubblicazioni.aspx>. Research for this article was possible thanks to a grant obtained within the research project «The Making of a New European Legal Culture. Prevalence of a single model, or cross-fertilisation of national legal traditions?», funded by University of Torino and Compagnia di San Paolo.

¹ P. W. Hogg-A. Bushell, *The Charter dialogue between courts and legislators (or perhaps the Charter of rights isn't such a bad thing after all)*, in *Osgoode Hall Law Journal*, 35, 1997, p. 75-124. See, the article of Gerotto, in this book.

² R. Clayton, *Judicial deference and "democratic dialogue": the legitimacy of judicial intervention under the Human Rights Act 1998*, in *Public Law*, 2004, p. 33-47, spec. 42.

³ The main ones upon which this work is based are the following: *Blaikie No. 1*, [1979] 2 S.C.R. 1016; *Blaikie No. 2*, [1981] 1 S.C.R. 312; *Protestant School Boards*, [1984] 2 S.C.R. 66; *Manitoba Language Rights*, [1985] 1 S.C.R. 721; *Bilodeau*, [1986] 1 S.C.R. 449; *MacDonald*, [1986] 1 S.C.R. 460; *Société des Acadiens*, [1986] 1 S.C.R. 549; *Mercure*, [1988] 1 S.C.R. 234; *Forget*, [1988] 2 S.C.R. 90; *Ford*, [1988] 2 S.C.R. 712; *Devine*, [1988] 2 S.C.R. 790; *Mabe*, [1990] 1 S.C.R. 342; *Reference re Public Schools Act*, [1993] 1 S.C.R. 839; *Beaulac*, [1999] 1 S.C.R. 768; *Arsenault-Cameron*, [2000] 1 S.C.R. 3; *Doucet-Boudreau*, [2003] 3 S.C.R. 3; *Solski*, [2005] 1 S.C.R. 201; *Gosselin*, [2005] 1 S.C.R. 238; *Nguyen*, [2009] 3 S.C.R. 208.

⁴ *Quebec Veto Reference*, [1982] 2 S.C.R. 793.

⁵ *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217.

⁶ On which see, among many, J. Maclure, *Québec identity, the challenge pluralism*, McGill-Queen's University Press, Montreal 2003; J. Woehrling, *La Constitution canadienne et l'évolution des rapports entre le Québec et le Canada anglais de 1867 à nos jours*, in *Revue française de droit constitutionnel*, 10, 1992, p. 195.

⁷ For a critical comment on this bill, that never became law, see R.Y. Bourhis-P. Foucher, *Bill 103: Collective rights and the declining vitality of the english-speaking communities of Quebec*, 17 Sep 2010, available on the website of the Quebec Community Groups Network, <http://www.qcgn.ca/> (last accessed: 29 Mar 2013).

⁸ With *An Act respecting a judgment rendered in the Supreme Court of Canada on 13 December 1979 on the language of the legislature and the courts in Québec*, 1979 (Que.), c. 61.

⁹ Thus provides indeed s. 6 of the Supreme Court Act, R.S.C., 1985, c. S-26; see, in the Italian scholarship, T. Groppi-L. Luatti, *La Corte suprema del Canada, «custode della Costituzione»: alcune considerazioni sulla sua composizione e sulla procedura di controllo di costituzionalità*, in *Politica del diritto*, 28, 1997, p. 215-239.

¹⁰ E. Palici di Suni, *Intorno alle minoranze*, Giappichelli, Torino 2002, p. 161 (the translation is ours); see also V. Piergigli, *Il federalismo canadese. Minoranza anglofona in Québec versus minoranze francofone del Rest of Canada*, in *Amministrare*, 32, 2002, p. 229-245 (see in particular pp. 229-31 and 241-5, where the author speaks of «asymmetry» to describe the very structure of Canadian federalism, and the way the relationship between linguistic communities has been shaped in that country).

¹¹ Broadly on these issues, see J. Woehrling, *La Constitution du Canada, la législation linguistique du Québec et les droits de la minorité anglo-québécoise*, in N. Levrat (dir.), *Minorités et organisation de l'État*, Bruylant, Brussels 1998, p. 561; Id., *La Constitution canadienne et la protection des minorités ethniques*, in *Les cahiers de droit*, 27, 1986, p. 171-188; for a theoretical analysis, in the Italian scholarship, of the differences between the separatist and the bilingual approaches, see E. Palici di Suni, *op. cit.*, pp. 23-27.

¹² This approach was followed for instance by P. Foucher, *L'interprétation des droits linguistiques constitutionnels par la Cour Suprême du Canada*, in *Ottawa Law Review*, 19, 1987, p. 381-411.

¹³ On this issue, see for example C. Maève Conrick, *Language choice and education rights in Quebec: Bill 101 passes the Supreme Court test?*, in *French Studies Bulletin*, 59, 2005, p. 9-13.

¹⁴ A case concerning bilingualism before courts was also *Charlebois v. Saint John (City)*, [2005] 3 S.C.R. 563, but it was actually more a statutory construction case than a language rights case: the 5-4 holding was that «the City was not obliged to adopt in its pleadings the official language chosen by [Mr] Charlebois because the word "institution" in s. 22, as defined in s. 1 of the *Official Languages Act (OLA)*, does not include municipalities». Mr Charlebois had instead been successful in a previous application that had not reached the Supreme Court: the New Brunswick Court of Appeal had ruled that the statutes of the municipalities in that province had to be adopted in both official languages, under s. 18(2) of the *Canadian Charter*: for a comment on this latter case, see S. Rousselle, *L'arrêt Charlebois: une décision sans faille en matière de droits linguistiques*, in *University of New Brunswick Law Journal*, 51, 2002, p. 15-34. Specifically on language rights in federal courts, and on the statutory framework resulting from the Supreme Court's case-law, see M. Hudon, *Bilingualism in the Federal Courts*, Library of Parliament, Ottawa 2011, Publication No. 2011-40-F, available at <http://parl.gc.ca/Content/LOP/ResearchPublications/2011-40-e.pdf> (last accessed: 29 Mar 2013); several years earlier, see J. D. Richard, *Le bilinguisme judiciaire au Canada*, in *cahiers de droit*, 42, 2001, p. 389-396; R. Soublière, *Les perpétuels tirailllements des tribunaux dans l'interprétation des droits linguistiques*, in *Revue de la common law en français*, 4, 2001, pp. 1, 45-104.

¹⁵ See on this topic C. J. Galipeau, *National minorities, rights and signs: the Supreme Court and language legislation in Quebec*, in A.G. Gagnon-A.B. Tanguay (ed.), *Democracy with justice: essays in honour of Khayyam Zev Paltiel*, Carleton University Press, Ottawa 1992, p. 66.

¹⁶ The most recent example of the high sensitivity of the issue is the U.S. Supreme Court's judgment of 20 January 2012 in *Perry v. Perez*, 565 U.S. (2012), where the Court rejected elections maps that in this case were deemed to bring an unfair advantage to the Democratic Party.

¹⁷ Also the reference *Re: Objection by Quebec to a Resolution to amend the Constitution* (the second case in the *Quebec veto controversy*) was a unanimous decision, while the reference *Re: Resolution to amend the Constitution* (the first stage of the controversy) had seen several dissenting votes by different justices on the different issues at bar.

¹⁸ See for instance the already mentioned article by R. Soublière, *op. cit.*; more recently, see W.J. Newman, *La progression vers l'égalité des droits linguistiques par voie législative et judiciaire*, in *Revue de la common law en français*, 6, 2004, pp. 19-48, (also considering some important cases not from the Supreme Court of Canada); back at the end of the 1980s, see also A. Riddell, *À la recherche du temps perdu: la Cour suprême et l'interprétation des droits linguistiques constitutionnels dans les années 80*, in *Les cahiers de droit*, 29, 1988, p. 829-856. In the Italian scholarship, see for instance V. Piergigli, *I diritti linguistici nella giurisprudenza della Corte suprema: oscillazioni interpretative e linee di tendenza*, in G. Rolla (a cura di), *L'apporto della Corte suprema alla determinazione dei caratteri dell'ordinamento costituzionale canadese*, Giuffrè, Milano 2008, p. 149.

¹⁹ Including the contrast between francophones protection by the Supreme Court outside and inside Quebec; the sometimes uneasy situation of anglophones in Quebec; the fact that French language in Canada falls in the category of weak national languages, in other words official languages needing to be protected, a situation by no means unknown in Europe.

²⁰ F. Vaillancourt-O. Coche-M. Cadieux-J. Ronson, *Official language policies of the canadian provinces costs*

and benefits in 2006, Fraser Institute, 2012, available at <http://www.fraserinstitute.org/uploadedFiles/fraser-cal/Content/research-news/research/publications/official-language-policies-of-canadian-provinces.pdf> (last accessed: 29 Mar 2013).

²¹ See in particular two articles of his, published on the Mises Institute's website: D. Hieber, *Language and the socialist-calculation problem*, 7 Sep 2010, available at <http://mises.org/daily/4687>; and Id., *Why do languages die?*, 4 Jan 2012, available at <http://mises.org/daily/5846/Why-Do-Languages-Die> (both last accessed: 29 Mar 2013).

²² It is the perspective adopted firstly by Ludwig von Mises in *Nation, State, and Economy* (Ludwig von Mises Institute, Auburn 1983 [1919]): as Daniel Hieber explains, see in particular, on language issues, the first chapter of this work.

²³ The notion of «spontaneous orders» was famously a key of Friedrich von Hayek's reflection in *Law, Legislation and Liberty* (1982), especially in volume I, *Rules and Order* (1973). Specifically on language, he wrote: «[a]lthough there was a time when men believed that even language and morals had been 'invented' by some genius of the past, everybody recognizes now that they are the outcome of a process of evolution whose results nobody foresaw or designed» (p. 37 of the 1983 edition of *Rules and Order* by The University of Chicago Press-Routledge & Kegan, Chicago).

²⁴ D. Hieber, *Language*, cit., p. 1.

²⁵ D. Hieber, *Language*, cit., p. 2.

²⁶ J. Jackson Preece, *Minority rights: between diversity and community*, Cambridge University Press, Cambridge 2005, *passim* from the *Preface*. Let us just think of the situation in the French region of Alsace, that between the 1870s and World War II moved several times from being under French sovereignty to German sovereignty and vice versa: each time the new government imposed its own language, with the result that today in some families the grandchildren cannot communicate with their grandparents, because they were educated in different languages.

²⁷ As explains, citing to some scientific studies, Y. Bhattacharjee, *Why bilinguals are smarter*, in *The New York Times*, 18 March 2012, p. SR12.

²⁸ D. Hieber, *Language*, cit., p. 3.

²⁹ D. Hieber, *Language*, cit., p. 4.

³⁰ *Per se* not directly connected to minority issues, according to P. C. Begotti, *Incontri e conflitti di lingue e culture*, in C. Lottieri (a cura di), *Dalle vicinie al federalismo. Autogoverno e responsabilità*, Associazione Culturale Carlo Cattaneo, Pordenone 2010, pp. 127, 150-1, but anyway important. For a thorough account of such links in the Canadian case, see L. Cardinal (dir.), *Le fédéralisme asymétrique et les minorités linguistiques et nationales*, Éditions Prise de Parole, Sudbury 2008.

³¹ D. Hieber, *Language*, cit., p. 4.

³² After all, it is arguably not by coincidence that Switzerland, that is to say the best example in the world of decentralized political order, and strong small political communities that come together in the confederation but preserve an extremely high autonomy, was described as a «paradise for languages» (*Sprachenparadies*) (by K. H. Neumayer, *Über den Schutz bedrängter Sprachminderheiten*, in H. Kipp-F. Meyer-A. Steinkamm (Hrsg.), *Um Recht und Freiheit. Festschrift für Friedrich August Freiherr von der Heydte zur Vollendung des 70. Lebensjahres*, Duncker & Humblot, Berlin 1977, volume I, p. 395, 421).

³³ C. Kukathas, *The liberal archipelago: a theory of diversity and freedom*, Oxford University Press, Oxford 2003, pp. 8-9. The author goes on by contrasting his views with the ones of W. Kymlicka, a Canadian philosopher that Kukathas ends up describing as «essentially, a liberal nationalist» (p. 15).

³⁴ D. Hieber, *Language*, cit., p. 4.

³⁵ D. Hieber, *Why do languages die?*, pp. 3-4 of the pdf version. The reference from Mises's *Nation, State, and Economy* is from p. 37 of the already cited edition. The heavy «russification» policies pursued in the Soviet Union when nationalist drives prevailed in that country are a paradigmatic example of how severely nationalism threatens the survival of minorities: see broadly in L. A. Grenoble, *Language policy in the Soviet Union*, Kluwer, Dordrecht 2003.

³⁶ C. Schmitt, *Constitutional theory*, Duke University Press, Durham 2008 [1928], p. 262. For an example of this attitude referred to the Italian case, see P. C. Begotti, *op. cit.*, p. 150.

³⁷ From this point of view, French in Canada would be in a very similar position towards English as Flemish towards French in Belgium, as pointed out by J. Woehrling, *op. cit.*, p. 580.

³⁸ C. Kukathas, *op. cit.*, pp. 233-4.

³⁹ *Ibidem.*

⁴⁰ Broadly on the meaning and function of such apparatus, see in the Italian scholarship C. Lottieri, *Credere nello Stato? Teologia politica e dissimulazione da Filippo il Bello a WikiLeaks*, Rubbettino, Soveria-Mannelli 2011.

⁴¹ A typical example of this situation is that of what the Italian scholar E. Palici di Suni has described as «restricted minorities» (*minoranze ristrette*) (in her work *Intorno alle minoranze*, *cit.*, pp. 40-1), i.e. minority groups who are located in an area where there are other major minority groups, like typically the germanophone community in Belgium or, in Italy, the Walser in Valle d'Aosta or the Ladin in Trentino-Alto Adige. As for Canada, G. Poggeschi, *I diritti linguistici. Un'analisi comparata*, Carocci, Roma 2010, p. 82 evaluates instead quite positively Quebec's overall experience: «Quebec seems to be one of the few places in the world where there is a good combination between linguistic rights of first, second and (partially) third species, the latter being present in the whole country so that Canada can be considered a fortunate constitutional model whose multiculturalism is not just a slogan, but a policy enforced by all levels of government» (our translation); G. Poggeschi, *op. cit.*, p. 83, anyway acknowledges that «Canadian federalism, based (also) on the bi-national principle, more than towards a bilingualism spread across the whole Federation idealized by Trudeau, has moved towards a partial bilingualism regime (in federal institutions and in some provincial spheres), inclined to territorial monolingualism, particularly in anglophone provinces and only partially in Quebec, where there exists a French monolingualism tempered by the anglophone minorities' rights» (our translation). For some interesting data, see the *Statistics* section in the website of the *Office of the commissioner of official languages*, at http://www.ocol-clo.gc.ca/html/stats_e.php (last accessed: 29 Mar 2013). for instance, according to the most recent figures available, only 17% of Canadians possess knowledge of both official languages.

⁴² Such threat was already identified very clearly by G. Jellinek, in his work *Das Recht der Minoritäten*, Hölder, Vienna 1898, pp. 43 and following. Jellinek's idea was to fight it by promoting pluralism, and the rise of a multilevel linguistic identity, a suggestion in many ways similar to the *Proposals from the group of intellectuals for intercultural dialogue set up at the initiative of the European Commission*, published in Brussels in 2008, with the title *A rewarding challenge: How the multiplicity of languages could strengthen Europe*, available at http://ec.europa.eu/education/policies/lang/doc/maalouf/report_en.pdf (last accessed: 29 Mar 2013). Independent of the concrete solutions proposed and of the ways to achieve them, the call for pluralism and for a multi-level linguistic identity still seems to be very fruitful today: as we ourselves have pointed out earlier in the text, languages should arguably be looked at not as mutually exclusive, but as possibly co-existing on different levels, for different purposes, and for different types of communication. For some reflections in the Italian literature along these lines, building on Jellinek's reflection, see E. Palici di Suni, *La lingua tra globalizzazione, identità nazionale e identità minoritarie*, in M. Papa-G. M. Piccinelli-D. Scolart (a cura di), *Il libro e la bilancia. Studi in memoria di Francesco Castro*, Edizioni Scientifiche Italiane, Napoli 2011, volume II, p. 451 (also, in a slightly shorter version, in *Percorsi Costituzionali*, 1, 2008, p. 101); see also, by the same author, the article *Unitarietà della Repubblica e gruppi identitari: il caso delle minoranze linguistiche*, in S. Labriola (a cura di), *Valori e principi del regime repubblicano*, Laterza, Roma – Bari 2006, volume II, p. 635, where E. Palici di Suni considers how to reconcile the principle of protection of linguistic minorities with the one of unity of the Republic (the focus is on the Italian constitution, but extensive references are made to comparative experiences, including Canada).

⁴³ See a very famous passage from *Société des Acadiens*, [1986] 1 S.C.R. 549, §§ 63-65: «Unlike language rights which are based on political compromise, legal rights tend to be seminal in nature because they are rooted in principle. Some of them, such as the one expressed in s. 7 of the Charter,

are so broad as to call for frequent judicial determination. Language rights, on the other hand, although some of them have been enlarged and incorporated into the Charter, remain nonetheless founded on political compromise. This essential difference between the two types of rights dictates a distinct judicial approach with respect to each. More particularly, the courts should pause before they decide to act as instruments of change with respect to language rights. This is not to say that language rights provisions are cast in stone and should remain immune altogether from judicial interpretation. But, in my opinion, the courts should approach them with more restraint than they would in construing legal rights».

⁴⁴F. L. Morton-R. Knopff, *The Charter revolution & the court party*, Broadview Press, Peterborough 2000, pp. 59-60. The phrase «Charter patriotism» was used by P. H. Russell, *The political purposes of the Charter: have they been fulfilled? An agnostic's report card*, in P. Bryden-S. Davis-J. Russell (ed.), *Protecting rights and freedoms*, University of Toronto Press, Toronto 1994, p. 33, 42. The title of this study rightly catches the function of holy text of a «civil religion» that is vested with the constitutions of modern democracies (for a reflection on these issues in the Italian scholarship, see C. Lottieri, *op. cit.*; on the difficult historical process of creation of the «Canadian nation», see also T. Groppi, *La difficile nascita della nazione in Canada: l'integrazione (o la disgregazione?) attraverso i diritti*, in *Diritto pubblico comparato ed europeo*, 13, 2001, pp. 1130, 1130-1139).

⁴⁵C. Caldwell, *The French are right to resist global english*, in *Financial Times*, 17 Feb 2012.

⁴⁶The quotes are from M. Côté, *Language and public policy*, in J. Richards-F. Vaillancourt-W.G. Watson (ed.), *Survival: official language rights in Canada*, C.D. Howe Institute, Toronto 1992, pp. 7-8. This notion of linguistic diversity as a curse is extremely old, and traditionally it is traced back to the biblical episode of the Tower of Babel: things are anyway more complicated than what the traditional story tells us, as explained by U. Eco, *The Search for the perfect language* (English edn Wiley-Blackwell, Hoboken 1995 [1993]), pp. 6-10. Several scholars have made use of this image of linguistic diversity as a potential curse: for instance, an original view, connected to the alleged negative impact of linguistic diversity on economic solidarity, was expressed by P. Van Parijs, *Linguistic diversity as curse and as by-product*, in X. Arzoz (ed.), *Respecting linguistic diversity in the European Union*, John Benjamins, Amsterdam 2008, p. 17.